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A unanimous panel of the U.S. Court of Appeals for the 8th Circuit ruled on July 16 in *InterVarsity Christian Fellowship/USA v. University of Iowa*, 2021 U.S. App. LEXIS 21127, 2021 WL 3008743, that University of Iowa officials could not claim qualified immunity as a defense against their discriminatory application of the University's Human Rights Policy to InterVarsity Christian Fellowship, whose registered student organization (RSO) status they revoked as part of an apparent campaign to strike at organizations that effectively barred LGBT students from leadership positions. Circuit Judge Jonathan Kobes (who was appointed by President Donald J. Trump), wrote for the panel, whose other members were James Loken (appointed by George W. Bush) and L. Steven Grasz (also appointed by Donald J. Trump). The court affirmed a ruling finding a First Amendment violation and denying qualified immunity by District Judge Stephanie Rose.

In previous unrelated litigation, also before Judge Rose, the University was sued by Business Leaders in Christ (BLinC), a student organization that had lost its RSO status after a student filed a complaint in 2017 under the University's Human Rights Policy, complaining that BLinC had denied him the opportunity to seek a leadership role despite his Christian faith because he would not formally subscribe to the group's belief that same-sex relationship were "against the Bible." In effect, he charged that gay people were effectively excluded from leadership positions. In the ensuing litigation, the Judge Rose issued a preliminary injunction, finding that BLinC was likely to prevail on its claim that its free speech rights had been violated by the University.

"In response to the preliminary injunction," wrote Judge Kobes, "the university through its Center for Student Involvement and Leadership, began a 'Student Org Clean Up Proposal' and reviewed all RSO constitutions to bring them into compliance with the Human Rights Policy . . . Reviewers were told to 'look at religious student groups first' for language that required leaders to affirm certain religious beliefs. Around the same time the reviewers turned their focus to religious groups, the University amended the Human Rights Policy to expressly exempt sororities and fraternities from the policy prohibiting sex discrimination. But the University did deregister 38 student groups – mostly for failure to submit updated documents – and several were deregistered for requiring their leaders to affirm statements of faith." Does it sound like the University was targeting religious organizations for enforcement? Does it sound like a case where there would likely be a slam-dunk ruling against the University in the U.S. Supreme Court as presently constituted, by at least a vote of 6-3 and possibly unanimously? Are these mere rhetorical questions?

One of the groups cut up in this targeted review was InterVarsity, which had been active at the University for over twenty-five years, and which is affiliated with a national ministry to "establish university-based witnessing communities of students and faculty who follow Jesus as Savior and lord, and who are growing in love for God, God's Word, and God's people of every ethnicity land culture." You guessed it: "God's Word" requires condemnation of homosexuality, so far as InterVarsity is concerned. When a student challenged InterVarsity's constitution under the Human Rights Policy in June 2018, the group's leader argued that the constitution did not prevent anyone from joining if they did not subscribe to the group's faith, as "only its leaders were required to affirm their statement of faith." The University's coordinator of Student Development responded that "having a restriction on leadership related to religious beliefs is contradictory" to the Human Rights Policy.

In other words, the University, which deregistered InterVarsity when it refused to back down, was proceeding as if the preliminary injunction requiring it to continue BLinC's registration pending a ruling in that case did not exist. No surprise, then, that the District Court concluded on a summary judgment motion that the University had violated the First Amendment Free Speech rights of InterVarsity, and that the University officials involved would not enjoy qualified immunity from personal liability for violating the organizations 1st Amendment rights.

What boggles the mind – considering that University officials presumably have access to legal counsel, and that legal counsel would do at least a minimum amount of research before advising them – is that any university situated in the states of the 8th Circuit would think they can get away with something like this. The 8th Circuit has eleven active judges. One was appointed by Barack Obama. All the rest were appointed by George H.W. Bush, George W. Bush, and Donald Trump (who appointed four of them). And, of course, the Supreme Court now has a super majority of religious free exercise and free speech enthusiasts, who would probably see no need to grant a cert petition by the University in this case, being deeply engaged in a program of widening the scope of the Free Exercise Clause.

The court makes it clear that this case is totally distinguishable from the Supreme Court's 2010 decision in *Christian Legal Society Chapter of UC Hastings College of Law v. Martinez*, 561 U.S. 661, in which Justice Ruth Bader Ginsburg, proceeding from a factual stipulation in that case that the Law School's antidiscrimination policy

provided that any student was entitled to join and seek to lead any registered student organization (the so-called "all comers policy"), rejected a 1st Amendment challenge by CLS to the Law School's withdrawal of recognition over this very issue. The University of Iowa does not have an "all comers" policy, found the 8th Circuit panel, as the University, ironically, had formally excused sororities and fraternities from complying with the ban on sex discrimination, and had allowed numerous other student organizations to categorically exclude students from membership based on characteristics listed in the Human Rights Policy.

On the issue of qualified immunity, the District Court had taken the position that denial of immunity was clear-cut as it had found in its prior ruling in BLinC that the Human Rights Policy as applied to a group whose constitution resembled InterVarsity's in relevant respects probably violated the 1st Amendment. The 8th Circuit panel rejected this reasoning, pointing out that a prior ruling by the same District Court could not be the basis for denying qualified immunity, since district court rulings are not binding as precedents. However, it pointed out, there was plenty of appellate precedent in the 8th Circuit, in sister circuits, and even recent Supreme Court cases that would justify denying qualified immunity to the University administrators involved in a decision regarding deregistering InterVarsity on these facts. "The Supreme Court has clearly stated that universities may not single out groups because of their viewpoint," wrote Kobes. "Our own precedent [in upholding the qualified immunity ruling in the BLinC case] clearly establishes this is a violation of the 1st Amendment. Out-of-circuit decision also define the selective application of a nondiscrimination policy against religious groups as a violation of the First Amendment."

And, while acknowledging that in some contexts, it may be difficult to deal with the intersection of the First Amendment and anti-discrimination principles, the court tellingly quoted Justice Clarence Thomas commenting on denial of cert earlier in July in *Hoggard v. Rhodes*: "Why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"

"Because the University and individual defendants violated InterVarsity's First Amendment rights, the question is whether their actions satisfy strict scrutiny," wrote Kobes, addressing the merits. "The University 'can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests,'" he continued, quoting from *Fulton v. City of Philadelphia*, 593 U.S. __ (2021), hot off the presses, having been decided just a month previously. In *InterVarsity*, the 8th circuit panel found the lack of a compelling government interest coupled with a lack of narrow tailoring, because the University "did not meaningfully consider less-restrictive alternatives to deregistration."

"On appeal," he continued, "the University and individual defendants do not try to argue their actions survive strict scrutiny. That is wise. Of course, the University has a compelling interest in preventing discrimination. But it served that compelling interest by picking and choosing what kind of discrimination was okay. Basically, some RSOs at the University of Iowa may discriminate in selecting their leaders and members, but others, mostly religious, may not." The court pointed out that the University could have adopted an "all comers" policy, but had not done so, and it offered no compelling reason for letting some RSOs discriminate on various grounds but denying an exception to religious RSOs. Again, the court cited *Fulton* on this point, in which the Supreme Court found that Philadelphia failed to presenting a compelling reason for not granting an exception to it's the contractual non-discrimination policy – for which the city retained sole discretion in its contract with Catholic Social Services – when there were two dozen other agencies in Philadelphia that would provide the services to same-sex couples and CSS had been operating without any complaints about its services for decades.

"What the University did here was clearly unconstitutional," Kobes reiterated in conclusion. "It targeted religious groups for differential treatment under the Human Rights Policy – while carving out exemptions and ignoring other violative groups with missions they presumably supported. The University and individual defendants turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law. Either way, qualified immunity provides no safe haven." ■