No. 19-3389

United States Court of Appeals for the Eighth Circuit

INTERVARSITY CHRISTIAN FELLOWSHIP/USA AND INTERVARSITY GRADUATE CHRISTIAN FELLOWSHIP,

Plaintiffs-Appellees,

v.

THE UNIVERSITY OF IOWA, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Iowa
No. 3:18-cv-00080

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE

InterVarsity Graduate Christian Fellowship was a registered student group at the University of Iowa for over 25 years. In June 2018, InterVarsity was deregistered on the grounds that its longstanding requirement that its leaders be Christians constituted "religious discrimination" in violation of the University's nondiscrimination policy. At the same time, the University knowingly exempted dozens of other student groups from the same policy, including very large groups.

Moreover, the University had already been enjoined in a related federal lawsuit for selectively applying its policy to punish another religious student group for that group's religious leadership requirements. So when InterVarsity was forced to seek relief from the University's selective enforcement, the district court below was "baffled" by the University's actions. The court found that the University's actions violated the First Amendment's protections for speech, association, and the exercise of religion. It also ruled that the constitutional right against viewpoint discrimination was clearly established, and so it denied qualified immunity to the individual Defendants.

InterVarsity requests 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Iowa had jurisdiction under 28 U.S.C. § 1331. The court denied qualified immunity to defendants and entered partial permanent judgment in favor of Plaintiffs, including a permanent injunction, on September 27, 2019. Defendants filed a timely notice of appeal on October 5, 2019. This Court has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Did the district court correctly find that the University of Iowa and the individual Defendants violated InterVarsity's clearly established First Amendment rights, and did it correctly deny the individual Defendants qualified immunity?

Apposite Cases

Free Speech Clause: *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010); *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

Free Association: *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995); *Dale v. Boy Scouts of Am.*, 530 U.S. 640 (2000); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000); *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

Free Exercise Clause: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

Religion Clauses: *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015).

STATEMENT OF THE CASE

A. InterVarsity at the University of Iowa

InterVarsity Graduate Christian Fellowship is a religious student group that has been at the University for more than 25 years. IVCF.App.2226-27 ¶ 4. It meets for weekly Bible study and monthly religious services, sponsors campus events on religious matters, and organizes service projects to serve both the University and the local community. *Id.* The University has previously recognized and awarded InterVarsity for exemplary service to the entire University community. *Id.*; *see also* IVCF.App.3114-15 ¶¶ 384-85 (praising InterVarsity's "vital contribution to the University of Iowa community").

InterVarsity Graduate Christian Fellowship is a chapter of InterVarsity Christian Fellowship/USA, a national ministry that has chapters on over 600 campuses across the country. IVCF.App.2226 ¶ 3. Both groups exist to establish university-based "witnessing communities of students and faculty who follow Jesus as Savior and Lord," and who are "growing in love for God, God's Word, [and] God's people of every ethnicity and culture[.]" IVCF.App.2226 ¶ 2.

While membership and participation in the InterVarsity chapter at the University is open to all students, students who want to hold a leadership role must affirm the group's religious beliefs. IVCF.App.2226-27 ¶¶ 4-5.[1] Leaders hold distinct, substantial religious roles because they make a significant spiritual commitment by agreeing to lead the group, including leading InterVarsity's Bible study, prayer, worship, and acts of religious service. IVCF.App.2227 ¶ 6. InterVarsity's student leaders are the primary embodiment of its faith and message to the University. IVCF.App.2228 ¶ 8. Accordingly, InterVarsity trains its student leaders to prepare them for religious leadership roles, and it provides them regular religious support throughout the semester via an InterVarsity USA staff member assigned to the chapter. IVCF.App.2227 ¶ 7.

B. Registered Student Organizations at the University

The University has long "encourage[d] the formation of student organizations around the areas of interests of its students." IVCF.App.2235 ¶¶ 19-21. It recognizes that students benefit from

[1] Defendants twice mischaracterize InterVarsity as seeking "to exclude from its *membership ranks* students who are not Christian." Br.24 (emphasis added); *see also* Br.32 (same). That is wrong. InterVarsity welcomes any student as a member. IVCF.App.2226-27 ¶¶ 4-5. This case concerns leadership selection.

"organiz[ing] and associat[ing] with like-minded" individuals, and thus has allowed student organizations to restrict membership to "any individual who subscribes to the goals and beliefs" of the organization." IVCF.App.2236-37 ¶ 23. Hundreds of groups participate in this broad forum, from "Greeks" and political groups to religious organizations and sports clubs. *See, e.g.*, IVCF.App.2239-2246 ¶¶ 31-43. The University encourages this participation by giving student groups significant benefits for registering with the University, including access to communications resources, important recruitment events and tools, unique speech opportunities, free meeting facilities, and modest financial aid derived from student activity fees that groups can use to promote their missions, recruit new students, and conduct activities. IVCF.App.2236-37 ¶¶ 23, IVCF.App.2292 ¶¶ 204-05; IVCF.App.2305 ¶ 20. The University is careful, however, to clarify that these groups are independent from the University and that registration "does not constitute an endorsement of [the organization's] programs or its purposes." IVCF.App.2235-36 ¶¶ 20-22. Rather, registration "is merely a charter to exist" on equal footing with other registered student groups. IVCF.App.2235-36 ¶ 21.

The University also has a Human Rights Policy (the "Policy") that prohibits certain forms of discrimination, including categories such as race, sex, national origin, disability, and religion. IVCF.App.2237 ¶ 26. The Policy applies to the University—in *all* of its activities, IVCF.App.2237 ¶ 24—and to all registered student organizations, including fraternities, sororities, sports clubs, and standard student groups, IVCF.App.2237-38 ¶¶ 26-27, IVCF.App.2244-45 ¶ 42. Before 2018, the Policy had no written exceptions, but the University has always applied extensive exemptions for historical reasons, practical considerations, or to comply with federal and state laws and regulations.

For example, the University has allowed many exceptions for its own programs. Its NCAA sports teams, along with its sports camps, intramural leagues, and recreational clinics are all overwhelmingly segregated by sex. IVCF.App.2246-47 ¶¶ 44-48. And the University has multiple programs, scholarships, grants, and awards designed to benefit individuals based upon their membership in a protected class, including racial minorities, women, veterans, and individuals with disabilities. IVCF.App.2247-51 ¶¶ 49-50. Strictly applied, the Policy would condemn all these practices. *See* IVCF.App.2275 ¶ 130, IVCF.App.2288-89 ¶¶ 188-

90. But in applying the Policy, the University has distinguished "invidious" discrimination from efforts to promote cultural diversity or support positive associations. *Id.*

Common sense has likewise been the prevailing principle in applying the Policy to registered student groups. The University's many student-run sports clubs are largely sex-segregated. IVCF.App.2245-46 ¶ 43. The same is true for the campus's 53 fraternities and sororities, whose members make up 17% of the University's undergraduate student body. IVCF.App.2238 ¶ 27, IVCF.App.2243 ¶ 39; IVCF.App.2275 ¶ 129; IVCF.App.2287-88 ¶ 183. And many groups have formed—and restricted membership—based on protected characteristics, including to generate recreational or networking opportunities for students from China; perform all-male or all-female vocal repertoire; or provide support for military veterans. IVCF.App.2239-42 ¶¶ 32-34, IVCF.App.2243 ¶ 39. And still others have formed around missions to exclusively promote a particular protected class. IVCF.App.2244-45 ¶ 40. The Policy is not now, and has never been, an all-comers policy. IVCF.App.2233-35 ¶¶ 16-18; *see also* Add.37 ("the University does not have an all-comers policy").

For decades, the University has expressly permitted registered student groups to restrict leadership and membership based on a group's mission. In 1999, it affirmed that the Christian Legal Society ("CLS") could require its members to sign a statement of faith affirming their Christian beliefs. IVCF.App.2251-53 ¶¶ 51-56. In 2004, Defendant Thomas Baker sent CLS written assurance that "[*a*]*sking prospective members to sign the CLS statement of faith would not violate the UI Human Rights policy*." IVCF.App.2257 ¶ 65 (emphasis in original); IVCF.App.2253-58 ¶¶ 57-69. The University reaffirmed that principle over the next several years, including when the student government tried to deny funding to CLS individually, when other student groups complained about CLS's religious standards, and when the student government revised its bylaws to bar funding to "exclusive religious groups." IVCF.App.2258-66 ¶¶ 70-98. The University repeatedly warned student members of the student government association that they could face personal liability if they discriminated against religious groups because of their religious associational requirements. IVCF.App.2260-63 ¶¶ 79, 90.

C. The University Deregisters BLinC

That all changed in 2017 when a student filed a complaint against another religious student organization on campus—Business Leaders in Christ or "BLinC." IVCF.App.2267 ¶ 101. The student claimed that BLinC had violated the University's Policy by denying him a leadership position because he was gay. *Id.* The University conducted an investigation and learned that BLinC welcomed all students as members but required its leaders to affirm its religious beliefs, including traditional biblical beliefs concerning marriage and sexuality. IVCF.App.2266-68 ¶¶ 100, 102.

In the meantime, the complaining student had gone on to form his own Christian student group—an organization called Love Works that adopted a gay-affirming view of Christianity and required its leaders to sign a statement of faith to that effect. Def.App.40, IVCF.App.179, 824. But while Love Works was permitted to require leaders to agree with its statement of faith, BLinC was deregistered for its requirement. IVCF.App.2294 ¶ 213; IVCF.App.2516 ¶¶ 315-16.

BLinC sued and the district court granted a preliminary injunction. IVCF.App.2285 ¶¶ 170-71. The court held that the University, including

Defendants Nelson and Baker, had engaged in "selective enforcement" of its Policy by permitting a variety of other organizations—secular and religious—to "organize around their missions and beliefs." Def.App.29-30. In light of this "selective enforcement," the court found that BLinC had a "fair chance of prevailing on the merits of its claims under the Free Speech Clause." Def.App.30. The court emphasized that, once a "state university creates a limited public forum for speech, it may not 'discriminate against speech on the basis of its viewpoint.'" Def.App.16 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) and *Gerlich v. Leath*, 861 F.3d 697, 704-05 (8th Cir. 2017)). The court then ordered the University to "restore BLinC to registered student organization status for ninety days." Def.App.33. When the University sought to resume its discriminatory enforcement later that summer, the court issued a second injunction and again explained that viewpoint discrimination is unconstitutional. IVCF.App.3152.

As result of BLinC's lawsuit, Defendants initiated a review of the constitutions of all religious groups on campus, flagging those with religious standards for their leaders. IVCF.App.2287 ¶ 181. Later, the University reviewed the constitutions of all other student organizations,

except fraternities and sororities. IVCF.App.2287-88 ¶¶ 183-84. Most of the organizations were deemed in some way to be out of compliance with the University's Policy. IVCF.App.2508 ¶ 258. Defendants Nelson, Kutcher, and Shivers were primarily responsible for this review, with Shivers reporting to Defendant Harreld about its progress and the ultimate decision to deregister other religious groups that had religious leadership standards. IVCF.App.2519-21 ¶¶ 342-44, 351-156.

D. The University Deregisters InterVarsity

As result of that decision, the University, for the first time, ordered InterVarsity to remove its religious leadership requirement, stating that InterVarsity could not even "encourage" its leaders to agree with its faith, and warning that the University would deregister InterVarsity unless the requirement was removed. IVCF.App.2228-31 ¶¶ 10-12; IVCF.App.2289-91 ¶¶ 191-201. Defendants said that they interpreted and applied the Policy to forbid any limits on a student's ability to "hold leadership positions" that implicate the nondiscrimination criteria listed in the Policy, including "religion." IVCF.App.2229 ¶ 11; IVCF.App.2290 ¶ 196. The University "recognize[d] the wish to have leadership requirements based on Christian beliefs," but refused to allow

them because "[h]aving a restriction on leadership related to religious beliefs is contradictory" to the Policy's prohibition on religious discrimination. IVCF App.2290 ¶ 194.

The University gave InterVarsity just two weeks to comply with its new requirements.[2] Because InterVarsity did not change its religious leadership standard, the University deregistered InterVarsity in June 2018. IVCF.App.2231 ¶ 13; IVCF.App.2291 ¶ 201. The University also deregistered other religious groups, including the Christian Pharmacy Fellowship, the Chinese Student Christian Fellowship, the Geneva Campus Ministry, the Imam Mahdi Organization, the J. Reuben Clark Law Society, the Latter-day Saint Student Association, and the Sikh Awareness Club. IVCF.App.2232-33 ¶ 14; IVCF.App.2291-92 ¶ 202.

After Defendants deregistered InterVarsity, they put a notice on InterVarsity's student webpage that the group was "defunct" due to "lack of interest," even though they knew this was false.

[2] Defendants mistakenly claim that they first notified InterVarsity on April 20. Br.12. But they did not notify InterVarsity until June 1—two weeks before the June 15 compliance deadline. IVCF.App.2509 ¶¶ 259-266.

IVCF.App.2505 ¶¶ 232-33; IVCF.App.2511-12 ¶¶ 277-78, 286.[3] The University also froze InterVarsity's bank account and did not allow it equal access to meeting space that would normally be open to registered student groups. IVCF.App.2048 ¶ 53; IVCF.App.2504-05 ¶¶ 230-235.

As result, InterVarsity suffered its sharpest membership decline in 20 years. IVCF.App.2504-06 ¶¶ 228, 230, 242-46. Several of InterVarsity's current members stated that they were intimidated by what the University's accusations and deregistration meant for their educations and careers, especially since the University is both educator and employer for some of the members. IVCF.App.2506 ¶¶ 239-41; *accord* IVCF.App.2512 ¶¶ 287-89 (University admitting that "defunct" message would harm recruitment). Students who inquired about joining InterVarsity raised concerns about deregistration. IVCF.App.2505 ¶¶ 237-38. Likewise, InterVarsity's student president testified that she probably would not have agreed to serve as president had she known what was coming, and that she had difficulty recruiting replacement

[3] Defendants did not file a response to the Supplemental Statement of Facts, and the district court deemed those facts admitted. Add.10. Defendants' counsel also admitted at oral argument below that the facts contained therein are accurate. Tr.19.

officers because she did not want to put them through what she has experienced. IVCF.App.2504-05 ¶¶ 224, 229-31. InterVarsity had to forgo meetings and other aspects of its ministry, and instead diverted its efforts into seeking to resolve the problem with the University. IVCF.App.2504 ¶ 230. InterVarsity USA also incurred thousands of dollars in costs and dozens of hours in employee time trying to get re-registered. IVCF.App.2504 ¶ 228.

E. The University's Policy Discriminates Against Religion

Around this time, the University amended the Policy to formalize previous practice by expressly excusing fraternities and sororities from complying with the prohibition against sex discrimination. IVCF.App.2238 ¶ 27; IVCF.App.2278 ¶ 142; IVCF.App.2288 ¶ 186. Under the new Policy, groups with political and ideological missions could still require their leaders or members to affirm the group's beliefs. IVCF.App.2240-43 ¶¶ 33-34, 39; IVCF.App.2294 ¶ 212. Student sports clubs could still discriminate based on sex. IVCF.App.2245-46 ¶ 43; IVCF.App.2289 ¶¶ 189-90. And groups without explicit membership requirements could still serve one protected class to the exclusion of others, or pursue missions that favor one protected class at the expense

of other protected classes. IVCF.App.2244-45 ¶ 40; IVCF.App.2294 ¶ 214.

For instance, the University testified that, under its Policy, political groups could require their leaders to embrace *secular* anti-poverty principles, but that InterVarsity couldn't require its leaders to accept *religious* anti-poverty principles, as expressed through the Parable of the Good Samaritan. IVCF.App.2514 ¶¶ 300-301; IVCF.App.2520 ¶ 350. Similarly, the student group known as Women in Science and Engineering could "encourage" its members to be women, but InterVarsity couldn't encourage its leaders to be Christian. IVCF.App.2510-12 ¶¶ 270-73, 280-83. Another student group, Hawkapellas, could require the singers leading its group to be "all-female," but InterVarsity couldn't ask the students leading its worship services to believe in the God they were singing about. *Id.* And the University re-affirmed that Love Works, a student group that held progressive Christian beliefs, could ask its leaders to share its faith to preserve its mission, but that InterVarsity could not make the same request of its leaders to preserve its mission. IVCF.App.2516 ¶¶ 315-16.

Greek groups were given special treatment under the updated policy. IVCF.App.2243 ¶ 39; IVCF.App.2287-88 ¶ 183; IVCF.App.2295 ¶ 217. For over 150 years, the University has never enforced the Policy against fraternities or sororities to prevent them from selecting both leaders and members based on sex. *Id*. Then in 2018, at the same time the University deregistered InterVarsity and other religious student groups, the updated Policy created a new, explicit exemption for fraternities and sororities. *Id*. Finally, in addition, to the new exemption that explicitly allows Greek groups to discriminate on the basis of sex, the University continues to allow them to select leaders and members on other grounds as well, including religion and ideology. IVCF.App.3117-20 ¶ 391.

In addition to its exceptions for student groups, the University also exempts its own operations from the Policy. IVCF.App.2247 ¶ 47. Dozens of University programs, scholarships, awards, and grants discriminate based on race, national origin, sex, veteran status, service in the U.S. military, and disability—and sometimes on combinations thereof. IVCF.App.2247-51 ¶¶ 49, 50; IVCF.App.2288-89 ¶ 188; IVCF.App.2295 ¶ 215. The University also enforces sex-based limitations on the intramural sports, sports camps, and recreational services that it offers.

IVCF.App.2247 ¶ 48; IVCF.App.2295 ¶ 215. And the University's sports teams openly violate the Policy. IVCF.App.2246 ¶¶ 45-46.

F. The University's Reasons for Its Discrimination

The University later admitted that it had no InterVarsity-specific interest, let alone a compelling interest, in deregistering InterVarsity for its religious leadership standards. IVCF.App.2512-15 ¶¶ 290-92, 304-07, 311; IVCF.App.2517 ¶ 322; IVCF.App.2521-23 ¶¶ 362-64, 369, 377-78. The University testified that it had no evidence that anyone had ever complained about InterVarsity's standards. IVCF.App.2514 ¶¶ 298-99. Nor did the University attempt to gather, discuss, or otherwise identify any specific evidence of harms that were caused by InterVarsity's religious leadership standards or that would result from granting InterVarsity an accommodation. IVCF.App.2521-22 ¶¶ 357-65. To the contrary, the University ultimately admitted that there was not any difference in any "harms" caused by InterVarsity's leadership selection and the "harms" caused by groups or programs that it exempted. IVCF.App.2514 ¶¶ 301-03. The University was simply willing to accept such "harms" from, for instance, a political or ideological group but not from a religious group. *Id.*

The University also justified certain exceptions on the basis that they provided "safe spaces" to undefined minority groups. IVCF.App.2516 ¶ 316. For example, Love Works was permitted to select leaders based on religion, and House of Lorde permitted to select members based on race and sexual orientation, because the University believed such exemptions were necessary to avoid undermining the purposes of the groups. IVCF.App.2516 ¶¶ 317-19. But it admitted that failing to grant a similar accommodation for religious groups would undermine their missions just as much. *Id*. For instance, Defendants admitted that it would impair the message of a Jewish student group for its Passover celebrations to be led by a Muslim, or a Muslim group if its celebration of Eid Al-Fitr were led by a Christian. *Id*. Defendants likewise admitted that requiring InterVarsity to be led by non-Christians would open it up to charges of hypocrisy, undermine trust within the group, and change the substance of its religious message. IVCF.App.2516 ¶ 321; IVCF.App.2522 ¶¶ 366-68.

The University also made no attempt to ensure that its interests required deregistering InterVarsity. IVCF.App.2515 ¶¶ 308-11; IVCF.App.2521-23 ¶¶ 363, 375-76. For instance, the University was

aware of other public universities, such as Iowa State University, that have policies that accommodate religious leadership selection like InterVarsity's. IVCF.App.2514-15 ¶¶ 304-07; IVCF.Appp.2523 ¶¶ 377-78. Defendants likewise made no attempt to study or explain why those policies could not be formally adopted by the University, as they effectively had been in the previous 25 years of InterVarsity's registered status on campus. *Id.*

G. The Lawsuit

After InterVarsity filed this lawsuit, the University agreed to temporarily reinstate InterVarsity and all other deregistered religious groups. IVCF.App.2233 ¶ 15. But the University's position on the Policy remained unchanged. It still insisted that InterVarsity could not remain a registered student organization if it requires its leaders to agree with its faith. *Id.*

The parties filed cross-motions for summary judgment. InterVarsity sought a permanent injunction, declaratory relief, and a finding of personal liability for the Defendants' violations of InterVarsity's First Amendment rights to speech, association, exercise of religion, and religious leadership selection. Add.14. Defendants sought qualified

immunity on all money damages claims, dismissal of the state claims for failure to exhaust administrative remedies, and dismissal of the prospective relief on mootness grounds. Add.14-15.

While the cross-motions were pending, the district court issued final judgment in the parallel *BLinC* case. The court found that the University had violated BLinC's speech, associational, and religious exercise rights, and granted a permanent injunction. Def.App.70. The court also granted qualified immunity to the individual Defendants on the grounds that the law was not clearly established at the time of their actions against BLinC. *Id.*[4]

The University took the position that the *BLinC* ruling did not change anything in this case and testified that InterVarsity's constitution still violated university Policy. IVCF.App.2517-18 ¶¶ 330-334. The court then held a hearing in this matter on the pending cross-motions, expressing its concern that neither the University nor its counsel "understand free expression and viewpoint discrimination." Tr.25. The court said that, in light of the court's prior rulings in *BLinC*, it was "ludicrous" that the

[4] An appeal of that ruling is currently pending before this Court. *BLinC v. Univ. of Iowa*, No. 1696 (8th Cir.). Briefing concluded in July 2019. Oral argument has not been scheduled.

University of Iowa apparently thought that it could "selectively go after student groups based on what they think, based on what they advocate, whether it's religious or otherwise, unless you're going to do it evenly, equally." Tr.26.

The district court then granted partial summary judgment to InterVarsity on its claims arising under the First Amendment's protections for speech, association, and religious exercise. Add.51-52. It also granted a permanent injunction and nominal damages to InterVarsity as against the University and Defendants Shivers, Nelson, and Kutcher, and also found that Shivers, Nelson, and Kutcher were personally liable for the free speech violations. *Id.* In explaining its ruling on liability, the court stated that its prior injunction order made the law clear: "any ambiguity as to whether the University could selectively enforce its . . . Policy against a religious student group should have been firmly resolved when [the *BLinC* injunction] order was filed in January 2018." Add.46. Yet Defendants "appl[ied] extra scrutiny to religious groups" under the Policy "while at the same time continuing to allow some groups to operate in violation of the [P]olicy and formalizing an exemption for fraternities and sororities." Add.47. The judge found this

inexplicable: "The Court does not know how a reasonable person could have concluded this was acceptable, as it plainly constitutes the same selective application of the . . . Policy that the Court found constitutionally infirm in the preliminary injunction order." *Id*.

Turning to the remaining defendants and claims, the court found that the evidence was not yet sufficient for Defendants Harreld and Baker to be held personally liable, but also denied those Defendants' motion for qualified immunity. Add.20, 49, 52. Claims against them would have to be proved at trial. The court also denied InterVarsity's Religion Clauses claim to autonomy in religious leadership selection. Add.38. It waited to decide Defendants' motion to dismiss the state-law claims pending the parties' resolution of how to proceed. Add.49-50.

The University appealed. All remaining claims have been stayed pending disposition of this appeal.

SUMMARY OF THE ARGUMENT

Under the First Amendment, few principles are more clearly established than that the government may virtually never engage in viewpoint discrimination to suppress disfavored views, discriminate against religious beliefs as such, or interfere in a religious group's selection of its own religious leaders. Here, the University managed to flout all three principles at once. Worse, it managed this trifecta despite being under *two* injunctions—against the same University, addressing the same religious discrimination, under the same Policy.

Nor is this the extremely rare case where the government can justify discriminating against religion. Defendants do not even attempt to do so.

What Defendants *do* attempt is hanging their entire appeal on a framing of the case that is entirely divorced from the undisputed facts. The University says that "all that [it] asks is that students are not excluded from any group on the basis of protected characteristic[s]," Add.32, and that InterVarsity—uniquely unwilling to comply with this reasonable and across-the-board standard—is demanding a "special dispensation in order to discriminate" based on "religious beliefs [that]

are in direct conflict with state and federal civil rights law[.]" Br. 18, 25. As the district court observed: "Of course, this is not true." Add.32.

The facts are shocking. In June 2018, *after* twice being enjoined from selectively enforcing its policies against religious groups, Defendants accused *InterVarsity* of discrimination, deregistered it, publicly declared it "defunct," froze its bank account, and left it deregistered until August 2018—all while knowingly exempting dozens of other larger student groups from the *exact same* requirements they placed on InterVarsity. Up until that point, InterVarsity had been a respected, award-winning student organization at the University for 25 years. And throughout that time, it had welcomed all students to participate in its Bible studies, worship, prayer, and community service. Its only offense, the one Defendants now smear as "invidious discrimination," was that InterVarsity has always asked that the students leading its ministry affirm InterVarsity's Christian faith. To Defendants, even *encouraging* leaders of religious groups to affirm the fundamental tenets of the group's faith—such as the *Shema* or the *Shahada* or the Nicene Creed—is deemed to be rank "religious discrimination." Which is why Defendants

also showed the door to numerous other religious groups, including Sikh, Muslim, Protestant, and Latter-day Saint groups.

Yet for decades, the University has otherwise had a common-sense approach to its Policy. That approach accommodates the needs of Greek groups, sports clubs, minority support groups, and political and ideological advocacy organizations—among others—to pursue their distinct missions by selecting leaders who sincerely embraced those missions. The University has that same approach for its internal programs, including its sports teams, minority outreach efforts, and religious accommodations, all of which make distinctions based on otherwise protected characteristics. It is only recently that the University gerrymandered this approach to retain accommodations for virtually everyone but disfavored religious groups.

That violates clearly established law. For decades, the controlling precedent of the Supreme Court and the Eighth Circuit has repeatedly confirmed that student organizations have a right to exercise their freedom of speech, association, and religion free from viewpoint discrimination. No court has *ever* held that a university may engage in viewpoint discrimination against a student organization. Indeed,

Defendants' favorite case—*Christian Legal Society v. Martinez*—firmly *upheld* the rule against viewpoint discrimination. Courts applying *Martinez* have uniformly ruled that it does not allow universities to selectively enforce their policies against religious groups.

If anything, the law has only gotten clearer since *Martinez*, because the U.S. Supreme Court has unanimously ruled that government is barred from interfering in a religious group's selection of its religious leaders. Thus, while all student organizations are protected from viewpoint discrimination, and all religious student organizations are protected from religious discrimination, religious organizations' leadership selection is *particularly* safeguarded by the First Amendment.

The district court's denial of qualified immunity should be affirmed.

ARGUMENT

This court reviews a grant of summary judgment *de novo*, viewing the facts in the light most favorable to the nonmoving party. *Gerlich* 861 F.3d at 704. If there is no genuine dispute as to any material fact, the summary judgment must be affirmed. *Id*. Here, the individual Defendants appeal the district court's summary judgment ruling denying them qualified immunity. Br. 8. This requires the Court to reconsider

(1) "whether the facts shown . . . make out a violation of a constitutional or statutory right," and (2) "whether that right was clearly established at the time of the . . . alleged misconduct." *Gerlich*, 861 F.3d 704.

I. This Court should affirm both that Defendants violated the law and that the law was clearly established.

Defendants argue that it would be "fair and efficient" for the Court to skip the first qualified immunity inquiry. Br.16. But Defendants' arguments here and their position throughout this litigation make that neither fair nor efficient. First, it would be unfair to allow Defendants to continue their unbroken pattern of accusing InterVarsity of wrongdoing. For example, Defendants argue—as they have throughout this lawsuit—that InterVarsity students want "a 'pass' to discriminate against their peers who belong to other protected groups," Br.32-33, that InterVarsity is "unwilling[] to comply with the University's Human Rights policy," Br.24, and that InterVarsity's "sincerely held religious beliefs are in *direct conflict* with state and federal civil rights law," Br.18 (emphasis added). Exercising First Amendment rights is not engaging in invidious discrimination. This Court should expressly reject this argument.

Nor would it be efficient to skip the underlying constitutional question, because Defendants' argument repeatedly questions the validity of the

district court's merits ruling. Defendants complain that they were victims of Scylla and Charybdis: "stuck between protecting the rights of religious groups to freely speak and assemble and protecting the rights of students to be free from discrimination . . . on the basis of a protected class." Br.20. They further claim that that their actions were justified "given the state's interest in regulating the property in its charge," Br.24, and that no court has ever "squarely addressed the interplay between a university's non-discrimination policy and a religious group's First Amendment rights, Br.25-26; *accord* Br.13.

Indeed, at oral argument, counsel for Defendants argued that it was unfair to "hold university officials to understand the First Amendment," Tr.22, and to expect that "people [for whom] that isn't what they do for a living should understand that." Tr.24. The trial court found these arguments "incredibly baffling," Tr.26, noting that she had already told the University in the *BLinC* case "not to do X" (i.e., selectively enforce its Policy), and "the next thing [the University] did was double X." Tr.24. "I told you exactly what to do, and you did the opposite of that[.]" Tr.25. But Defendants continue to argue on appeal that they engaged in no wrongdoing and that they *still*—even now, four injunctions later—are

unsure of what the law requires. Br. 18, 33 (this case raises "a difficult question" in "unsettled area of law" that has "been the subject of much academic debate"). Given Defendants' insistence, the Court should address both prongs of the analysis to expressly reject Defendants' arguments.

Indeed, because "[t]he protection of first amendment rights is central to guaranteeing our capacity for democratic self-government," this Court has a long history of communicating "to organized society that [those rights] be scrupulously observed." *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000). For instance, in *Burnham v. Ianni*, while the university appellant "focuse[d] on the second" prong of qualified immunity analysis, this Court first confirmed there was "a violation of a constitutional right." 119 F.3d 668, 674 (8th Cir. 1997) (en banc).[5]

II. Defendants violated InterVarsity's First Amendment rights.

The district court correctly held that the undisputed record in this case demonstrates beyond doubt that Defendants violated InterVarsity's

[5] *See also Norman v. Schuetzle*, 585 F.3d 1097, 1103 (8th Cir. 2009) ("courts generally look first at whether the official's alleged conduct violated the [plaintiff's] federal rights"), *overruled on other grounds in Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (resolving both prongs "is often . . . advantageous").

freedom of speech, freedom of association, and freedom of religion, in ways that cannot satisfy strict scrutiny. And the record shows that Defendants likewise violated InterVarsity's right under the Religion Clauses to select its leaders without government interference.

A. Defendants infringed InterVarsity's freedom of speech.

State universities are not obligated to grant official recognition to student-led organizations. But when they do, they create a limited public forum governed by the First Amendment. *Gerlich*, 861 F.3d at 704-05; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). While "some content- and speaker-based restrictions may be allowed" in the forum, *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), universities face at least two restrictions: (1) they "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'" and (2) they may not "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (citation omitted); *accord Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 684 (2010); *see also Healy v. James,* 408 U.S. 169, 181 (1972) (universities cannot deny "recognition . . . to college organizations" based on their views). Where a university's restriction on a student group's speech or

access to the forum is either unreasonable in light of the forum's purpose or discriminates based on viewpoint, the restriction must undergo strict scrutiny. *Gerlich*, 861 F.3d at 705.

The district court held that the University's policy was "both reasonable and viewpoint neutral as written" but "not viewpoint neutral as applied to InterVarsity." Add.22. But the district court's own findings show that the University's policy was unreasonable and discriminatory both as written and as applied.

1. The University's Policy is both unreasonable and discriminatory.

Unreasonable. A content-based restriction in a limited public form is reasonable only if it "preserves the purposes of th[e] limited forum," and "respect[s] the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829-30. Thus, for instance, a forum dedicated to the free exchange of *students'* ideas about *art* can reasonably insist on student speech and exclude content about public transit, but it cannot make "other content-based judgments" that disrespect the forum's own boundaries. *Martinez*, 561 U.S. at 703 (Kennedy, J., concurring).

The University's Registered Student Organization policy ("RSO policy") creates a limited public forum for the specific purpose of letting

students associate based on shared beliefs and interests. The policy explicitly "encourages the formation" of groups "around the areas of interest *of its students*" and grants these student groups freedom to "organize and associate with *like-minded students*." IVCF.App.2235-36 ¶¶ 20, 23 (emphases added). It expressly anticipates that groups will limit membership to "any individual who subscribes to the goals and beliefs" of the organization. IVCF.App.2236 ¶ 23. And the University guarantees that all student groups will have an "equal opportunity" to apply for University resources without having their "exercise of First Amendment rights of free expression and association" inhibited. IVCF.App.2236 ¶ 23.

In light of these purposes, the policy is unreasonable to the extent it fails to recognize that "religion" inherently embodies "goals and beliefs" around which like-minded students may wish to associate. By failing to acknowledge that status and belief are inextricably intertwined when it comes to religion, prohibiting groups from associating on the basis of religion inevitably prohibits groups from associating around shared "goals and beliefs," which directly conflicts with the purposes of the forum.

This might have been excused had the University applied common sense and observed constitutional norms in applying the policy. But instead the University acted unreasonably by applying the policy literally and refusing to let InterVarsity select leaders who affirm its beliefs. Refusing to let groups select mission-aligned leaders destroyed the University's purpose of allowing students to form interest-based organizations. Just as an organization cannot form around hidden beliefs, it cannot survive without leaders who agree with its beliefs. Thus, denying InterVarsity the ability to select religious leaders not only failed to "preserve[] the purposes of th[e] limited forum," *Rosenberger*, 515 U.S. at 829-30, but was a direct violation of the RSO policy's core purposes. Excluding InterVarsity specifically because of its *religious* leadership criteria accordingly constituted an impermissible "content-based judgment[]" limiting participation in the forum. *Martinez*, 561 U.S. at 703 (Kennedy, J., concurring).

Discriminatory. The Policy is also discriminatory both as written and as applied. Viewpoint discrimination occurs when government action stems from the "ideology or the opinion or perspective of the speaker." *Gerlich*, 861 F.3d at 705 (quoting *Rosenberger*, 515 U.S. at 829). Courts

"use the term 'viewpoint' discrimination in a broad sense." *Matal*, 137 S. Ct. at 1763. Where a viewpoint fits "within the forum's limitations," restrictions on it are "presumed impermissible." *Rosenberger*, 515 U.S. at 830. Nor are outright bans or censorship the only impermissible restrictions. Ideological favoritism also qualifies: "[t]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal*, 137 S. Ct. at 1757 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

The University's discriminatory limit on InterVarsity's leadership selection constitutes viewpoint discrimination. Personnel is policy, and leadership selection is message control. Leaders shape and embody the message of a group, making leadership selection inescapably expressive. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (ruling against a state law which interfered with political parties' ability to select voting members, since their "choice of a candidate is the most effective way in which that party can communicate"). And this point "applies with special force with respect to religious groups" because their "very existence is dedicated to the collective expression . . . of shared religious ideals" and

because "the content and credibility of a religion's message depend vitally on the character and conduct of its teachers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200-01 (2012) (Alito, J., concurring). Thus, courts have insisted that religious groups must have "the ability to select, and to be selective about, those who will serve as the very embodiment of its message." *Id.* at 201 (cleaned up).

But rather than according religious groups the "special solicitude" that the First Amendment requires for their leadership decisions, the University has subjected them to a special burden. *Id.* at 189 (opinion for the Court). Under its gerrymandered Policy, the University has largely retained its longstanding, common-sense approach: Greek groups, sport clubs, political and ideological organizations, and certain favored minority groups remain free to select leaders who authentically embody the message of the organizations they lead. But not religious groups. That differentiation is viewpoint discrimination. And particularly because the Policy was amended to expressly include the exemption for fraternities and sororities, the Policy is discriminatory both as written and as applied.

This cannot be justified on the grounds that the Defendants were (selectively) imposing a written *nondiscrimination* policy. "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019). Moreover, "[t]olerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). All InterVarsity asked for was the same reasonable, message-preserving accommodation that was offered to other groups and allowed by the plain terms of the Policy. Defendants' targeted refusal to grant it must withstand strict scrutiny.

2. *Martinez* does not support the University's unreasonable, discriminatory actions.

As the district court recognized, "*Martinez* is of limited value in this case." Add.37. First, the Supreme Court's consideration was limited to policies that "mandate acceptance of all comers." 561 U.S. at 671. And the Court expressly refused to bless policies that target "solely those groups whose beliefs are based on religion . . . and leave other associations free to limit membership and leadership to individuals committed to the group's ideology." *Id.* at 675. But as shown above, the University's Policy does just that. Second, *Martinez* is also inapplicable

because, under *Hosanna-Tabor*, it cannot be applied to religious groups' selection of their leaders. Indeed, *Martinez* itself recognized that limits on leadership selection raise unique constitutional problems. *Id.* at 692-93 (finding it unlikely that students would "seek leadership positions in . . . groups pursuing missions wholly at odds with their personal beliefs" and stating that if a student did so, a group could decline to "elect her as an officer"); *id.* at 706 (Kennedy, J., concurring) (finding that even with a true all-comers policy, a religious student group would have a "substantial case" if the policy was used to "challenge [group] leadership"). Third, the University loses under *Martinez* for the reasons noted above: the University's actions are unreasonable and viewpoint discriminatory.

Thus, the University's targeting of InterVarsity for selecting leaders who affirm its beliefs is a clear infringement of InterVarsity's freedom of speech and must face strict scrutiny.

B. Defendants infringed InterVarsity's freedom of association.

As the district court recognized, the University's actions also violate InterVarsity's freedom of association. Under the First Amendment, "the ability of like-minded individuals to associate for the purpose of

expressing commonly held views may not be curtailed." *Knox v. SEIU*, 567 U.S. 298, 309 (2012). Thus, where a group "engage[s] in some form of expression, whether it be public or private," and a law "significantly affect[s] the [organization's] ability to advocate public or private viewpoints," then the law can stand only if it passes strict scrutiny. *Dale v. Boy Scouts of Am.*, 530 U.S. 640, 648, 650 (2000).

Here, there is no dispute that InterVarsity engages in "some form of expression." *Id.* at 648. It exists to express its faith. IVCF.App.2226-27 ¶¶ 3-4. Indeed, religious groups are quintessential examples of expressive associations, since their "very existence is dedicated to the collective expression . . . of shared religious ideals," making them "the archetype of associations formed for expressive purposes," *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring).

Nor is there any dispute that the University's restrictions would "significantly affect [InterVarsity's] ability to advocate [its] viewpoints." *Dale*, 530 U.S. at 650. Courts "must . . . give deference to an association's view of what would impair its expression." *Id.* at 653. But here, no deference is needed. The University expressly admitted that its Policy undermines InterVarsity's ability to express its faith, and that it

exempted other student groups from the same Policy precisely to avoid the harmful impact to their message. IVCF.App.2516, 2522 ¶¶ 317-321, 366-68; *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (finding that university violated free association rights by derecognizing religious student group for requiring leaders to agree with its faith).

Thus, Defendants' actions must face strict scrutiny. *Martinez*, 561 U.S. at 680 (infringements on association permissible only if they serve "compelling state interests" that cannot be advanced through "significantly less restrictive" means). As the district court correctly held, Defendants cannot meet that standard. Add.33.

C. Defendants infringed InterVarsity's free exercise of religion.

The district court also correctly found that Defendants violated the Free Exercise Clause by discriminating against InterVarsity's religious exercise. Add.29. The Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny" laws that disfavor religion. *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993)). Restrictions on religion are

thus subject to strict scrutiny unless they are both "neutral" and "generally applicable." *Id*. at 2021; *accord Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 9 (Iowa 2012). The University's actions here were neither.

1. The University's Policy is not generally applicable.

A law is not generally applicable if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Zimmerman*, 810 N.W.2d at 16; *accord Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (Alito, J.). Here, the University's Policy is not generally applicable for at least three reasons.

First, it was not and is not enforced equally by the University. *Lukumi*, 508 U.S. at 545-46 (regulation that "society is prepared to impose upon [religious groups] but not upon itself" is the "precise evil . . . the requirement of general applicability is designed to prevent"); *accord Tenafly Eruv Ass'n v. Borough of Tenalfy*, 309 F.3d 144, 168 (3d Cir. 2002) (rejecting a "selective, discretionary application of [the law] against" religiously motivated conduct). This is reflected, for example, in the Iowa

Edge student group, which employs race-based preferences for its officers; the UI Veteran's Association, which requires members be veterans; and student sports clubs, which discriminate based on sex. IVCF.App.2243-2248 ¶¶ 39, 43, 49(a); IVCF.App.2289 ¶¶ 189-90. Indeed, the University does not even enforce the Policy equally against religious groups: Love Works and the Christian Legal Society expressly require leaders to share their respective faiths and were never among the deregistered religious groups. IVCF.App.2294 ¶ 213; *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (enforcing law against Jehovah's Witnesses while exempting other religious groups violated Free Exercise Clause). The University likewise does not evenly enforce the Policy in its own programs, including its Iowa First Nations Summer Program (which limits eligibility based on race), its National Education for Women Leadership program (which limits eligibility based on sex), and the Military Veteran and Student Services program (which limits eligibility based on veteran status). IVCF.App.2247 ¶ 49; IVCF.App.2295 ¶ 215; *see also* IVCF.App.2247 ¶ 48 (sex-segregated intramural sports leagues and recreational programs); IVCF.App.2248-2249 ¶ 50, IVCF.App.2295 ¶ 215 (scholarships, awards, and funds that discriminate based on race, sex,

color, national origin, among others); IVCF.App.2246 ¶¶ 45-46, IVCF.App.2288-2289 ¶ 188 (sex-segregated Athletics Department).

Second, the University has categorically exempted a huge swath of student organizations from the reach of its policy, both historically and currently. While "'[a]ll laws are selective to some extent, . . . categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.'" *Zimmerman*, 810 N.W.2d at 11 (quoting *Lukumi*, 508 U.S. at 542). Where a categorical exemption threatens the government's interests "'in a similar or greater degree than [the prohibited religious exercise] does,'" it must face strict scrutiny. *Id.* (quoting *Lukumi*, 508 U.S. at 543). Thus, in *Rader v. Johnston*, the court found that a university's express secular exemptions to a residential housing requirement triggered (and, ultimately, failed) strict scrutiny when similar exemptions were not afforded for religious reasons. 924 F. Supp. 1540, 1553 (D. Neb. 1996); *accord Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d. Cir. 1999) (scrutiny triggered by "categorical exemption for individuals with a secular objection [to a challenged policy] but not for individuals with a religious objection").

The most obvious categorical exemption here is the one the University created for Greek groups. The exemption is huge: it covers over fifty fraternities and sororities, which alone constitute about 10% of the University's registered student groups and collectively have a membership of almost 20% of the University's undergraduate class. IVCF.App.2287-2288 ¶ 183. The exemption is also very broad, allowing Greek groups to exclude students from *both* leadership and membership. IVCF.App.2238 ¶ 27, IVCF.App.2275 ¶ 129, IVCF.App.2287-95 ¶¶ 183-187, 216. The net result is that while the University punished InterVarsity over 3 or 4 religious leadership positions each year, Greek groups were allowed to exclude half the student population from thousands of possible membership positions. And far from deregistering Greek groups, the University has welcomed them for over 150 years, actively advertising for them, creating substantial benefits and programs to support them, and telling students that they are the "largest and most successful support networks available to Hawkeye students." IVCF.App.2295 ¶ 217; IVCF.App.3005-07 ¶¶ 386-390.

Third, a similar but stealthier general-applicability problem arises via "silent" exemptions: categories of "secular activities that equally

threatened the purposes" of the Policy were left unprohibited, and "therefore were approved by silence[.]" *Zimmerman*, 810 N.W.2d at 10 (citing *Lukumi*, 508 U.S. at 543). This problem arises here through the University's decision to ban any "restriction[s] on leadership related to religious beliefs," while failing to likewise ban any leadership restrictions based on *ideological* or *political* beliefs. IVCF.App.2290 ¶¶ 194-201, IVCF.App.2237-2238 ¶ 24-27. This "underinclusion" acts as a silent categorical exemption for *non*-religious beliefs, and thereby "undermines its general applicability." *Zimmerman*, 810 N.W. 2d at 16. The discrimination is stark: under the Policy, a political group can exclude leadership candidates who do not hold its political beliefs about poverty alleviation, but InterVarsity cannot ask its leaders to hold substantively similar beliefs that are rooted in religious conviction, such as the Parable of the Good Samaritan. IVCF.App.2514 ¶ 301; IVCF.App.2520 ¶ 346.

In all three forms of discrimination, the University "devalues religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537; *accord Tenafly*, 309 F.3d at 168 (same). Such value judgments against religious motivations must face "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019.

2. The University's Policy is not religiously neutral.

The "minimum requirement of neutrality" is that a law "not discriminate on its face." *Lukumi*, 508 U.S. at 533. But "[f]acial neutrality" is not enough. *Id.* at 534. Rather, the Free Exercise Clause forbids "covert suppression" of religion and "subtle departures from neutrality"; hostility that is "masked" as well as "overt." *Id.*; *Zimmerman*, 810 N.W.2d at 10 (same).

Here, the University's new interpretation of its Policy *is* facially discriminatory: it bans any "restriction on leadership related to *religious* beliefs." IVCF.App.2230-31 ¶ 12. That alone fails neutrality. Laws that fail to operate "without regard to religion" or that otherwise "single out the religious" for disadvantages "clear[ly] . . . impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2020-21.

Moreover, the blatant "difference in treatment" between how the University has treated religious groups like InterVarsity and how it treats other secular organizations and programs provides "[a]nother indication of hostility" and compels strict scrutiny. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (2018). For

instance, although the university's policy in *Rader* was "certainly neutral on its face," the university's refusal to make an "exception[] to the policy" for a religiously-motivated request while "routinely" granting them for secular requests was sufficient to show a lack of neutrality. 924 F. Supp. at 1554-55. Simply put, "[a] double standard is not a neutral standard," and so must "run the gauntlet of strict scrutiny." *Ward*, 667 F.3d at 740.

D. Defendants' actions do not pass strict scrutiny.

Because the Defendants' actions against InterVarsity discriminate against religious viewpoints, those actions are invalid unless they are "the least restrictive means" of serving a "compelling state interest." *Republican Party of Minn. v. White*, 416 F.3d 738, 754 (8th Cir. 2005). This is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and Defendants thus bears a "heavy burden" to justify excluding an organization from the full "range of associational activities" Defendants otherwise permit. *Healy*, 408 U.S. at 184; *accord Gerlich*, 861 F.3d at 705. As the district court correctly held, Defendants do not come close to meeting their burden. Add.30-33.

1. Defendants did not have a compelling interest in discriminating against InterVarsity.

The compelling interest analysis is open and shut: because the

University's Policy "leaves appreciable damage to [its] supposedly vital interest[s] unprohibited," Defendants' ban on religious leadership selection "cannot be regarded as protecting an interest of the highest order." *Lukumi*, 508 U.S. at 547; *accord White*, 416 F.3d at 750 (same). No more is necessary to affirm the district court's judgment against Defendants, but there is plenty of support for it nonetheless.

First, the interests the University alludes to are in avoiding feelings of exclusion in students who did not share InterVarsity's religious beliefs. Br.24, 32. That is a non-starter. "Regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be." *Telescope Media*, 936 F.3d at 755.

Nor is there evidence that any such hurt would have occurred. Indeed, the University entirely failed to show that there was an "actual problem" in need of solving. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). In the 25 years InterVarsity was on campus before deregistration, no one ever complained about InterVarsity's religious leadership criteria. IVCF.App.2514 ¶ 298-99. That makes sense. InterVarsity welcomes *everyone* to participate in all of its events, and only limits leadership because it requires certain religious expression—such as prayer and

worship—that are dependent upon sincere belief. IVCF.App.2226 ¶ 4; *Ward*, 667 F.3d at 740 (religious accommodations are in the "best interest" of both the students accommodated and those who do not share their beliefs).

Indeed, the only evidence in the record is that the University both awarded and praised InterVarsity for its service to the student body during that time. IVCF.App.2226-28 ¶¶ 4-5, 9; IVCF.App.3114-15 ¶¶ 384-85. And once Defendants decided to change course and deregister InterVarsity after 25 years on campus, they made no attempt to gather, discuss, or otherwise identify any specific evidence of harms that were caused by InterVarsity's religious leadership standards or that would result from granting InterVarsity an accommodation. IVCF.App.2521-22 ¶¶ 357-65. Nor has the University set up any sort of mechanism to monitor whether its interests are either helped or harmed by the prohibition on InterVarsity's leadership selection—or by the allowance of Greek groups' far larger membership exclusions. *Id.*

In sum, the University seems entirely uncurious about the real-world effects of its Policy. And that is fatal for Defendants' strict scrutiny showing. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821

(2000) (governmental failure to conduct "some sort of field survey" made it "impossible to know" if the regulation served a compelling interest, meaning it flunked strict scrutiny).

2. Defendants did not employ the least restrictive means to serve the University's interests.

To meet the least-restrictive-means test, the University must, *inter alia*, show that applying its Policy against InterVarsity "could be replaced by no other regulation that could advance the interest as well with less infringement on speech." *White*, 416 F.3d at 751. To meet this burden, it must show that "it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014). That it did not do.

For instance, the University admitted that it was aware of other public universities, such as Iowa State University, that have clear-cut policies accommodating religious leadership selection. IVCF.App.2514-15 ¶¶ 304-07; IVCF.App.2523 ¶¶ 377-78. Yet the University made no attempt to study or explain why it could not adopt such policies. *Id*. There was no evidence that those policies are ineffective at other institutions, nor that it would be impracticable for the University to adopt them. *Id*.

Such "meager efforts to explain" why "the plans adopted by those other institutions would not work" for the University means that the University cannot show its policy is the least restrictive means. *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013); *see also Mo. Broadcasters Ass'n v. Schmitt*, 946 F.3d 453, 462 (8th Cir. 2020) (even under lesser scrutiny, government must show it "carefully calculated the costs and benefits associated with the burden on speech").

The University also gave no real consideration to other less burdensome alternatives, even though it already provided them for other student groups. For instance, it dismissed out of hand InterVarsity's suggestion about "strongly encourag[ing]" its leaders to agree with its faith, despite granting precisely the same accommodation to Women in Science and Engineering. IVCF.App.2510-11, 2515 ¶¶ 273-76, 308-11; IVCF.App.2521-22 ¶¶ 359-65. Similarly, the University failed to consider whether *some* form of leadership selectivity by InterVarsity might be permissible, despite permitting Hawkapellas to restrict its leading roles to women while allowing men to participate in other ways. *Id.* The University's failure even to consider *existing* alternatives means that it cannot survive strict scrutiny. *White*, 416 F.3d at 751; *NIFLA v. Becerra*,

138 S. Ct. 2361, 2376 (2018) (government flunked narrow-tailoring test where it had "identified no evidence" to "prove" tailoring).

In sum, the University failed to get beyond the "broadly formulated" considerations that have long been held insufficient, thus failing to meet its burden to prove the "asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro*, 546 U.S. 418, 431 (2006) (citing *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). "Instead," as the district court noted, "the University took an extreme step—complete deregistration of InterVarsity—to discriminately prevent theoretical harms that may never materialize." Def.App.204. Thus, the district court correctly held that the University failed strict scrutiny. Add.33.

E. Defendants also violated InterVarsity's rights to select its own religious leadership.

Government interference with a religious organization's leadership "runs headlong into the Religion Clauses of the First Amendment." *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361 (8th Cir. 1991). As the Supreme Court unanimously held, the Free Exercise Clause's protection for "a religious group's right to shape its own faith and mission through its appointments" forbids government from "imposing an unwanted minister," and the Establishment Clause

correspondingly "prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-89. Together, the clauses "categorically prohibit[] federal and state governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015).

The Religion Clauses bar the University's interference in InterVarsity's leadership selection because (1) InterVarsity is a "religious group," and (2) the position in question is for "one of the group's ministers." *Hosanna-Tabor,* 565 U.S. at 176-77.

There is no dispute that InterVarsity is a religious group. *InterVarsity*, 777 F.3d at 834 (finding that InterVarsity USA qualifies because its "mission is marked by clear or obvious religious characteristics"); IVCF.App.2226-27, 2235 ¶¶ 2-6, 20 (InterVarsity is a religious ministry that exists solely to express and practice its faith); *Scharon*, 929 F.2d at 362 (even hospital that was "primarily a secular institution" protected).

And there is no dispute that InterVarsity's leadership holds ministerial roles. *Hosanna-Tabor*, 565 U.S. at 188-89, 192 (such roles are those that "minister to the faithful," "personify its beliefs," and convey the church's "message and carry[] out its mission"); IVCF.App.2227-

28 ¶¶ 5-8 (leaders personally lead religious meetings, Bible studies, prayer, and worship; determine the religious content of meetings; minister individually to their peers; receive religious training and support to ensure they can fulfill religious duties). Thus, the Religion Clauses protect InterVarsity against Defendants' actions.

The district court rejected that conclusion on novel grounds. The court agreed that the Establishment and Free Exercise Clauses together protect religious leadership selection from government interference. Add.34. But it determined that this protection was only activated where *both* clauses were infringed. Add.36. Taking the narrow view that the Establishment Clause applied only to state action that "appointed ministers," the court found that the protection fell apart because Defendants did not "appoint" InterVarsity's ministers. Add.36. And any remaining Free Exercise protection simply fell down into the standard neutral-and-generally-applicable analysis, which was mentioned briefly in a footnote in *Martinez*. Add.37 (citing 561 U.S. at 697 n.27 (relying on *Emp't Div. v. Smith*, 494 U.S. 872 (1990)).

That is mistaken. The ministerial exception works just as well on one leg as both. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d

113, 122 n.7 (3d Cir. 2018) (Establishment Clause element enough alone). The Establishment Clause broadly "prohibits government *involvement* in [ministerial] ecclesiastical decisions," not just "appointing ministers." *Hosanna-Tabor*, 565 U.S. at 184, 189 (emphasis added). And—two years after *Martinez*—the Supreme Court unanimously rejected the idea that *Smith* set the outer boundary of constitutional protection for religious leadership selection. *Id.* at 190.

Thus, the Religion Clauses apply here to bar the University's actions and provide an alternative basis to affirm summary judgment.

III. InterVarsity's rights were clearly established at the time of the violations.

This Court takes a "broad view of what constitutes 'clearly established law' for the purposes of the qualified immunity inquiry." *Bonner v. Outlaw*, 552 F.3d 673, 679 (8th Cir. 2009) (citation omitted). A right is "clearly established" when its contours are "sufficiently clear so that a reasonable official would understand when his actions would violate the right." *Gerlich*, 861 F.3d at 708. Rights can be clearly established even where there is no "case directly on point," *id.*, and "even in novel factual circumstances," *id.* at 711 (Kelly, J., concurring) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Tlamka v. Serrell*, 244 F.3d 628, 634

(8th Cir. 2001) (courts can "look to all available decisional law, including decisions of state courts, other circuits and district courts" to determine clearly established law). And there is no question that the standards equally apply to "university officials" where the case "involve[s] the First Amendment." *Gerlich*, 861 F.3d at 710 (Kelly, J., concurring) (collecting Eighth Circuit precedent).

A. InterVarsity's free speech rights were clearly established.

The issue here tracks the issue in *Gerlich*: "the question here is whether plaintiffs' right not to be subject to viewpoint discrimination when speaking in a university's limited public forum was clearly established." 861 F.3d at 708. The answer here likewise tracks the answer in *Gerlich*: yes.

1. It is overwhelmingly clear that viewpoint discrimination is unconstitutional.

Decades of both Supreme Court and Eighth Circuit precedent overwhelmingly show that viewpoint discrimination is unconstitutional. In *Healy*, the Supreme Court held that a state college that allowed student groups to "place announcements . . . in the student newspaper," "us[e] various campus bulletin boards," and reserve "campus facilities for holding meetings" could not deny equal access to a student group that

held "abhorrent" views and was reputed to have espoused "violent and disruptive activities" as a political tool. 408 U.S. at 176, 178, 187-88. In *Widmar*, the Court extended that ruling to protect religious student organizations, concluding that a public university could not justify denying them equal treatment out of fear it would "confer [an] imprimatur of state approval" in violation of the Establishment Clause. 454 U.S. at 274. In *Rosenberger*, the Supreme Court held that, if a public university provides funding for secular student groups to speak on certain topics, it cannot deny funding to religious groups addressing the same topics from a religious perspective. 515 U.S. at 829, 831. Finally, in *Trinity Lutheran*, the Supreme Court reiterated that a government cannot withhold a "generally available benefit" on the basis of religious views or identity. 137 S. Ct. at 2019. These cases alone are sufficient to overcome Defendants' claim for qualified immunity. *See also Apodoca v. White*, 401 F. Supp. 3d 1040, 1059-60 (S.D. Cal. 2019) ("viewpoint neutrality [a]s an operational principle" has been "clearly established for almost two decades").

This Court's rulings are no less clear. Just over two years ago, before the University deregistered InterVarsity, this Court held in *Gerlich* that

it has "*long* been recognized that if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum." 861 F.3d at 709 (emphasis added). That principle had sufficient clarity that it applied even to bar a qualified immunity defense regarding restrictions on usage of university trademarks, a trickier issue than merely requiring equal access to registered status for student groups.

Earlier cases have also established the point. In *Gay & Lesbian Students Association v. Gohn*, for example, this Court held that a public university engaged in viewpoint discrimination when it applied an abnormal funding standard to a gay and lesbian group and when certain of the decision makers "freely admitted that they voted against the group because of its views." 850 F.2d 361, 367 (8th Cir. 1988). And in *Gay Lib v. University of Missouri*, the Court emphasized that the same rule protected student groups whose views may, to some, be "abhorrent, even sickening." 558 F.2d 848, 856 n.16 (8th Cir. 1977); *see also Wishnatsky v. Rovner*, 433 F.3d 608, 611-12 (8th Cir. 2006) ("denial of participation in a state-sponsored program based on the party's beliefs or advocacy is unconstitutional," and there is no exception to this rule that "permits institutions of higher education—traditionally bastions of free speech

and the vigorous exchange of ideas—to discriminate on the basis of viewpoint").

Defendants distinguish none of these cases, instead just arguing that the possible conflict between a nondiscrimination policy and First Amendment rights was sufficient to muddy the waters. But there is nothing about enforcing a nondiscrimination policy that gives the government *carte blanche* to discriminate—especially where, as here, the government gave itself *carte blanche* to enforce the policy unevenly. *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (when deciding the "clearly-established prong," courts "must take care" to "define the 'clearly established' right" within the factual context of the case). In all of the relevant cases, the college or university found *some* justification for its discrimination, be it concern for public safety (*Healy*), fear of violating the Establishment Clause (*Widmar*; *Rosenberger*), or disapproval of a group's message (*Gerlich*; *Gohn*; *Gay Lib*). The fact that the University seeks to justify its discrimination in terms of enforcing its nondiscrimination policy—while ironic—is, in the end, a difference without a distinction: strict scrutiny must still be met. Defendants "failed to satisfy their strict scrutiny burden" below, Add.33, and make no effort

to satisfy it here. And the district court held that the defense would have failed in any case, because the University's interests in promoting "diversity" and "equal access," while perhaps compelling, still had to be enforced evenly against all groups. Add.30.

2. Defendants' cases cut against their position.

The cases Defendants rely on addressing enforcement of nondiscrimination policies uniformly cut against their position. For instance, *Martinez* turned on an alleged all-comers policy that, as the Supreme Court interpreted it, meant there was no discrimination by definition: *all* groups had to accept *all* comers. *Martinez*, 561 U.S. at 671, 678. Here, in contrast, it is entirely undisputed that Defendants did not and do not have an all-comers policy. IVCF.App.2233-35 ¶¶ 16-18; Add.37. And *Martinez* emphasized that—absent an all-comers' policy—"a public educational institution exceeds constitutional bounds . . . when it restricts speech or association simply because it finds the views expressed by a group to be abhorrent." 561 U.S. at 683-84 (cleaned up).[6] Indeed, *Martinez* was the lead case this Court relied upon in *Gerlich* to

[6] *See also Martinez*, 561 U.S. at 679 ("[T]he Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral.").

hold that "[i]t has long been recognized" that a university "may not engage in viewpoint discrimination within [a limited public] forum." *Gerlich*, 861 F.3d at 709 (citing *Martinez*, 561 U.S. at 667-68). *Martinez* thus stands for the proposition that nondiscrimination policies cannot themselves be used to discriminate, at least not without satisfying strict scrutiny, which Defendants have indisputably failed to do here.

Defendants also mistakenly rely on the Ninth Circuit's ruling in *Alpha Delta Chi-Delta Chapter v. Reed*, which emphasized that a university nondiscrimination policy is "unconstitutional if not *applied* uniformly." 648 F.3d 790, 803 (9th Cir. 2011). (emphasis added). That is precisely the problem here: Defendants' "disparate treatment constitute[d] viewpoint discrimination against InterVarsity." Add.25.[7]

[7] While getting the as-applied issue right, *Reed* was wrong to hold that the nondiscrimination policy in that case was "viewpoint neutral as written" despite not being an all-comers policy and despite placing burdens on religious views that it did not place on political or ideological views. 648 F.3d at 803. That conflicts with controlling caselaw, *supra* at Sections II(A)(1), (C), and (E), and this Court should reject it in ruling on the first element of qualified immunity that Defendants violated the constitution. The Policy as written *does* discriminate based on viewpoint. But for purposes of the clearly-established element, *Reed* expressly confirms that discriminatory *enforcement* is clearly established as unconstitutional.

Finally, *Walker* held that CLS was likely to prevail on its claim of viewpoint discrimination after the university in that case "applied its antidiscrimination policy to CLS alone, even though other student groups discriminate[d] in their membership requirements on grounds that [were] prohibited by the policy." 453 F.3d at 866. *Walker* carefully addressed and applied First Amendment law and shows that, at least as of 2006, it was exceedingly clear that nondiscrimination policies could not be used to discriminate against religious speech.

All of this has been well established in the Eighth Circuit since at least this Court's 2000 ruling in *Cuffley v. Mickes*. There the Court held that the government cannot rely on a group's "discriminatory membership criteria" to justify denying access to a generally available public program. 208 F.3d 702, 711-12 (8th Cir. 2000). Further, the Court dismissed the idea that there is any conflict between nondiscrimination requirements and allowing diverse viewpoints on issues concerning protected categories: "offering a service to a group that discriminates is not equivalent to discrimination in the offering of that service." *Id.* at 711. *Cuffley* thus clearly established both (1) that there was no legal conflict between InterVarsity's constitutional rights and the University's

obligations under its own Policy or under state or federal nondiscrimination laws; and (2) that deregistering InterVarsity was a violation of its First Amendment rights, regardless of the University's Policy.

In short, Defendants are simply wrong that there are no cases directly addressing conflicts between the First Amendment and nondiscrimination policies. *Cuffley* addressed the issue two decades ago. And cases like *Martinez*, *Reed*, and *Walker* are all explicit in noting that—at minimum—nondiscrimination policies must be enforced neutrally and provide no excuse for viewpoint discrimination. Thus, cases dealing with the application of nondiscrimination policies in limited public forums confirm that the law against viewpoint discrimination has long been clearly established in that context.

3. The two preliminary injunctions against the University put Defendants on notice.

Even if there had been some question that the First Amendment forbids religious viewpoint discrimination, that was no longer true by August 2018, when InterVarsity was forced to sue. By then, the district court had *twice* granted preliminary injunctions that expressly forbade selective enforcement of the Policy against a religious student group.

Def.App.29-30; IVCF.App.3152. The court explained that the injunction was an "extraordinary remedy" issued because the University was likely to lose on the merits. Def.App.13-14; *see also Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) ("granting of preliminary injunctions is not favored unless the right to such relief is clearly established"). Both injunction decisions clearly explained that viewpoint discrimination is unconstitutional. Def.App.29-30; IVCF.App.3152. Defendants were thus keenly aware that the First Amendment specifically forbade their selective enforcement of the Policy against InterVarsity's religious leadership requirements.

Yet Defendants still chose to double down on their selective enforcement against InterVarsity and numerous other religious student groups while consciously exempting dozens of fraternities, sororities, and other favored organizations covered by the same Policy. That discriminatory purge of religious groups was a knowing violation of clearly established First Amendment rights. And Defendants admitted as much, agreeing that their uneven enforcement of the Policy was "a problem" and in "conflict" with the First Amendment. IVCF.App.2508 ¶¶ 251; IVCF.App.2517-20 ¶¶ 323-24, 338-40, 345-47; IVCF.App.2279-81

¶¶ 145-51, 154; *see Burnham*, 119 F.3d at 677 n.15 (denying qualified immunity, noting university defendant's awareness that plaintiffs had a "good case" against him).

As this Court recognized in *Gerlich*, rights can be clearly established even when there is no "case directly on point," 861 F.3d at 708, and "even in novel factual circumstances," *id.* at 711 (Kelly, J., concurring). But here there *was* a case directly on point, with virtually *identical* facts: the same University enforcing the same policy in essentially the same religiously discriminatory way.

B. InterVarsity's free association rights were clearly established.

The Supreme Court's rulings regarding freedom of association and assembly have likewise long "made it clear" that "antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Walker*, 453 F.3d at 863 (citing both *Hurley* (1995) and *Dale* (2000)). This Court recently reaffirmed those well-established principles in *Telescope Media*, recognizing that "there is no question that the government cannot compel" association with particular viewpoints, such as by requiring "the organizers of a parade to allow everyone to participate." 936 F.3d at 752.

Nor, once again, does *Martinez* rescue Defendants. At best, *Martinez* says that "expressive-association and free-speech arguments merge" in this context, 561 U.S. at 680—meaning that Defendants' blatant viewpoint discrimination scuttles their defenses on both scores. *See also Robb v. Hungerbeeler*, 370 F.3d 735, 744-45 (8th Cir. 2004) (finding forum analysis irrelevant to freedom of association case after viewpoint discrimination is established).

Here, it is undisputed that InterVarsity's ability to select its leaders is critical to its message, and the evidence is overwhelming that InterVarsity was targeted for its leadership standards simply because Defendants disapproved of them. *Hurley*, *Dale*, and *Walker* thus reinforce that the illegality of Defendants' discrimination was clearly established, notwithstanding their efforts to couch it in terms of enforcing a nondiscrimination policy. *See also Cuffley*, 208 F.3d at 709 (finding unconstitutional state nondiscrimination policy denying KKK from participating in Adopt-A-Highway program: the "State simply cannot condition participation in its . . . program on the manner in which a group exercises its constitutionally protected freedom of association").

C. InterVarsity's free exercise rights were clearly established.

The relevant cases establishing InterVarsity's free exercise right against religious discrimination were on the books before Defendants violated the law, and most have been so for many years: *Fowler* (1953), *Lukumi* (1993), *Rader* (1996), *Fraternal Order of Police* (1999), *Tenafly* (2002), *Blackhawk* (2004), *Ward* (2012), *Zimmerman* (2012), *Trinity Lutheran* (2017), and *Masterpiece Cakeshop* (2018). This Court need look no further than *Lukumi*, *Zimmerman*, and *Trinity Lutheran* to confirm that authoritative precedent clearly forbade Defendants' flagrant religious discrimination. And cases like *Rader* and *Ward* apply the precedent to the university setting.

Moreover, no reasonable official could have believed that it was permissible to forbid InterVarsity's Christian leadership requirement *solely because of its religious content*. "[T]argeting religious beliefs as such is never permissible," full stop. *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. But that is precisely what Defendants have admitted they did to InterVarsity. They admitted preferring political belief standards to religious ones *solely* because the latter were religious. IVCF.App.2514 ¶ 301; IVCF.App.2520 ¶ 350 (political groups can require leaders to hold

political beliefs regarding poverty, but religious groups cannot do so for same beliefs held from religious viewpoint, such as based in parable of the Good Samaritan). For decades, it has been "quite clear" that government may not assume that reliance on religious beliefs "taints" a viewpoint "in a way that other foundations for thought or viewpoints do not." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-11 (2001); *see also* IVCF.App.2230-32 ¶¶ 12-13; IVCF.App.2291-93 ¶¶ 201, 208. So too here.

D. *Hosanna-Tabor* further shows that InterVarsity's rights were clearly established.

The Religion Clauses make this clear case even clearer. As the Seventh Circuit explained, there "can be no clearer example of an intrusion into the internal structure or affairs" of a religious student group than forcing it to accept leaders who do not share its faith. *Walker*, 453 F.3d at 861, 863. The Religion Clauses foreclose this intrusion by allowing religious groups to select their own leaders, and categorically forbidding the government to "dictate to a religious organization who its spiritual leaders would be." *Conlon*, 777 F.3d at 835-36.

Even in *Martinez*, the Supreme Court began recognizing that leadership selection raises unique considerations. 561 U.S. at 692-93

(majority op.) (groups may choose not to elect those who "seek leadership" yet are "wholly at odds" with the groups' beliefs); *id.* at 706 (Kennedy, J., concurring) (religious student group would have a "substantial case" against policy used to "challenge [group] leadership"). And two years later in *Hosanna-Tabor*, a unanimous Court made clear that the Religion Clauses protect the internal "autonomy of religious groups" by ensuring they are "free to determine who is qualified to serve in positions of substantial religious importance." *Hosanna-Tabor*, 565 U.S. at 199-200 (Alito, J., concurring).

Such protections are crucial within the University's student group forum, which welcomes wholly religious groups such as InterVarsity. For instance, one registered group is a formal part of a local church and another group administers Mass several times per week. IVCF.App.2279 ¶ 147. Registered student groups may also be the "functional equivalent" of a church, including by preaching sermons, holding worship services, conducting prayer meetings, observing sacraments such as baptism and communion, and celebrating holy days. IVCF.App.2276 ¶ 132; IVCF.App.2279 ¶ 147.

To avoid the Religion Clauses' protections for religious groups, Defendants have argued that limited public forums can condition access on a religious group's abandoning its right to freely select its religious leaders. Add.36-37. But it's long been established that First Amendment rights cannot be purchased so cheaply. *See Cuffley*, 208 F.3d at 707 (noting "fifty years" of unconstitutional conditions precedent). Nor can the government buy the ability to entangle itself in religious affairs. *Scharon*, 929 F.2d at 363 ("Personnel decisions" by religious groups are "*per se* religious matters" protected from any governmental "second-guessing"). And practically speaking, accepting Defendants' argument threatens houses of worship nationwide that rent government facilities for religious services. *Lamb's Chapel,* 508 U.S. at 390. According to the University, all it takes to allow the government to "demand that an atheist musician perform at an evangelical church service," *Telescope Media*, 936 F.3d at 756, is for the service to be held in a rented public school, library room, or fairground. That is not the law.

CONCLUSION

This Court should affirm the district court's finding that Defendants violated the First Amendment's protections for speech, association, and

religious exercise; affirm its denial of qualified immunity; and reverse the district court's erroneous ruling on the Religion Clauses' protections for leadership selection.

Dated: March 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 12,891 words, excluding the parts of the brief exempted by Federal Rule 32(f).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.
3. This brief complies with the electronic filing requirements of Eighth Circuit Rule 28A(h). The latest version of Windows Defender has been run on the files containing the electronic version of this brief and the addendum and no virus has been detected.

Executed this 6th day of March, 2020.

/s/ Eric S. Baxter
Eric S. Baxter

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

I further certify that on this 6th day of March, 2020, one copy of the Response brief attached to this certificate was served on the following via U.S. mail:

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