APPEAL NO. 19-3389
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, AND INTERVARSITY GRADUATE CHRISTIAN FELLOWSHIP,

Plaintiff-Appellees

v.

UNIVERSITY OF IOWA, ET AL.,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Iowa—Davenport
The Honorable Stephanie M. Rose
Case No. 3:18-CV-00080

Brief of Religious Student Organizations as *Amici Curiae* in Support of InterVarsity Christian Fellowship/USA and InterVarsity Graduate Christian Fellowship and Urging Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 29(a)(4)(A) and 26.1, *Amici Curiae* submit the following corporate disclosure statements:

Ratio Christi, Inc. is a nonprofit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Christian Medical & Dental Associations is a nonprofit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Parkview Evangelical Free Church is a nonprofit organization. It has no parent organization and no publicly held company holds 10% of its stock.

Chi Alpha Campus Ministries, U.S.A. is a nonprofit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Respectfully submitted,

/s/ Michael Ross
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STATEMENT OF INTEREST[1]

Amici are religious ministries with active chapters at the University of Iowa. Because *Amici* maintain belief- and conduct-based standards for their leaders, the registered status of their University of Iowa chapters are "pending" based on this litigation's outcome. Like Appellees, *Amici*'s chapters welcome everyone to their meetings, activities, and events. But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs.

Ratio Christi explores and debates some of the most probing questions about faith, reason, and life through panel discussions, lectures, discussion groups, and debates. At more than 125 chapters around the world, Ratio Christi trains students to discuss their beliefs in a rational manner, hosts events, and fosters dialogue on campus. Indeed, at many of its chapters, more non-Christians than Christians attend its events.

Christian Medical & Dental Associations strives to motivate, educate, and equip Christian healthcare professionals to glorify God by serving all peoples with professional excellence as witnesses of Christ's love and compassion and by advancing biblical principles of healthcare within the Church and our culture. CMDA has 319 chapters at medical, dental, optometry, physician assistant, and undergraduate schools across the country.

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[1] *Amici* have requested and obtained the consent of all parties to file this brief. No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person—other than the *Amici Curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

Parkview Church operates a nonprofit ministry called 24:7. Through this ministry, Parkview advances the Gospel of Jesus Christ and His Kingdom by creating a supportive community for students and offering unique community service opportunities both locally and internationally at the University of Iowa.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. At each of its 320 university chapters across the country, it strives to reconcile diverse groups of students to Christ and to equip them through Spirit-filled communities of prayer, worship, fellowship, discipleship, service, and missions.

INTRODUCTION & SUMMARY OF THE ARGUMENT

"Religious groups need not apply." That is how the University of Iowa has interpreted and applied its paradoxically named "Human Rights Policy" since 2017. That Policy is why the University is now subject to four injunctions that it has brazenly ignored. And that is why the district court rightly concluded that the University's officials do not deserve qualified immunity.

For decades, the University had maintained its Policy, which prohibits discrimination based on grounds like race, sex, national origin, disability, and religion. IVCF.App.2237 ¶ 26. For nearly as long, the University respected students' constitutional rights. It allowed racial and ethnic groups to select leaders that reflected the group's identity. Single-sex fraternities, sororities, and music groups thrived. And religious groups selected leaders who shared and embodied the groups' religious beliefs.

In 2017, all this started to change—but only for religious groups. Suddenly, the University began systematically derecognizing—*i.e.*, effectively banishing from campus—any religious organization that used religious-belief requirements for their leadership. Non-religious groups continued as usual. Once enjoined, the University did not change its ways. Rather, it doubled down, expanding its discrimination by derecognizing even more religious groups, including InterVarsity Graduate Christian Fellowship, and defying the district court's injunctions against enforcement of this policy. *Business Leaders in Christ ("BLinC") v. Univ. of Iowa*, No. 3:17-cv-00080, 2018 WL 4701879 (S.D. Iowa Jan. 23, 2018); *BLinC v. Univ. of Iowa*, No. 3:17-cv-00080, 2018 WL 3688981 (S.D. Iowa June 28, 2018).

It doesn't have to be this way. Numerous universities have applied similar, if not identical, anti-discrimination policies, without violating *Amici's* rights and without forcing litigation, let alone two cases and an appeal for both. The University could have easily resolved this issue if had dropped its current Policy interpretation and reverted to its prior, long-held position.

Given the outrageous context, none of the University officials responsible for this targeted campaign against religious groups deserves qualified immunity. Reasonable officials comply with court injunctions. Reasonable officials do not adopt radically new policy interpretations and apply them to only one type of student group. Here, University officials have done both, and this Court should affirm the district court's rulings.

ARGUMENT

I. Since 2017, the University has targeted religious groups, disregarded two injunctions, and abandoned its historical respect for religious groups.

A. In 2018, the district court repeatedly enjoined the University from selectively enforcing its Policy against religious groups.

In January 2018, the district court enjoined the University from selectively enforcing its Policy against the student organization Business Leaders in Christ ("BLinC"). *BLinC*, 2018 WL 4701879. The University derecognized BLinC because the group required its leaders to affirm its religious views. But the University took no action against other student groups formed around race, sex, or other characteristics that would trigger the Policy. *Id.* at *14. In June, the court extended the original injunction after discovery revealed that dozens of other student groups "were operating in violation of the University's stated policies" but were not punished like BLinC. *BLinC*, 2018 WL 3688981, at *1.

After the initial injunction, the University launched a search-and-derecognize campaign against all religious groups that required leaders to hold certain religious beliefs. IVCF.App.2231–32 ¶¶ 13–14. InterVarsity was one of those groups. But the University continued to recognize sororities and fraternities, single-sex singing groups, a group that provided support for military veterans, and many others that violated the Policy as the University was now interpreting it. IVCF.App.2239–43 ¶¶ 32–34, 39. In the district court's words, it told the University "not to do X," and "the next thing [the University] did was double X." Tr.24.[2]

That prompted the current suit, and the district court, again, held that the University cannot use its Policy to target religious groups. But because the University had responded to the district court's injunction by engaging in *more* religious discrimination, the court also denied qualified immunity: "The Court does not know how a reasonable person could have concluded this was acceptable, as it plainly constitutes the same selective application . . . that the Court found constitutionally infirm in the preliminary injunction order." Add.47. This order marked the *fourth* injunction against the University for selectively enforcing its Policy. The University's anti-religious conduct also stands in stark contrast to how the University used to treat these groups and to other universities, who nearly always fix these constitutional deficiencies.

B. The University long respected student groups' constitutional freedoms before radically changing course in 2017.

Amici have long maintained chapters on the University of Iowa campus,

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[2] In February 2019, the district court also permanently enjoined the University from selectively enforcing its Policy. *BLinC v. Univ. of Iowa*, 360 F. Supp. 3d 885 (S.D. Iowa 2019).

some for decades. During that time, the University consistently recognized that its Policy entitled student organizations to select leaders based on their beliefs and personal conduct. In fact, for over 20 years, the University vigorously *defended* religious student groups' right to enact faith standards for their leaders. IVCF.App.2239–40 ¶ 32. In 2004, the University reassured Christian Legal Society that it "would not be required, and will not be required, to condone the behavior of student members . . . that is contrary to the purpose of [its] organization and its statement of faith." IVCF.App.2257 ¶ 66. Twelve years ago, the University warned student government leaders that they could be personally liable if they denied groups' benefits because of their religious views, and it repeated this warning a year later. IVCF.App.2260 ¶ 79, 2262 ¶ 87. The Dean even stated: "Since the Human Rights Policy protects groups such as your CLS student clients from discrimination on the basis of creed, it is not necessary to formally exempt religious groups from [it]." IVCF.App.155. In other words, the University already knew how to interpret and enforce the Policy without violating constitutional protections.

This approach allowed *Amici* to contribute greatly to the campus's diverse, vibrant atmosphere. As the Dean explained, religious groups allow students to "espouse a particular ideology or belief or a mission" and are "beneficial" because they "promote[] progress toward graduation [and] give[] students a sense of camaraderie." IVCF.App.2280 ¶ 152. Religious groups make religious students feel at home, increasing their likelihood of remaining at the University.

Religious groups also contribute to the campus in other ways. In the

spring of 2016, Ratio Christi's Iowa chapter hosted a lecture on the rational defense of Jesus' resurrection. The lecture drew 600 people from all backgrounds. In March 2018, they hosted another event discussing God as revealed in the Old Testament. That event drew over 100 people and led to a weekly apologetics series. Both presented students with views they would not otherwise hear on campus. CMDA hosts health fairs, blood drives, and free blood pressure checks. And its members visit the local children's hospital to encourage patients and families. The University also recognized InterVarsity for its efforts in serving the University community through service projects, educational events, interfaith activities, and other campus-wide events. IVCF.App.2226–27 ¶ 4.

These organizations and the other *Amici* provide countless service hours, enhance students' spiritual and emotional well-being, add rich cultural diversity, and give religious students an irreplaceable community that encourages and supports them. Religious groups are vibrant threads in the tapestry of campus life. The University's irrational, selective enforcement of its Policy ignores this.

C. The University has now adopted an extreme position and rejected common-sense protections other universities have adopted.

The University now says that targeting religious groups is vital to prevent discrimination. Yet other universities know how to punish genuine invidious discrimination while respecting students' constitutional freedoms.

In *Amici's* experience, nearly every time a university objects to recognizing their chapters based on similar campus policies, those policies change without litigation. Eighteen universities have balked at recognizing

Ratio Christi chapters because of their belief requirements for leaders. After negotiations, all 18 chapters have been recognized with their belief requirements intact.

Only once has litigation become necessary, and even then, it did not proceed past responsive pleadings. When the University of Colorado, Colorado Springs (UCCS) refused for years to grant Ratio Christi registered status, Ratio Christi sued. *Ratio Christi at Univ. of Colo., Colo. Springs v. Sharkey*, No. 1:18-cv-02928 (D. Colo. 2019). Before UCCS even filed its answer, it agreed to modify its policy to protect belief-based requirements for all groups (religious and secular), and granted Ratio Christi registered status. *Lawsuit Prompts Colorado University to Change Policy, Protect Students' Freedoms*, Alliance Defending Freedom (May 14, 2019), https://bit.ly/2IWZq2N.

Similarly, Chi Alpha has successfully engaged in negotiations with many universities throughout the country, including Missouri, Indiana, Colorado, California, and New York.

The Department of Education recently affirmed this same principle for grade schools: "Similar to other student groups . . . the Equal Access Act permits religious student groups to allow only members of their religion to serve in leadership positions . . . ." U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 16, 2020), https://bit.ly/2Q0PDN7.

The University says it does not know how to treat religious groups because this area of law is "rapidly-developing," "unsettled," and "the subject of much academic debate." Appellants' Br. 19, 33. Not so. *Amici* know from

personal experience that other universities have easily gotten this issue right.

II. Even absent selective enforcement, the University's interpretation of its Human Rights Policy violates the First Amendment and destroys vibrant and diverse religious life.

The University argues that its Policy allows it to bar religious groups from selecting leaders who share the organization's core religious beliefs. This Policy interpretation destroys the very diversity the University purports to create and thus violates settled First Amendment law on free association, free speech, and the free exercise of religion.

A. By forcing religious groups to accept leaders who do not share their religious beliefs, the University has violated InterVarsity's freedom of association.

For an expressive association like InterVarsity (and *Amici*), any law that "affects in a significant way [its] ability to advocate public or private viewpoints" violates its freedom of expressive association unless it can withstand strict scrutiny. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 659 (2000). Punishing religious groups who seek to ensure that their leaders actually share their religious beliefs does precisely this. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200–01 (2012) (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.").

1. Religious groups are expressive associations.

The University does not dispute that InterVarsity is an expressive association. Nor could it. InterVarsity needs to show only "that a group of people have come together . . . for the purposes of engaging in some activity protected by the First Amendment." *Walker v. City of Kan. City*, 911 F.2d 80,

89 (8th Cir. 1990). Advancing its religious views qualifies.

2. Forcing religious groups to accept leaders who do not share their beliefs impedes their ability to advocate their views.

All parties also agree that prohibiting religious-belief requirements affects in a significant way a group's ability to advocate public or private viewpoints. *Dale*, 530 U.S. at 648; IVCF.App.2516, 2522 ¶¶ 317–21 (admitting that Bible studies, religious ceremonies, prayer would be significantly impaired if group's leader did not share group's beliefs). This alone subjects the University's Policy interpretation to strict scrutiny.

In addition, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574–75 (1995) (forcing parade organizers to include unwanted group "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's control").

This concern is particularly acute for leadership because leaders express and embody their groups' views. *Hosanna-Tabor*, 565 U.S. at 200–01 (religious groups "are the archetype of associations formed for expressive purposes" and its leaders "serve as the very embodiment of its message") (Alito, J., concurring) (citation omitted). Forcing a group to offer leadership roles to those who do not share its core beliefs distorts or destroys that voice. *Dale*, 530 U.S. at 654 (presence of unwanted scoutmaster would "surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs"). Requiring leaders to affirm belief statements and abide by codes of conduct protects

against the ideological drift that time, inattention, and majoritarianism inevitably bring. Rod Dreher, *A Response From Vandy's Misfit Christian*, The Am. Conservative (Aug. 27, 2014), https://bit.ly/2XBM7ut.

That is why the University has not mandated that Iowa UDems allow a Trump supporter to run the club or made Hawks for Choice appoint a pro-life advocate to speak on its behalf. IVCF.App.2241–42 ¶ 34. That is why it does not require fraternities to accept women or the Hawkapellas (a female music group) to accept men. IVCF.App.2510 ¶ 273.

A religious organization is no different, and its "right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and 'its voice to the faithful.'" *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (citation omitted). For example, "would [it] be important for a student who was leading [a group] in a Bible study to believe that the study of scripture was, in fact, leading to the truth?" IVCF.App.2807, 93:20–24. In the University's words, "Yes." *Id.* By preventing a Christian group from ensuring that its leaders share its Christian beliefs, the University is seeking to distort or destroy the group's Christian message. *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) ("When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters.").

The University tries to excuse its unconstitutional burdens on students' freedom of association by invoking *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010). Appellants' Br. at 24. But as the district court explained, "*Martinez* is of limited value here because the University does not have an all-comers

policy." Add.37. The fact that the University allows nonreligious groups to be selective about their leadership proves this point.

The University admits that InterVarsity is an expressive association and that infringing on their leadership selection would substantially impair their message. Their actions are therefore subject to strict scrutiny.

3. The University's interpretation of its Policy cannot survive strict scrutiny.

Because the University's Policy burdens students' expressive association rights, it must "run the gauntlet of strict scrutiny. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). To pass strict scrutiny, a law must serve a compelling interest and be the least restrictive means of serving that interest. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310 (2012). To show the least restrictive means, the University must prove that its policy is "necessary," is "not overinclusive," "not underinclusive," and "could be replaced by no other regulation." *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014). The University does not even try to defend its Policy in this way. Any attempt would be futile. Appellees' Br. 39–43.

First, there is no compelling interest because the University had no "actual problem." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). InterVarsity was on campus for 25 years, but no one had ever complained about its religious-leadership criteria. IVCF.App.2514 ¶¶ 298–99. And the University not only tolerated religious groups for decades, it celebrated and defended them from the exact same discrimination in which it is now engaging. *See supra* Part I.B.

Of course, the University claims it seeks to eliminate discrimination. But

not even this is enough. *Hurley*, 515 U.S. at 579 (applying antidiscrimination law to "expressive conduct [] is a decidedly fatal objective"); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019) ("Even antidiscrimination laws, as critically important as they are, must yield to the Constitution.").

Nor has the University employed the least restrictive means to accomplish its interests. After all, many other universities maintain similar policies and still respect students' constitutional rights. *See supra* Part I.C. Plus, the University has allowed and still allows groups based on sex, race, and other protected characteristics to select leaders that reflect their missions. Appellees' Br. 41–43. So it can secure its interests without trampling students' rights.

In fact, the University's interpretation is antithetical to its asserted diversity interests. The freedom of association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 622). Large, broadly accepted groups can defend their identity through sheer force of numbers. But smaller or less popular groups are far more vulnerable to takeover or harassment. They will be more vulnerable if they cannot select leaders who espouse their beliefs.

The University's interpretation of its Policy strikes at the heart of InterVarsity's (and *Amici's*) freedom of association, but the University ignores these concerns. This is fatal to its interpretation.

B. The University has violated InterVarsity's freedom of speech by excluding them from the student organization forum.

College campuses are a "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972), featuring "ideologies and viewpoints, including religious ones, [that] are broad and diverse." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). Critical to that marketplace is allowing students to join to advance a common cause, particularly when the student body numbers in the tens of thousands.

By recognizing student organizations, the University created a limited public forum. *Rosenberger*, 515 U.S. at 829. Thus, it "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'" or "discriminate against speech on the basis of its viewpoint." *Id.* (citation omitted). But the University's Policy interpretation does both.

1. Barring religious groups from using belief-based leadership requirements is impermissible viewpoint discrimination.

Regardless of the University's purpose, it cannot discriminate against religious beliefs *per se* as it is doing here. Opening a forum for student expression but then excluding religious expression "discriminate[s] against an entire class of viewpoints." *Rosenberger*, 515 U.S. at 831.

Viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* at 829. It is "an egregious form of content discrimination," *id.*, and is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). The Supreme Court thus "use[s] the term 'viewpoint' discrimination in a broad sense." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (citing *Rosenberger*, 515 U.S. at 831). This prohibits laws that, through subjective or indefinite terms,

"can easily be exploited for illegitimate ends." *Iancu*, 139 S. Ct. at 2303; *Rosenberger*, 515 U.S. at 836 ("Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes."). The University proves these concerns well-founded. It *has* selectively applied its nondiscrimination policy against religious groups.

The University claims that its Policy is viewpoint neutral because it treats all religious groups the same. Appellants' Br. 24. But the Supreme Court has rejected this argument. By refusing to fund "religious activities," "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. That policy, like the University's Policy interpretation here, "discriminate[s] against an entire class of viewpoints." *Id.* at 831.

And in *Lamb's Chapel*, the Supreme Court reversed the Second Circuit's determination that a restriction on using school property after hours for "religious purposes" was content neutral. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). "That all religions and all uses for religious purposes are treated alike under Rule 7" did not mean that the rule was content neutral. *Id.* Rather, the rule was viewpoint-based because it required the school to treat content about "child rearing and family values" differently based on whether or not it was presented from a "religious standpoint." *Id.* at 393–94. It is the same here. The University even admitted that it would allow a group to have secular, but not religious, belief requirements about alleviating poverty. IVCF.App.2687, 115:21–116:7; *see*

IVCF.App.2514 ¶¶ 300–01.

The University adds that its policy also applies to other categories like race and sex. But the *Rosenberger* majority rejected this:

> [I]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Rosenberger, 515 U.S. at 831–32. The University also silently exempts political and ideological groups, since they are not protected classes under the Policy. And this is to say nothing of its selective enforcement.

The University says its actions are viewpoint neutral under *Martinez*. But again, there is no "all-comers" policy here. And unlike the college in *Martinez*, the University is not targeting specific beliefs about marriage or sexuality, but religious beliefs writ large. This is worse, not better, and it is precisely what *Rosenberger* said was unconstitutional. 515 U.S. at 831 (prohibiting all religious speech "discriminate[s] against an entire class of viewpoints").

The University recognizes the great damage it would do to the "marketplace of ideas" if it prevented these secular groups from forming around shared ideas. The damage is no less severe when the University deprives religious groups the same freedom.

2. Barring religious groups from using belief-based leadership requirements is unreasonable considering the forum's purposes.

In this limited public forum, the University's Policy must also be "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829. When the government opens a forum for expression, it is unreasonable

to exclude "exactly th[e] type of information" to which it opens the forum in the first place. *Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997). But that is what the University has done here.

The University "encourages the formation" of student groups "around the ideas of interest of its students," and it wants students to "organize and associate with like-minded students." IVCF.App. 2235–36, ¶¶ 20, 23. That is why it created the forum of recognized student groups. By prohibiting religious groups from forming around religious beliefs, the University is not allowing certain groups to associate around their ideas of interest. This is unreasonable and antithetical to the entire purpose of having such a forum.

For example, this Court held that opening a display case for history professors and students to show their areas of interest—but then censoring certain displays because of a perceived negative reaction—was both unreasonable and viewpoint discriminatory. *Burnham*, 119 F.3d at 676. "Since the purpose of the case was the dissemination about the history department, the suppression of exactly that type of information was simply not reasonable." *Id.* This Court denied qualified immunity. *Id.* at 677.

So too here. The University is acting unreasonably because it is preventing religious students from fulfilling the very purpose of the student group forum: forming groups around shared interests and ideas.

C. By trying to dictate who can lead a religious group, the University has violated the free exercise clause.

The religious nature of InterVarsity heightens the importance of its free speech and free association claims. It also merits "special solicitude" under the Free Exercise Clause. *Hosanna-Tabor*, 565 U.S. at 697. Not only does the

University's selective enforcement violate the Free Exercise clause, Appellees' Br. 33–39, but so does its interpretation of the Policy. This Policy interferes with the selection of religious leaders, is neither neutral nor generally applicable, and cannot survive strict scrutiny.

1. The Free Exercise Clause bars the University from interfering with a religious group's leadership selection.

The University's interference with how religious groups select their leaders violates the Free Exercise Clause even were the Policy reformulated to be neutral and generally applicable. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2012) (*citing Hosanna-Tabor*, 565 U.S. 171). "[A] religious group's right to shape its own faith and mission through its appointments" forbids government from "imposing an unwanted minister." *Hosanna-Tabor*, 565 U.S. at 188–89; *accord* Appellees' Br. 43–45.

This is not a controversial point. The right of religious association includes the "right to organize voluntary religious associations," *Watson v. Jones*, 80 U.S. 679, 728 (1871), to choose the leaders of those associations, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), and to require "conformity of the members of the [association] to the standard of morals required of them." *Watson*, 80 U.S. at 733.

These rules apply here. InterVarsity's leaders speak publicly for the group, lead Bible studies, prayer, and worship, determine the religious content of meetings, and in all other ways "serve as the very 'embodiment of its message.'" *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (citation omitted); IVCF.App.2227–28 ¶¶ 5–8. Thus, the Free Exercise Clause forbids the University from attacking InterVarsity for how it selects its leaders.

2. The University's interpretation of its Policy is neither neutral nor generally applicable.

In addition, the University's Policy interpretation is not neutral or generally applicable. Thus, it must survive strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

The University's Policy interpretation imposes "special disabilities" on religious groups simply because they are religious. *Trinity Lutheran*, 137 S. Ct. at 2019. It categorically selects religious groups for disfavored treatment and restricts their ability to exercise their religious beliefs on campus. Again, this is internally inconsistent: the University wants students to form around shared beliefs, but claims that doing so is invidious discrimination if the University dislikes those beliefs.

The University also routinely exempts other groups and programs, whether through a silent exemption (for political beliefs), a formal exemption, (for Greek life), or a *de* facto exemption (for organizations or school programs formed around race or sex). IVCF.App.2238 ¶ 28; IVCF.App.2243–46 ¶¶ 39–44. A Policy with so many exceptions is neither neutral nor generally applicable.

The silent exemptions for political and ideological beliefs also render the University's Policy interpretation impermissibly underinclusive. *Lukumi*, 508 U.S. at 543; Appellees' Br. 36–37. Discriminating against students based on their political or ideological beliefs can "harm" them as much or more than other types of discrimination. As a result, the University's interpretation of its Policy violates the Free Exercise Clause.

For all these reasons, the University's Policy must survive strict

scrutiny, which it cannot. *See supra* Part II.A.3.

III. The district court correctly denied qualified immunity. Affirming that ruling will protect student groups.

The University—in direct defiance of two injunctions and long-established precedent—interpreted and selectively applied the Policy to derecognize religious groups. The district court correctly held that University officials do not deserve qualified immunity.

This Court should affirm both the constitutional violation and denial of qualified immunity, and not just because the University ignores its selective enforcement. Doing so also will protect the rights of thousands of other students who face many obstacles to vindicating their rights in court.

A. Addressing the constitutional merits is fair and efficient.

Courts reviewing the denial of qualified immunity consider: "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017). While courts need not start with the first prong "in all cases," doing so "is often beneficial" and "advantageous." *Pearson v. Callahan*, 555 U.S. 223, 236, 242 (2009).

The University asks the Court to skip the first question—whether its officials violated InterVarsity's First Amendment rights—and simply address whether the rights so violated were "clearly established." Appellants' Br. 16–17. But the University ignores the factors that favor addressing the constitutional violation. *Pearson*, 555 U.S. at 236–42.

First, bypassing the merits inquiry here produces "little if any

conservation of judicial resources." *Id.* at 236. This Court's analysis of the "clearly established" question will require assessing the "particularized facts," Appellants' Br. 13, 18, to show "precisely what the existing constitutional right" is. *Pearson*, 555 U.S. at 236 (citation omitted). So any qualified-immunity opinion will necessarily have to address the merits.

Second, not addressing the constitutional question will contribute to "constitutional stagnation," *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring). *See infra* Part III.C.2. The result would be to give a pass to University officials while failing to promote "law-abiding behavior" for them and others. *Camreta v. Greene*, 563 U.S. 692, 706 (2011).

Third, specific circumstances where bypassing qualified immunity's first question makes sense are not applicable here—such as where the constitutional question will "soon be decided by a higher court," "rest[s] on an uncertain interpretation of state law," or when it was decided "at the pleading stage." *Pearson*, 555 U.S. at 238.

In short, there is no good reason to circumvent the first prong of qualified-immunity analysis.

B. The University violated InterVarsity's clearly established rights.

Regardless, resolving the "clearly established" prong is easy. For a right to be clearly established, there need not be a Supreme Court case that "has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful." *Hayes v. Long*, 72 F.3d 70, 73 (8th Cir. 1995). Yet here, both are true.

The University not only defied a federal-court injunction, it "appl[ied] extra scrutiny to religious groups" by refusing to allow any religious-belief

requirements. Add.47. Again, the University does not defend itself on this issue.

Also, decades of precedent from this Court and the Supreme Court have held that "if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum." *Gerlich*, 861 F.3d at 709 (citing *Rosenberger*, 515 U.S. at 829–30, *Martinez*, 561 U.S. at 667–68, *Widmar*, 454 U.S. 263, and *Healy*, 408 U.S. 169); *accord, e.g.*, *Burnham*, 119 F.3d at 677 ("we have long established, binding precedent" forbidding universities from viewpoint discrimination).

And although the court did not need to reach the merits of InterVarsity's free association and free exercise claims, decades of controlling decisions from the Supreme Court and this Court clearly establish that the University has violated those rights. Appellees' Br. 54–59; *supra* Part II.

C. It is vital for courts to hold unrepentant university officials, like Defendants, accountable for constitutional violations.

Student groups' unique status also makes it vital for this Court to hold the University accountable. As described above, many religious-student groups face discrimination from universities who try to exclude religious views from campus. While *Amici* regularly resist, combating it is difficult and costly. If this Court does not hold the University accountable by affirming the district court's denial of qualified immunity, "the inexorable result" will be that fewer discriminatory acts by university officials will be curbed. *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part).

1. While universities regularly back down, this comes at significant cost to religious groups.

Litigating against a university is costly to a student group. Here, the

InterVarsity chapter at Iowa has experienced great difficulty recruiting new leadership; it has reduced its event schedule because it is preoccupied financially and logistically with litigation; and it has seen its largest attendance ebb in 22 years. IVCF.App. 2504–06 ¶¶ 225, 228, 230, 243. Students rightly fear that litigation will detract from ministry, that the University may discipline them, and that they may suffer lasting reputational harm because of the University's invective. IVCF.App. 2505 ¶ 232 (InterVarsity was defunct "due to lack of interest"); Appellants' Br. 18, 25, 32–33 (accusing InterVarsity of "seeking special dispensation . . . to discriminate").

The same is true for *Amici*. While Ratio Christi and Chi Alpha have successfully resolved many universities' objections to their leadership criteria, each incident requires hours of student time that would have been available for ministry or schoolwork. Students have also been subjected to personal attacks, even from government officials, accusing them of invidious discrimination.

Despite the clarity in this area of the law, universities continue deregistering religious groups for maintaining religious-belief requirements. At a 2015 Congressional hearing, students submitted letters showing a dozen examples. *Hearing on First Amendment Protections on Public College and University Campuses Before the Subcomm. on the Const. & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 48–75 (2015), *available at* https://bit.ly/39Dg1EL.

2. Justiciability issues in the university context make it particularly vulnerable to constitutional stagnation.

The unique financial status of student-plaintiffs also creates an imbalance in the ability for students to vindicate their rights. Many student groups simply lack the resources to litigate. Some, like Intervarsity and *Amici*, rely on pro bono representation yet still come under intense public scrutiny. The transient nature of students also makes it difficult to maintain protracted litigation.

But "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967). Thus, this Court should be particularly sensitive to encourage constitutional compliance in this setting. Otherwise, university officials will know they can play out the clock, wait for students to graduate to moot equitable claims, and then invoke qualified immunity to neutralize damage claims. Granting University officials qualified immunity after they flaunted not one but two injunctions over the same policy will teach students that obtaining a meaningful court victory is a Sisyphean task. More religious student groups will remove themselves from campus or self-censor. And the marketplace of ideas will exist only in theory, as universities target disfavored views with impunity.

CONCLUSION

Diversity and the value it provides exist only when differences co-exist. The University may think that prohibiting any religious groups from maintaining belief requirements is "forward thinking," but it is wrong. "[I]t is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (cleaned up). It is forward thinking to read the First Amendment; to understand the history of authoritarian government; to confirm that authoritarian regimes are relentless in stifling free speech; and to carry those lessons to today. *Id.* "Governments"—and particularly universities—"must not be allowed to force persons to express a message contrary to their deepest convictions." *Id.* Thus, this Court should affirm the district court's rulings that (1) the University's interpretation of its Policy is unconstitutional, and (2) the University officials do not deserve qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

This brief complies with FED. R. APP. P. 32(a)(5)(A) because it was prepared using 13-point Century School Book, a proportionally spaced serif font which is slightly larger than 14-point Times New Roman.

Excluding parts of the brief in FED. R. APP. P. 32(f), this brief contains 6,237 words, which is less than the 6,500 word limitation imposed by FED. R. APP. P. 29(a)(5) and 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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Pursuant to Eighth Circuit Local Rule 28A(h)(2), I certify that on March 16, 2020, the digital submission has been scanned for viruses using the CM/ECF Check PDF Document utility and that, according to the program, the brief is virus-free.

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