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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, NO. 3:18-CV-00080

BRIEF FOR *AMICI CURIAE* THE CARDINAL NEWMAN SOCIETY, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND THE LUTHERAN CHURCH – MISSOURI SYNOD IN SUPPORT OF PLAINTIFFS-APPELLEES FAVORING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed Amicus Curiae The Cardinal Newman Society certifies that it is a nonprofit corporation that has no outstanding stock, and consequently, that no parent corporation or publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed Amicus Curiae The Ethics & Religious Liberty Commission of the Southern Baptist Convention certifies that it is a nonprofit corporation that has no outstanding stock, and consequently, that no parent corporation or publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed Amicus Curiae The Lutheran Church – Missouri Synod certifies that it is a nonprofit corporation that has no outstanding stock, and consequently, that no parent corporation or publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

The Cardinal Newman Society is a Catholic organization that promotes and defends faithful Catholic education. Among other things, the Society recognizes and sponsors working groups of faithful Catholic schools and colleges and works for the success of educators who are committed to faithful Catholic education by teaching with Catholic ideals, principles, and attitudes.

The Ethics & Religious Liberty Commission of the Southern Baptist Convention ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

The Lutheran Church—Missouri Synod ("the Synod") is an international Lutheran denomination with more than 6,000-member congregations and 2 million baptized members throughout the United States. In addition to numerous Synod-wide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the

country. The petitioner in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), was a member congregation of the Synod.[1]

SUMMARY OF ARGUMENT

The First Amendment's Religion Clauses are clear: "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012). The applicability of that rule in this appeal is likewise clear. It is undisputed that InterVarsity is a religious group and that its leaders qualify as ministers. The only question is whether the government may condition a religious group's access to a limited public forum on the group's complete relinquishment of control over its leadership selection. It may not.

The district court concluded otherwise, reasoning that the freedom of a religious organization to select its own leaders is no real freedom at all, but rather, is merely an affirmative defense to employment discrimination claims. But *Hosanna-Tabor* explains that the "ministerial exception" to employment actions is only *one application* of the associational freedom enjoyed by religious groups. The University's action here—deregistering InterVarsity as a campus organization un-

[1] Pursuant to Rule 29(a), all parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and, no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

less it forfeits its right to choose leaders who adhere to its own religious beliefs—squarely infringes InterVarsity's freedom.

The district court, however, believed the infringement was constitutionally permissible because the government may (in the district court's view) condition a religious group's access to a limited public forum on the group's surrender of its right to select its own leaders. But the Supreme Court has repeatedly rejected the proposition that such access or other government benefits may be denied based solely on an organization's religious identity or sincerity, and the district court suggested no reason to reach a different result as to an organization's selection of its own leaders—a core part of its religious identity and autonomy. Of utmost concern to *amici*, the district court's rule would undermine the ability of religious organizations to use limited public forums like schools, libraries, and other meeting places—and potentially to access government programs—by allowing the government to limit access to those organizations that give up their right to choose leaders who adhere to their religious beliefs. That result would be devastating for the many religious organizations that depend on such forums to carry out their mission. Properly applying *Hosanna-Tabor* to disputes like this one would prevent this result and fully protect the right of religious organizations to choose the ministers who lead and guide them.

The University has suggested that InterVarsity's freedom of association is not significantly affected by its policy. This suggestion disregards the vital role that the leader of a religious organization plays. Even more than in ordinary associations, a religious leader is the organization's messenger, and it is crucial that the leader actually believes the religious propositions held and taught by the organization. The beliefs of religious organizations like *amici* cannot be adequately conveyed by someone who does not believe them.

This Court should affirm the judgment of the district court but make clear that InterVarsity's Religion Clauses claim should have been analyzed under *Hosanna-Tabor*; that the government may not condition access to limited public forums on a religious organization's forfeiture of its right to choose its leaders; and that a religious organization depends on leaders who themselves believe the organization's religious tenets.

ARGUMENT

I. Under the First Amendment's Religion Clauses, the government may not interfere with religious organizations' selection of their leaders.

As the Supreme Court has explained, "[c]ontroversy between church and state over religious offices is hardly new." *Hosanna-Tabor*, 565 U.S. at 182. England resolved the issue by establishing a national church in which the state had authority to appoint ecclesiastical officials. But the American States "sought to foreclose the possibility of a national church" by "forbidding the 'establishment of re-

ligion' and guaranteeing the 'free exercise thereof'" in the First Amendment. *Id.* at 184. Together, "the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling" church offices. *Id.* In particular, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. Put another way, the First Amendment makes it "impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* at 185.

Affirming decades of consensus among the courts of appeals, including the Eighth Circuit, the Supreme Court unanimously held in *Hosanna-Tabor* that "this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment." *Id.* at 188 & n.2. Specifically, the Court "recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188. Focusing on "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission," the Court held that the "ministerial exception" bars "an employment discrimination suit brought on behalf of a minister." *Id.* at 196.

The three basic questions in a case raising this type of claim are (1) is the group religious?; (2) is the employee a "minister"?; and (3) does the government action interfere with the group's minister selection? *See Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991). Here, InterVarsity is indisputably a religious entity entitled to protection under the First Amendment. The so-called "ministerial exception" has been properly applied to all religious entities, not just churches. *E.g.*, *id.* (a hospital that "provides many secular services (and arguably may be primarily a secular institution) … is without question a religious organization"). Indeed, the employer in *Hosanna-Tabor* was a small Lutheran congregation.

Here, InterVarsity is a voluntary Christian campus ministry that exists to grow and share its faith. IVCF App. 2226 ¶2, 2235 ¶20. Throughout its history, InterVarsity has "host[ed] monthly large-group religious meetings that feature prayer, worship, and Christian teaching" as well as "small-group Bible studies." *Id.* at 2038 ¶13. As the Sixth Circuit has directly held, because InterVarsity "is a Christian organization, whose purpose is to advance the understanding and practice of Christianity," "[i]t is therefore a 'religious group' under *Hosanna-Tabor*." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015).

Likewise, there is no dispute that InterVarsity's leaders can qualify as "ministers." Those leaders hold unique roles that require them to "minister to the faith-

ful," "personify its beliefs," and "convey[] the [ministry's] message and carry[] out its mission." *Hosanna-Tabor*, 565 U.S. at 188, 192–95; *see Fratello v. Archdiocese of New York*, 863 F.3d 190, 207 (2d Cir. 2017) (explaining that "ministers" may include school principals, press secretaries, and nursing-home staff). InterVarsity's leaders personally lead and participate in religious meetings, Bible studies, prayer, worship, and religious teaching. IVCF App. 2227–28 ¶¶5-8. The vast majority of student leaders' time related to the organization is spent on ministry. *Id.* They direct worship, teaching, and prayer at monthly religious services; they receive religious training; they mentor students in their faith; and they "model InterVarsity's Christian beliefs and values." *Id.* at 2042–43, 2071–73. Because of the religious importance of their leadership roles, InterVarsity's officer candidates are required to affirm its religious beliefs, including that "Jesus Christ, fully human and fully divine … was bodily raised from the dead" and that "[j]ustification [is] by God's grace to all who repent and put their faith in Jesus Christ alone." *Id.* at 2063–64; *see id.* at 2227–28 ¶¶5–8.

Nonetheless, the district court held that the right recognized in *Hosanna-Tabor* "does not apply to this dispute." *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 986 (S.D. Iowa 2019). By the district court's lights, *Hosanna-Tabor* was only about the "ministerial exception" to employment discrimination laws, and that exception is nothing more than "an affirmative de-

fense … that precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its members." *Id.* Absent an employment discrimination claim, according to the district court, the only Religion Clause requirement—and the only protection afforded InterVarsity's leadership selection—is that the University policy be "a neutral law of general application." *Id.* at 987; *see generally Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

The district court's holding is contrary to *Hosanna-Tabor*, and it would turn the Religion Clause's protection of religious leaders on its head by allowing the government to engage in *direct* interference with religious entities' selection of their leaders. Moreover, the district court's rationale would allow the government to close off limited public forums to any religious organization that insists on being led by a member of its own religion—cutting off access to crucial places like schools, libraries, and civic centers.

A. Limiting the rule recognized in *Hosanna-Tabor* to an affirmative defense is inconsistent with the First Amendment and would allow the government to do directly what it is forbidden to do indirectly.

The "freedom of a religious organization to select its ministers" recognized in *Hosanna-Tabor* reflects the Constitution's broader guarantee of "freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of

church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186, 188 (internal quotation marks omitted). Although in the context of employment discrimination cases courts have often labeled this First Amendment protection as the "ministerial exception," they have "t[aken] pains to clarify that the label was a mere shorthand." *Id.* at 199, 202 (Alito, J., joined by Kagan, J., concurring). The substance of the protection concerns the internal "autonomy of religious groups," ensuring they are "free to determine who is qualified to serve in positions of substantial religious importance." *Id.* at 199–200. Absent that freedom—the ability of religious organizations to choose their own messengers—most religious organizations would no longer exist in a meaningful way. In other words, the freedom recognized in *Hosanna-Tabor* was not about a particular affirmative defense or a narrow set of employment discrimination laws passed long after the First Amendment. Instead, the freedom protects the very lifeblood of religious organizations and their autonomy to operate without government interference. At stake is "the liberty of religious organizations to control their own message and select their own messengers." Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 862 (2012).

By forbidding InterVarsity from selecting leaders who actually believe the tenets of its faith, the University has directly and egregiously violated the liberty guaranteed to religious organizations by the First Amendment. The district court

wrongly rejected InterVarsity's claims under the Religion Clauses, thus allowing its reasoning to go unrebutted threatens further harm for religious organizations.

1. The district court's analysis cannot be squared with *Hosanna-Tabor*.

The core flaw in the district court's reasoning is to consider the "ministerial exception" as the *only* special protection of a religious organization's freedom to select its own leaders. In fact, the "ministerial exception" is but one application of this freedom. As the constitutional history outlined in *Hosanna-Tabor* demonstrates, the freedom itself long predates federal employment discrimination laws. *See* 565 U.S. at 182–85, 188. Accordingly, the Court in *Hosanna-Tabor* repeatedly emphasized that it was applying a constitutional rule to the employment discrimination context, not formulating a new employment discrimination rule.

First, the Court set out the general rule provided by the Religion Clauses: "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* at 185. The Court explained that it had "touched upon the issue indirectly … in the context of disputes over church property," and it examined its precedents in that area. *Id.* Then, the Court stated that "we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment"—while continuing to emphasize that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, *intrudes upon more than a*

mere employment decision." *Id.* at 188 (emphasis added). The Court eventually held that "a 'ministerial exception,' grounded in the First Amendment … precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.*

The Court's discussion demonstrates that the "ministerial exception" is an application, not the entirety, of the First Amendment protection given religious organizations' selection of their leaders. It would have made little sense for the Court to ask whether the "freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment" if that was the only possible implication of that freedom. Moreover, the church property and governance precedents examined by the Court would have had no bearing on the Court's consideration if the relevant constitutional rule were limited to employment discrimination cases. Further, it would be passing strange for the Court to have traced the history and original understanding of the First Amendment if the relevant freedom did not spring into existence until the passage of modern federal employment discrimination laws over 170 years after the First Amendment's ratification.[2]

[2] Confirming that there is no reason to limit the right to employment discrimination cases, lower courts have "long held that the ministerial exception applies to a variety of claims," including contract and tort claims. Grisham, *The Ministerial Exception After* Hosanna-Tabor, 20 FED. SOC. REV. 80, 87 & n.96 (2019).

Hosanna-Tabor also refutes the district court's suggestion that absent the government "actually select[ing]" a leader in violation of the Establishment Clause, religious organizations' freedom to select their ministers receives no more protection than the minimal *Smith* requirement of neutral, generally applicable laws. 408 F. Supp. 3d at 986–87. The district court made two critical mistakes in this portion of its analysis. First, the district court assumed that because "the ministerial exception represents a marriage of interests protected by the Establishment and Free Exercise Clauses," any claim that does not squarely present an Establishment Clause violation does not implicate the freedom of religious organizations that gave rise to the ministerial exception. According to the district court, the ministerial exception does not apply here because *Hosanna-Tabor* involved an Establishment Clause concern—namely, if the Court there had not applied the ministerial exception, the government would, in effect, have been appointing a minister. *See id.* at 987.

True, in *Hosanna-Tabor* a specific person either would or would not serve as a minister, whereas here no specific unbelieving individual ever sought to become an InterVarsity leader at the University of Iowa. *See InterVarsity*, 408 F. Supp. 3d at 983. But that is a distinction without a difference. If anything, the case for applying the First Amendment right is even stronger here, where the University's approach imposed a categorical bar on selecting *any* leaders who shared a group's re-

ligious beliefs. This categorical bar necessarily favors religions that hew to an "acceptable" viewpoint and penalizes those that do not.

Hosanna-Tabor itself emphasized that "[*b*]*oth* Religion Clauses bar the government from interfering with" the leadership selections of religious organizations. 565 U.S. at 181 (emphasis added). As the Supreme Court explained, "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments"; and, "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 188–89. The fundamental point is that the government is structurally forbidden from entangling itself in internal religious leadership selection. That a claim alleging a violation of this rule might lean more heavily on one Clause does not take the claim out of the realm of the rule.

Second, and relatedly, the district court erred in assuming that if InterVarsity's "Religion Clauses claims are really a single claim under the Free Exercise Clause," the only question is whether "the regulation that purports to limit the group's leadership selection … is a neutral law of general application" under *Smith*. 408 F. Supp. 3d at 986–87; *see also Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 904–05 (S.D. Iowa 2019) (making the same erroneous

assumption). The Supreme Court, however, in language that was not limited to the employment discrimination context, explicitly disavowed the application of *Smith* where a religious organization claims the government has interfered with its leadership selection. According to the Court, the government cannot interfere with a religious organization's leadership selection *even if* the government policy "is a valid and neutral law of general applicability." *Hosanna-Tabor*, 565 U.S. at 190. The Court limited *Smith* to "government regulation of only outward physical acts" and distinguished the case before it, which "concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself." *Id.*

Here, because InterVarsity claimed that the University interfered with its ability to select its own leaders, the district court erred in applying only *Smith*.

2. Limiting the First Amendment right to an affirmative defense would allow the government to directly interfere with religious organizations' leadership selections.

The above errors culminated in the district court's erroneous conclusion that the First Amendment freedom of religious organizations to select their own leaders can only be asserted as an affirmative defense. 408 F. Supp. 3d at 986. If the only possible application of that freedom were in employment discrimination suits, the district court might have a point. But as shown, that view is entirely incorrect. *Hosanna-Tabor* repeatedly demonstrates that religious organizations have a First

Amendment *right* to "be free to choose those who will guide it on its way." 565 U.S. at 196. This right, which operates as a structural limitation on government action, is in no way limited to employment discrimination suits.

Once the ministerial exception is properly understood as but one application of the "freedom of a religious organization to select its ministers," *id.* at 188, there is no justification for limiting the freedom to an affirmative defense. The Court's chief concern in *Hosanna-Tabor* was "[a]ccording the state the power to determine which individuals will minister to the faithful." 565 U.S. at 188–89. It does not matter whether the state seeks to exercise that power indirectly through lawsuits brought under the employment discrimination laws or directly by interfering with religious organizations' leadership selection. If the government violates the First Amendment by interfering with a religious organization's selection of its leaders, that violation can be asserted just as any other First Amendment violation. *See*, *e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (stating plaintiffs generally need not await governmental enforcement before vindicating First Amendment rights); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (involving injunctive and declaratory relief against a state law that interfered with their associational rights). Regardless of how InterVarsity's rights are asserted, the Religion Clauses function as a "structural limitation" on governmental power, a limitation which "categorically prohibits federal and state governments from be-

coming involved in religious leadership" issues. *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (internal quotation marks omitted).[3] The government cannot escape this limitation by artificially confining its assertion to an affirmative defense in one subset of cases.

Contrary to the district court's reasoning, the Supreme Court itself has characterized the right asserted in *Hosanna-Tabor* as a "free-exercise *claim*[]" recognized and upheld by the Court. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (emphasis added). And the Court has previously applied the Free Exercise Clause to prohibit interference in religious leadership disputes, vindicating the rights of a plaintiff who raised the issue offensively. *See*, *e.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707 (1976). Neither the University nor the district court has presented any reason to treat the claims here differently.

Some have noted that the Supreme Court in *Hosanna-Tabor* described the "ministerial exception" as an "affirmative defense." 565 U.S. at 195 n.4. That is unremarkable: in the context of that case, the exception was only relevant as a de-

[3] In *Lee*, the Third Circuit affirmed that courts have a *duty* to raise this issue "because the exception is rooted in constitutional limits on judicial authority." 903 F.3d at 118 n.4. Likewise, the Sixth and Seventh Circuits have held that "[t]he ministerial exception is a structural limitation … that can never be waived." *Inter-Varsity*, 777 F.3d at 836; *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). The exception's structural implications confirm that it makes no sense to limit its assertion to affirmative defenses.

fense, and indeed it is hard to imagine circumstances where the ministerial exception would be offensively raised in an employee's suit under the employment laws. But once again, the ministerial exception is not the only possible application of the First Amendment right of religious organizations to select their leaders, and there is no reason to assume that all other applications could only be asserted defensively.

Finally, limiting the protection given religious entities by the First Amendment to an affirmative defense would disserve "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. Under the ministerial exception recognized in *Hosanna-Tabor*, the government cannot indirectly pressure a religious group's leadership selection through the application of employment discrimination laws with private rights of action that enable third parties to sue religious entities. *See id.* at 188. Yet classifying the right recognized in *Hosanna-Tabor* as merely an affirmative defense would allow the government to apply *direct* coercive pressure to a religious group to abandon its religious criteria for leadership even though it cannot do so *indirectly*. That cannot be correct. And likely the only way for a student group like InterVarsity and many of *amici*'s members "[t]o protect the important right to select its own ministers" is to raise a *Hosanna-Tabor* claim against

state action. Note, 133 HARV. L. REV. 599, 611 (2019); *see* Tafoya, Note, 41 PEPP. L. REV. 157 (2013).

Because the district court has repeatedly refused to allow campus religious organizations to vindicate their First Amendment right to choose their own leaders, this Court should make clear that the right can be asserted as an independent cause of action.

B. The right recognized in *Hosanna-Tabor*—like the First Amendment more generally—prevents public entities from refusing access to limited public forums to religious groups who require their leaders to be co-religionists.

The district court committed another fundamental error in its analysis of InterVarsity's claims under the Religion Clauses. Though it acknowledged that "the University, through threats of deregistration or other penalties, could [indeed] impose an unwanted leader on InterVarsity," the court held that because "this case involves a limited public forum," "a university can impose restrictions on a religious student group's membership and leadership selection when imposed in exchange for registered status and its concomitant benefits." 408 F. Supp. 3d at 987 (internal quotation marks and brackets omitted). The University parrots the point, arguing that it has the power to "regulate the speech and conduct of registered student groups which operate within the limited public forum it has created." Br. 17. This argument, and the district court's holding, is legally erroneous. As explained more fully in the sections that follow, it has long been settled that religious groups

cannot be forced to give up their First Amendment rights to access limited public forums, and this rule applies as strongly in the context of religious organizations' First Amendment right to select their own leaders as it does in other contexts.

1. The government may not condition access to limited public forums on religious leadership selection any more than on religious identity or sincerity.

A long line of Supreme Court precedents has "prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) and citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); and *Widmar v. Vincent*, 454 U.S. 263 (1981)). In other words, religious identity is not a valid basis for exclusion from a government program or benefit.

There is no reason to treat religious leadership selection any differently. As *Hosanna-Tabor* makes clear, religious organizations have a First Amendment right to be free from governmental interference in the selection of their own leaders. Conditioning access to a government forum or benefit based on which leaders are selected infringes the First Amendment just as surely as conditioning access based on which religion the organization belongs to. Indeed, the First Amendment violation is especially stark in the religious leadership context, since the Religion Claus-

es set a "structural" limitation that "categorically prohibits state and federal governments from becoming involved in religious leadership disputes." *Lee*, 903 F.3d at 118 n.4. In other words, conditioning access in the manner approved by the district court not only violates the First Amendment right of the religious organization, it also allows the State to entangle itself in internal religious affairs.

The University argues that it "is not compelling InterVarsity to include non-Christians in its leadership team, but rather, has withheld the benefits of recognition as an official student group" and that "[c]ourts distinguish between policies which compel action, and those which merely withhold benefits." Br. 23–24. Not so in this context: even in 1963, it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Indeed, in *Hosanna-Tabor* itself, the Court noted that the award of front pay, back pay, money damages, and attorney's fees "would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination." 565 U.S. at 194.

In short, the courts have repeatedly and explicitly rejected the University's exact argument here. *See*, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2022 ("'To condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional

liberties.'" (ellipses and brackets omitted)); *accord Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8th Cir. 2006) ("[D]enial of participation in a state-sponsored program based on the party's beliefs or advocacy is unconstitutional."); *Petruska v. Gannon Univ.*, 462 F.3d 294, 308 (3d Cir. 2006) (holding that a religious organization does not waive the ministerial exception by "accepting state and federal funds with conditions limiting discrimination"); Note, 133 HARV. L. REV. at 609 ("[I]t makes little sense to argue that expulsion from a university campus—the eventual sanction for continued noncompliance—is not punitive enough to be prohibited by the First Amendment when either a fine or forced inclusion are.").

As the Seventh Circuit explained in *Christian Legal Society v. Walker*, it does not matter that a University's deregistration of a student group "is not forcing [the student group] to do anything at all, but is only withdrawing its student organization status." 453 F.3d 853, 864 (7th Cir. 2006). A university "may not do indirectly what it is constitutionally prohibited from doing directly." *Id.* For this reason, the government cannot condition access to a limited public forum on a religious group's sacrifice of its internal autonomy on religious matters—including its leadership selection.

2. The district court's rule would severely harm religious groups' ability to rent schools, library rooms, and other limited public forums for religious purposes.

Under the district court's and the University's theory, schools and other government facilities that regularly rent space to religious organizations across the nation could condition access to the space on an organization's compliance with hiring nondiscrimination policies—including that the organization not discriminate on the basis of religion. But courts have long recognized that religious groups can generally use such public spaces for religious purposes, and it would render those decisions null if the government could get around that right by essentially forcing the religious groups to stop being religious to access the public space. *See*, *e.g.*, *Lamb's Chapel*, 508 U.S. at 390 (school); *Powell v. Noble*, 36 F. Supp. 3d 818, 832–33 (S.D. Iowa 2014) (fairgrounds); *Redeemer Fellowship of Edisto Island v. Town of Edisto Beach, S.C.*, 2019 WL 1243108 (D.S.C. Mar. 18, 2019) (civic center); *Citizens for Cmty. Values, Inc. v. Upper Arlington Pub. Library Bd. of Trustees*, 2008 WL 3843579 (S.D. Ohio Aug. 14, 2008) (library meeting rooms); U.S. Dep't of Justice, Press Release, *Justice Department Closes Investigation of Texas City's Barring of Religious Speech at Senior Center*, https://bit.ly/3aH75hz (Jan. 8, 2003) (senior center).

The district court's sweeping rule would be devasting to *amici* and many other religious organizations that depend on these public spaces to engage in reli-

gious activities and services. It would mean that that a public entity could prohibit any religious organization that requires its leaders to adhere to its faith from using schools, libraries, and countless other limited public forums. And in effect, that would mean the government could cut off religious organizations' access to limited public forums entirely—contrary to the long line of precedents discussed above. Moreover, the district court's rule would mean that any public body could require that, to access the public space, Mass be led by a Buddhist, or Christian worship be led by an atheist, or Muslim prayers be led by a Jew.

Indeed, taken to its logical conclusion, the University's argument suggests that the government could revoke a religious organization's tax-exempt status if that organization insists on being led by a member of its own religion. *Cf. Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680 (1970) (explaining that "federal or state grants of tax exemption to churches [a]re not a violation of the Religion Clauses"). It also threatens religious seminaries that accept Title IV fund, several of which have previously prevailed in ministerial exception cases, *compare Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006), and *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996), *with* U.S. Dep't of Educ., Fed. Student Aid, https://bit.ly/2vYlJCz (2018) (listing both universities as Title IV recipients, along with many other seminaries), and impacts other religious schools and colleges that receive government aid—if they require leaders and teachers to adhere to tenets of

faith. And, of course, the hospital in this Court's *Scharon* decision was almost certainly the recipient of public funds; such religious hospitals would find no refuge under the University's logic.

This Court should reject such a sweeping argument and its attendant crabbed view of the First Amendment. Otherwise, organizations like *amici* may well be blocked from entering the public spaces where they conduct much of their mission.

C. Application of *Hosanna-Tabor* to protect the autonomy of religious student organizations on public university campuses provides an easily-administered rule that prevents the university from becoming excessively entangled in religious affairs.

Fortunately, it would be easy to avoid the negative consequences of the district court's rule. This Court should explain that the right discussed in *Hosanna-Tabor* prohibits state interference in the leadership selection of religious organizations, regardless of whether that interference takes the form of employment lawsuits or university policies. All the courts of appeals have experience deciding whether an organization is religious, and whether a particular person qualifies as a religious leader. Generally, these cases will not be difficult; even here, the University does not dispute that InterVarsity is religious and that its leaders function as ministers. Applying *Hosanna-Tabor* to the public university context would not only protect students' religious rights, it would also free universities from being excessively entangled in religious structures and beliefs.

II. The University's understanding of the freedom of association would uniquely harm religious associations by preventing them from selecting leaders based on faith.

The University has argued that its policy does not violate InterVarsity's freedom of association because the beliefs of the organization's leader do not significantly affect its expression. According to the University, InterVarsity could adequately express its views by, for example, including them in its constitution. To state the University's argument is nearly to refute it. First, the freedom of association protects more than mere expression; it protects the ability of members of the association to choose with whom to associate—and who should lead them. Second, the expression of any association is enormously affected by its leadership. That is especially true in the context of religious organizations. An inherent part of the message being conveyed by many religious associations is a personal belief that its religious claims are true and life-changing. This message can only be adequately conveyed by leaders who themselves believe in those claims.

A. The freedom of association protects both expression *and* membership.

The University's first error is focusing only on the organization's expression, which elides the important protection provided to its *membership* by the First Amendment. As the Supreme Court has explained, "[f]orcing a group to accept certain members may impair [its ability] to express [its] views." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). "There 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," because that "impair[s] the ability of the original members to express only those views that brought them together." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

Of course, if that is true for *membership* selection, it is all the more true for *leadership* selection, for an organization's leader is often—and almost always in religious organizations—looked to as a prime representative of the organization's membership *and* expression. Using a ban against religious discrimination to limit a religious group's leadership selection has a uniquely pernicious effect on these groups. Under policies like the University's, groups with other types of beliefs—political or ideological, for example—may choose leaders who adhere to their beliefs, while religious groups may not. *See* IVCF App. 2514 ¶¶301-03; McConnell, Speech, *Freedom of Association: Campus Religious Groups* 30:00-32:00, https://bit.ly/3cMniEb (Jan. 24, 2020). "That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

B. Religious associations require leaders who personally believe the propositions of their faith.

The University's second error lies in assuming that a religious organization's expression is not wholly undermined by having leaders who do not themselves believe that expression. Even in ordinary freedom of association cases, the Supreme

Court has recognized that, for example, "[b]y regulating the identity of [a party's] leaders" the government can "color the [party's] message." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 230–31 & n.21 (1989).

That law doubly applies to religious associations, "the archetype of associations formed for expressive purposes." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Preserving the autonomy of religious associations, which is central to their function, requires that religious authorities "be free to determine who is qualified to serve in positions of substantial religious importance." *Id.* at 200. After all, "[w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters" and that "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers." *Id.* at 201. Indeed, forcing a religious group to accept leaders who do not embrace its message would "cause the group as it currently identifies itself to cease to exist." *Walker*, 453 F.3d at 863. Being led by a hypocrite is not a viable option for a religious organization. *See* IVCF App. 2042 (InterVarsity stuff member explaining that "[h]aving leaders who express our faith without personally accepting it would compromise the integrity of the group"); *id.* at 2516 ¶¶317–21 (defendant-appellant admitting "that it would significantly impair [InterVarsity's] message … if the person leading didn't believe what he or she was saying"); IVCF App. 2522 ¶¶366–68 (same).

The University's argument threatens the freedom of all religious organizations to choose their leaders in the way that will best promote their own missions. By engaging in a proper analysis of this freedom—recognizing the centrality of membership and leadership to a religious organization's message—this Court can discourage other similarly-situated entities from treating religious organizations with such cavalier dismissals.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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MARCH 16, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 29(a)(4)(G), I, Sally R. Wagenmaker, an attorney, certify that I have complied with the above-referenced rules, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 6,417 words and therefore complies with the type-volume limitation of Rule 29(a)(5). This brief has been scanned for viruses and is virus-free.

Dated: MARCH 16, 2020

/s/ Sally R. Wagenmaker

Sally R. Wagenmaker

CERTIFICATE OF SERVICE

I, Clyde A. Taylor, an attorney, certify that on this day I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 16, 2020

/s/ Clyde A. Taylor

Clyde A. Taylor