No. 19-3389

IN THE 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 Amicus Curiae Jewish Coalition for Religious Liberty Supporting Plaintiffs-Appellees and Affirmance

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INTERESTS OF *AMICUS CURIAE*[1]

The Jewish Coalition for Religious Liberty ("JCRL" or "*Amicus*") is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to protect the ability of all Americans to practice their faith freely and to foster cooperation between Jews and other faith communities. Its founders have worked on *amicus* briefs in the Supreme Court of the United States and lower federal courts, published op-eds in prominent news outlets, and established an extensive volunteer network to promote support for religious liberty within the Jewish community.

SUMMARY OF ARGUMENT

JCRL writes to express their alarm at the actions of the University of Iowa ("University")[2] in de-registering InterVarsity Graduate Christian Fellowship ("InterVarsity") and Business Leaders in Christ ("BLinC") as student organizations because they require their religious leaders to adhere to a statement of faith. *Amicus* finds that this a clear case of religious viewpoint discrimination and maintains that the law is well established, thereby denying appellants qualified immunity. *Amicus*

[1] Pursuant to FRAP 29(a)(2) *Amicus* represents that all parties have consented the filing of this brief. And in accordance with FRAP 29(a)(4)(E)(i)-(iii), undersigned counsel states: No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. Further, no person, other than the *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting this brief.
[2] *Amicus* collectively refer to all Defendants/Appellees as "University".

is particularly concerned that an adverse ruling on qualified immunity may have a chilling effect on students belonging to minority religions, who seek to choose leaders that practice their faith, as it appears that after deregistering InterVarsity and BLinC the University also deregistered several other minority groups with similar religious leadership requirements, including Sikh, Muslim, Chinese Christian, and Latter-Day Saint groups. This Court should affirm the district court's finding that the University violated clearly established constitutional law.

The University's actions "violate[] the Nation's essential commitment to religious freedom." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993). While JCRL does not share the faith of appellees, they maintain that the University's attempt to dictate to any religious student organization whom it may choose as its religious leaders threatens the First Amendment rights of all religious students—especially of those who adhere to minority faiths. The Free Exercise Clause is designed to protect minority religions from the tyranny of the majority,[3]

[3] James Madison, the principal author of the Bill of Rights, noted this position years before he drafted the First Amendment:

> The Religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. The right is in its nature an unalienable right. It is inalienable, because the opinions of men, depending only on the evidence compiled by their own minds cannot follow the dictates of other men; It is unalienable also, because what is here a right toward men is a duty toward the Creator.

*Memorial and Remonstrance Against Religious Assessment*s (1785), in 8 PAPERS OF JAMES MADISON 301 (W. Rachal, R. Rutland, B. Ripel, & F. Teute eds. 1973). Of

and a ban on faith requirements threatens to allow majoritarian influences to erode the unique beliefs and practices of minority religions. There are several aspects of the *Amicus*'s faith that would make a ban on faith requirements – such as the one at issue here – particularly burdensome.

The University ignores the constitutionally protected autonomy that religious organizations possess to select their leaders. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181-90 (2012). Forbidding a religious student organization from having religious criteria for its leadership threatens to eviscerate the group's right to govern its own beliefs and religious affairs. If that principle was not settled and clearly established before *Hosanna-Tabor*, it was surely settled and clearly established after, making the University's request for qualified immunity in this case particularly troublesome. JCRL agrees with InterVarsity's

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course, Madison also saw that government choosing between beliefs, ***present in the record here***, was also a chief danger to free exercise of belief and conscience: "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Id*. The Court has been quick to note the same concerns as Madison in its First Amendment rulings:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

Lee v. Weisman, 505 U.S. 577, 589 (1992).

analysis of the qualified immunity question, Appellee Br. at 47-49, and will not repeat that analysis.

Finally, although the University's actions were seemingly undertaken under the guise of "non-discrimination," restricting religious leadership does not serve that goal. Indeed, the University's actions would consequently lead to less diversity in religious groups, not more. Instead of undermining diversity through policies that lead to the homogenization of religion on campus, the University ought to respect religious student organizations' differences and allow them to flourish.

ARGUMENT

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const., Amend. I. The Free Exercise Clause is applicable to the states through incorporation into the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

I. The University's Ban on Faith Requirements for Religious Leaders is Particularly Harmful to Minority Religions and There are Unique Aspects of Amici's Faith That Would Make a Ban on Religious Requirements for Leaders Particular Harmful.

Certain aspects of the nature of Jewish practice makes it essential that their religious organizations be permitted to appoint their own adherents as leaders.

A. Jewish student leadership must be dedicated to the principles of their faith.

In order for Jewish religious organizations to conveniently host events that religious Jews will be comfortable attending, the organizations must be led by people who are dedicated to and personally practice the principles, traditions, and laws of the faith.

Take, for example, Jewish laws that relate to the Sabbath. Sabbath laws govern nearly every activity that a religious Jewish person conducts from roughly Sundown Friday night until after Sundown on Saturday night. This includes prohibitions on activities including writing, the use of electricity, cooking, and spending money. In many cases, religious Jews believe that it is forbidden even to benefit from another Jew's violation of the Sabbath. It takes significant learning and practice to become knowledgeable in the laws relating to the Sabbath. A religious Jew would not attend a religious event hosted on Saturday unless he was certain that such strictures were observed and followed. Such events related to communally celebrating the Sabbath could be an important part of the mission of a Jewish campus organization. Selecting religiously observant leaders is the simplest way of ensuring that such events are possible.

Kosher laws are similar. Kosher food preparation requires an extensive knowledge of the laws and a willingness to adhere to those laws strictly despite the difficulties they entail. Many religious Jews, for example, go through a rigorous

process of washing vegetables and checking to make sure that they do not contain bugs—because bugs are not kosher. Many religious Jews would not eat vegetables unless they were certain that such processes were strictly followed. Kosher laws do not only apply to the actual food that is served as an event; instead, they govern every aspect of the preparation and heating of the food, as well as the utensils and cooking-ware used to prepare for the food. Importantly, these laws require both a knowledge of the requirements and a willingness to follow the restrictions even though it would be significantly easier to take shortcuts. Serving and eating food plays a vital role in attracting people to a campus organization's events. Having observant Jewish leaders would make it significantly easier for a Jewish campus organization to attract religiously adherent students.

Many religious Jews would be more comfortable joining an organization that performs Jewish religious functions if that organization is headed by another observant Jew. If the organization's events included Sabbath, holiday, or food related events, it would be impossible without religious leadership or supervision. If the University were to prevail, it could make it significantly more difficult for Jewish groups to operate on campus under the guise of prohibiting discrimination. A Jewish campus organization's efforts to ensure that religious students feel comfortable participating in its events should not be misconstrued as discrimination.

B. Judaism is a faith that must be experienced.

For many Jews, Judaism must be lived in order to be appreciated. Anyone can read a book about observing the Sabbath, repenting on the holiday of Yom Kippur, communally mourning national tragedies on the fast of the 9th of Av, or the national origin story of Passover. But mere passive knowledge is no substitute for living out those practices and internalizing them as a member of the community with a shared sense of history, obligation, and belonging. Experiencing these practices as an insider provides unique insight and appreciation.

The Passover service (Seder) focuses on the notion that Jews should see themselves as if they were personally taken out of Egypt. The services on the fast of the 9th of AV include Jewish rituals and restrictions of mourning. Jews spend the day acting in a manner similar to how they would act if a close family member had recently died. These are matters of personal experience—not intellectual assent—and there is simply no substitute for having experienced these activities "on the inside" as a member of the community.

A Jewish religious organization must be allowed to pick its leaders because it would be almost impossible for a member of another faith to fully appreciate Judaism as a lived faith. Therefore, observant Jewish leaders are uniquely qualified to lead a religious Jewish organization whose mission includes propagating religious ideals. This does not disparage any other human being and should not be understood

to constitute invidious discrimination; it merely recognizes that people who have first-hand experience with Judaism are uniquely qualified to lead religious Jewish organizations.

C. Forcing Jewish religious organizations to accept leaders that do not adhere to their faith would make it difficult for such groups to function.

Jewish history is replete with examples of persecution. This includes events like the crusades and the inquisition, attempts by groups like the Soviets and the Jacobins to secularize and assimilate Jews, and myriad forms of persecution that still occur around the world on a daily basis today. *See generally e.g.*, Anti-Defamation League, "A Brief History of Antisemitism."[4] It is thus crucially important that Jews be permitted to safeguard their own religious identity. Here, the University has not singled out Jewish student organizations for disparate treatment, but that does not make the threat any less real. Indeed, appellants acknowledge that their actions could impair Jewish groups. App.2516 ¶¶ 317-19.

If Jewish religious organizations are not allowed to pick their own leaders, they are entirely at the mercy of their neighbors in the majority, secular or religious. If, for example, members of the majority wanted to undermine the Jewish nature of a religious organization—say, for reasons related to anti-Semitism or simply because

[4]Available at: https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/Brief-History-on-Anti-Semitism-A.pdf, last visited March 9, 2020.

the majority found a religious practice offensive—all they would have to do is join the organization and run and/or vote for leadership that would change the nature of the group. Such an occurrence would eliminate a group that represents a religious minority in the name of protecting diversity.

Moreover, and less drastically, even from within, the Jewish faith is not monolithic. There are significant theological disagreements between different Jewish denominations. Even within Orthodoxy, Jews who lived in different parts of the world developed unique customs and religious interpretations. Middle Eastern, Eastern European, and Yemenite Jews may all fall under the umbrella of Orthodox Judaism while maintaining a variety of unique customs. If a potential religious leader did not ascribe to the religious tenets of the particular Jewish religious group at issue, requiring the group to nevertheless select that leader presents a clear—and unwarranted—threat to its existence.

II. The University's Actions Violate Students' Free Exercise Rights and Thereby Endanger Minority Religious Viewpoints.

Discriminatory laws that burden religion are subject to the highest form of scrutiny, and the University's actions do not satisfy that exacting standard. These points will surely be covered in by the parties' legal arguments – as they are covered in InterVarsity's opening brief, and JCRL here writes merely to make their point regarding the likely effect of the University's actions on religious minorities if such actions are not checked.

A. The University Discriminated Against Religion and Among Viewpoints.

Here, the University's ban on faith requirements discriminates against religion and among religious beliefs and, therefore, can be neither neutral nor generally applicable. For one thing, the University's actions discriminate against religion as such. Although the University prohibited InterVarsity, a **religious** organization, from imposing faith requirements on its leaders, the University allows ***other religious*** student organizations – like Love Works[5]– to require their leaders to adhere to principles advocated by those groups. When the government choses between religious viewpoints it is settled constitutional law that it is impermissibly discriminating among religious viewpoints. *See, e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98, 109 (2001).

The University did not act in an evenhanded manner as between ***religion*** and ***other protected categories***. Plainly on the record, the University forbids student organizations from discriminating on several bases other than religion, including race and sex. Despite this fact, as set forth InterVarsity's Brief, the University has allowed non-religious minority student organizations, such as the Chinese Student and Scholars Association and the Hawkapellas (an all-female acapella group), App.2521-22 ¶¶ 359-65, to discriminate on the basis of race and sex, among other

[5] App.2516 ¶¶ 317-18.

things. When the government regulates religious conduct but does not regulate analogous secular conduct, or other religious conduct, the government has impermissibly burdened religion. *Church of the Lukumi*, 508 U.S. at 545-46 (observing that a regulation "society is prepared to impose upon [religious groups] but not itself" is the "precise evil the requirement of general applicability is designed to prevent") (internal quotation marks omitted); *see also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990) ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."). Here, the University's gerrymandered religious discrimination is so blatantly egregious that the district court properly denied qualified immunity and this Court should affirm that decision.

B. The University's actions do not satisfy strict scrutiny.

Because the University's actions here discriminatorily burden religion and are neither neutral nor generally applicable, the University must satisfy strict scrutiny. This it cannot do.

The University's purported purpose is to prevent discrimination and promote diversity. As shown above, the ban does not prevent discrimination because religious groups have valid non-discriminatory reasons for choosing leaders who practice their faith. The policy also fails to further the University's goal of promoting of diversity. In fact, if not prohibited by this Court, the University's ban on ***some*** faith

requirements will actually ***decrease religious diversity*** on campus. "A civil society is formed by people who create voluntary associations, often around a particular identity," and university "[c]ampuses are one of the places where young people learn how to do this." Eboo Patel, "Should Colleges De-Register Student Groups," *Inside Higher Ed* (September 28, 2018).[6] Indeed, university campuses should be the quintessential "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972).

Before the University banned faith requirements for some leaders of religious student groups, many different religions were represented in the University's public forum. The response to the University's ban, however, if not overturned, will be that religious groups will either: (1) attempt to conform to the University's forced *ad hoc* inclusion, thus compromising the very thing that makes them unique; or (2) more likely, simply leave campus entirely. Either way, the result will be a campus that has ***fewer*** opportunities for religious expression: Religious organizations that chose to leave will be gone, and those that choose to stay will invariably have their principles of faith watered down or otherwise altered by leaders who may or may not adhere to the organizations' religious principles.[7]

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[6] Available online at: https://www.insidehighered.com/blogs/conversations-diversity/should-colleges-de-register-student-groups, last visited March 9, 2020.

[7] There are two variants of the threat to religious organizations posed by the University's *ad hoc* treatment of faith requirements for leaders. One is that, in the absence of such a faith requirement, a group of students who overtly disagree with a religious organization's statement of faith will take over the student organization and change its message to suit their views. The other is that the religious

This dilution and forced homogenization of religion through governmental control—where the few religious organizations left standing are required to sacrifice their distinct religious character—is not the type of pluralism envisioned by the Free Exercise Clause, nor does it further the principle of non-discrimination invoked by the University here. Instead, true diversity is attained by allowing each religious organization the ability to practice its own unique religion free from unwarranted governmental interference. True diversity entails providing a forum where different groups can both maintain their own unique identities and enrich society as a whole. A diverse civil society is "a place where people with differing identities and deep disagreements can collectively flourish, respecting one another's identities, building relationships across disagreements a cooperating where they can to serve the common good." *See* Patel, *supra*. That is precisely what the Free Exercise Clause envisions, and it is the antithesis of what the University has done here.

CONCLUSION

In evaluating whether the University's *ad hoc* treatment of faith requirements for religious leaders has violated the Free Exercise Clause, the Court should take special care to consider the impact of the University's actions on minority religions.

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organization will simply lose control of its ability to ensure the student organization's doctrinal conformity with its own principles of faith, which will invariably result in some measure of either dilution or alteration of the religious organization's statement of faith.

As demonstrated herein, that impact would be grave; indeed, the very existence of minority student religious organizations would be at risk. Under a straightforward application of existing jurisprudence, there can be only one conclusion—the University has violated the Free Exercise Clause by discriminating against disfavored religious groups. Consequently, this Court should hold that the University defendants violated clearly established constitutional principles and find qualified immunity does not apply in this case.

Respectfully submitted this 16th day of March 2020,

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) as it contains, exclusive of those provisions exempted by Federal Rule of Appellate Procedure 32(f), 3,011 words. It also complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), because this document has been prepared using a proportionally spaced typeface in Microsoft Word 2016 in Times New Roman, 14 point font.

Pursuant to 8th Cir. R. 28A(h)(3), Appellant states that electronic copies of this petition were "generated by printing to PDF from the original word processing file."

Pursuant to 8th Cir. R. 28A(h)(2), Appellant also states that this petition has been scanned for viruses using Norton Security Version 22.16.2.22, and both documents are virus-free.

/s/ Parker Douglas
Parker Douglas
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I do hereby certify that on March 16, 2020, I filed a copy of the foregoing electronically via this Court's CM/ECF, which has served electronic notice all counsel of record on March 16, 2020.

/s/ Parker Douglas
Parker Douglas
Counsel for Amicus Curiae