No. 19-3389

United States Court of Appeals
for the Eighth Circuit

InterVarsity Christian Fellowship/USA and InterVarsity Graduate Christian Fellowship,
Plaintiffs-Appellees,
v.
The University of Iowa, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Iowa
The Honorable District Judge Stephanie Rose
Case No. 3:18-cv-00080

BRIEF OF AMICI CURIAE STATES OF NEBRASKA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND UTAH SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTERESTS OF AMICI CURIAE

The States of Nebraska, Alabama, Alaska, Arizona, Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Carolina, South Dakota, Texas, and Utah file this brief under Fed. R. App. P. 29(a)(2), which permits them to "file an amicus brief without the consent of the parties or leave of court."

The amici States have a compelling interest in protecting the First Amendment rights of their citizens, including students attending public universities within their borders. That includes a particular interest in ensuring that school officials do not favor some expressive groups over others simply because of the views they hold.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Viewpoint discrimination is poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). The "individual freedom of mind" that the First Amendment promises, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), cannot exist if government officials have the power to single out people or groups for disfavored treatment because of their views.

The University of Iowa defendants have subjected certain religious student groups to disparate treatment—forbidding some but not all groups from selecting leaders that share their beliefs, and allowing some but not all groups to violate the school's written nondiscrimination policies. The viewpoint discrimination is so obvious that the defendants do not even contest the district court's conclusion that they selectively applied their policies to discriminate based on viewpoint. In this case, the First Amendment rights of expressive association, free speech, and free exercise all point in the same direction—they uniformly denounce the University's viewpoint discrimination.

While the plaintiffs here are religious groups, the University defendants' actions threaten the rights of religious and secular groups alike. If these officials can target religious groups like InterVarsity Christian Fellowship and InterVarsity Graduate Christian Fellowship (collectively, "InterVarsity") for disfavored treatment, nothing prevents a different university from similarly singling out an LGBT organization, environmental group, gun-rights association, or countless others. The rights of all groups on campus—no matter their views or beliefs—rise and fall together.

The amici States begin this brief by framing the relevant constitutional questions. The University defendants' characterization fails to account for the arguments raised on appeal and the facts established in the record. Most notably, the defendants *ignore* their selective application of school policies and their demonstrated viewpoint discrimination. But this Court must consider those undisputed facts. Indeed, the constitutional analysis hinges on them.

The amici States then explain the various ways in which the University defendants violated InterVarsity's First Amendment rights. For starters, the defendants violated the group's expressive-association and free-speech rights by engaging in viewpoint discrimination and otherwise acting unreasonably.

The viewpoint discrimination is most starkly illustrated by the defendants' treatment of religious groups. The school deregulated InterVarsity because that group requires its leaders to affirm its religious beliefs. But the defendants allow another religious group named Love Works to mandate that its leaders agree with its beliefs. The only difference between the groups is the substance of their beliefs. Treating them unequally is obvious viewpoint discrimination.

And the defendants acted unreasonably by failing to comply with the rules that they established for registered student organizations. Although written school policies forbid student groups from discriminating based on (among other things) religion, sex, creed, or political views, the defendants have allowed many groups to discriminate on those grounds. State officials like the defendants violate the Constitution when they defy the rules of their own forum.

That is not all. Free-exercise protections—much like the rights of expressive association and free speech—prohibit government officials from discriminating against religious beliefs or subjecting those beliefs to unequal treatment. The Supreme Court applied these principles in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). Since the University defendants discriminated against InterVarsity because of its religious beliefs, their actions also violated the Free Exercise Clause.

ARGUMENT

I. The constitutional analysis hinges on the University defendants' selective enforcement of their policies based on viewpoint.

Vital to resolving this case is an accurate framing of the constitutional issues—one that takes into account both the arguments developed on appeal and the facts in the record. The University defendants get this wrong when they characterize the relevant question as follows:

> Does a university's requirement that a student group adhere to its nondiscrimination and equal opportunity policies in order to receive state funding, recognition, and other peripheral benefits, violate that group's First Amendment Rights when that group's sincerely held religious beliefs are in direct conflict with state and federal civil rights law?

Appellants' Br. at 17–18. There are two primary problems with this framing.

First, by referencing "federal civil rights law," the University defendants suggest that federal law somehow *forbids* public universities from allowing faith-based student groups to select leaders who share their beliefs. Nowhere in their brief do the University defendants explain what federal law they reference, and the amici States are aware of none. To the extent that the Court addresses the question as framed by the University defendants, the amici States ask the Court to make clear that

nothing in federal law requires public universities to derecognize groups like InterVarsity. But the Court should not address that issue because the University defendants have not developed an argument on this alleged conflict between InterVarsity's leadership policies and federal law.

Second, the University defendants' framing ignores the most important fact in this case: that the defendants selectively enforced their policies to discriminate based on viewpoint. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace"). This was the district court's exact point when the University defendants' offered the same characterization of the issues below: "This framing misses the mark because it does not address the University's disparate application of the Human Rights Policy." *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 991 (S.D. Iowa 2019). Thus, as the district court explained, the relevant constitutional analysis asks whether a university violates a religious student group's expressive-association, free-speech, and free-exercise rights "when it enforces its nondiscrimination policy to limit the group's

ability to choose its leaders, but allows other groups to restrict membership or leadership in a manner that would similarly violate the policy." *Id.* Contrary to what the defendants say, those are the constitutional questions before this Court.

II. The University defendants violated InterVarsity's expressive-association and free-speech rights.

The ability of student groups like InterVarsity to select leaders who affirm their beliefs is indispensable to controlling the views that those groups express. As the Supreme Court recognized in *Christian Legal Society v. Martinez*, "*[w]ho* speaks" for student organizations "colors *what* concept is conveyed." 561 U.S. 661, 680 (2010). Any attempt to reduce these groups' leadership choices to mere "conduct" must fail because those decisions "constitute[ ] a form of expression that is protected by the First Amendment." *Id.* at 725 (Alito, J., dissenting).

Religious groups are no exception to this. They too exemplify the close link between an organization's leadership choices and the messages communicated. A religious group's leaders are the people who "personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012). "When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the

messenger matters." *Id.* at 201 (Alito, J., concurring). "[B]oth the content and credibility of a [religious group's] message depend vitally on the character and conduct of its teachers." *Id.* Its control over its leadership choices is thus "an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.*

The record here confirms this. "Students who hold leadership positions in InterVarsity lead the group in various religious activities, such as Bible studies and religious services." *InterVarsity*, 408 F. Supp. 3d at 973. And the group's leaders are "the primary embodiment of [its] faith and Christian message to the University." *Id.* Changing InterVarsity's leadership will necessarily alter its message.

When a religious organization like InterVarsity limits its leaders to people "who share the group's faith," that is not a "manifestation[ ] of 'contempt' for members of other faiths." *Martinez*, 561 U.S. at 733–34 (Alito, J., concurring). Rather, it is a reasonable—and sometimes indispensable—way to ensure that faith-based groups convey only what they consider true about transcendent matters "cover[ing] the gamut from moral conduct to metaphysical truth." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). In other words, a religious group's ability to favor

its beliefs when selecting leaders is not only rational and noninvidious, but essential to the group's mission. That is why it is "undoubtedly important" that "religious groups" remain free to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196.

The connection between an expressive association's leadership choices and its speech is so close that courts have treated a leader's mere presence in the group as itself expressive. Indeed, the Supreme Court held that forcing the Boy Scouts to retain a leader who openly rejected the organization's moral views would "send a message, both to the youth members and the world," that conflicted with what the group actually believed. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

Because a student group's leadership selection is so intertwined with its speech, the Supreme Court says that "expressive-association and free-speech arguments merge" in a case like this. *Martinez*, 561 U.S. at 680. And the limited-public-forum test is "the appropriate framework for assessing both . . . speech and association rights." *Id.* Under that test, the University defendants violate the First Amendment if their actions (1) "discriminate against speech on the basis of . . . viewpoint" or (2) are

not "reasonable in light of the purpose served by the forum." *Id.* at 685 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)). The defendants fail both requirements.

A. The University defendants selectively enforced their policies to discriminate based on viewpoint.

Viewpoint discrimination is "an egregious form of content discrimination" that targets a group for disfavored treatment not because of the "subject matter" of its expression but because of its "particular views." *Rosenberger*, 515 U.S. at 829. "Viewpoint discrimination is poison to a free society. . . . At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Iancu*, 139 S. Ct. at 2302–03 (Alito, J., concurring).

The Supreme Court in *Martinez* left no doubt that viewpoint discrimination in public universities' recognition of student groups is unconstitutional. While the Court found no such discrimination in that case, *see Martinez*, 561 U.S. at 695 n.25, it said that *Rosenberger*, *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Healy v. James*, 408 U.S. 169 (1972), established that public universities may not "deny[ ] student organiza-

tions access to school-sponsored forums because of the groups' viewpoints," *Martinez*, 561 U.S. at 668; *accord Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017).

Without exception, the circuits agree that viewpoint discrimination in student-group recognition violates the First Amendment. The Ninth Circuit affirmed this after *Martinez*, concluding that a university may not "exempt[ ] certain student groups from [its] nondiscrimination policy" if it withholds that exemption from others because of their "viewpoint." *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011). The University defendants admit that case is "apposite," Appellants' Br. 8, and that it bans schools from applying nondiscrimination policies "in a discriminatory fashion," *id.* at 35. Similarly, the Seventh Circuit, in a decision predating *Martinez* by a few years, barred a university from applying its policies governing student-group recognition "in a viewpoint discriminatory fashion." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866–67 (7th Cir. 2006). The University defendants cite not a single ruling—district or circuit—holding that schools may apply nondiscrimination policies in a selective manner based on viewpoint.

While this Court has not addressed viewpoint discrimination in student-group recognition, it has unequivocally rebuked public universities from engaging in viewpoint discrimination against student groups in analogous contexts. In *Gerlich*, for example, this Court condemned viewpoint discrimination involving one of the benefits that public universities routinely give to recognized student groups—use of the university's trademark. 861 F.3d at 704–07. The *Gerlich* opinion said, in no uncertain terms, "[i]f a state university creates a limited public forum for speech, it may not 'discriminate against speech on the basis of its viewpoint.'" *Id.* at 704–05 (quoting *Rosenberger*, 515 U.S. at 829). This Court has likewise held that public universities cannot withhold funding from a student group because state officials do not like "the views it espouse[s]." *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988).

Applying these principles in this case establishes that the University defendants violated the First Amendment. The record is clear that the defendants apply their policies in a viewpoint-discriminatory manner—so clear in fact that they do not dispute the district court's conclusion on this point. *See* Appellants' Br. at 24–25 (arguing that the

University's policies are "viewpoint neutral" on their face, but not disputing the district court's holding that the defendants applied those policies in a viewpoint-discriminatory manner).

The most obvious form of viewpoint discrimination is affording disparate treatment to two groups that have different views on the same subject. That is exactly what the University defendants have done on the topic of religion. They derecognized InterVarsity because the group requires its leaders to affirm a "statement of faith" that encompasses "the basic biblical truths of Christianity." *InterVarsity*, 408 F. Supp. 3d at 973. But the defendants consider a religious group named Love Works "in compliance" with school policies even though it too "requires its leaders to agree with [its] core beliefs." *Id.* at 970. The only basis for this disparate treatment is the religious beliefs that the groups hold. *See id.* (indicating that the groups have different beliefs about issues relating to sexual morality). That is viewpoint discrimination, plain and simple. *See Gerlich*, 861 F.3d at 705–06 (finding viewpoint discrimination because one student group with disfavored views was treated worse than groups with different views and missions). This alone is enough to establish a constitutional violation.

B. The University defendants acted unreasonably by violating the rules that they set for the forum.

The reasonableness of the University defendants' actions "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). Courts conducting this analysis "owe no deference to universities." *Martinez*, 561 U.S. at 686. While judges who evaluate the reasonableness of a school's conduct sometimes consider whether "substantial alternative channels" remain available to the plaintiff, that factor is irrelevant when the defendant's actions are "viewpoint discriminatory." *Id.* at 690.

At a minimum, reasonableness demands that a university follows the "boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. But here, the University defendants defy their own rules. The school's written policies say that membership and participation in a registered group must "be open to all students without regard to" (among other classifications) (1) religion, (2) sex, or (3) creed (which includes "political views"). *InterVarsity*, 408 F. Supp. 3d at 968–69 & n.2. Yet the defendants have made many exceptions for groups that violate these written requirements.

As to religion, the University defendants consider Love Works—the religious group whose views differ from InterVarsity—in compliance with its nondiscrimination policies even though its leaders must "agree with the group's core beliefs." *InterVarsity*, 408 F. Supp. 3d at 970. As to sex, registered sports clubs "restrict membership, participation, and leadership based on sex," and the University defendants allow all-female and all-male "a capella group[s]." *Id.* at 969. And as to creed, not only does "[t]he Iowa National Lawyer's Guild exclude[ ] individuals because of their political views," but also the University defendants confirmed that "lots" of other groups "exclude leaders who don't share their creed." *Id.* at 969 & n.2. All this shows that the defendants have not complied with the rules they established, and for that reason, their actions are unreasonable.

The University's stated purposes for its registered-organizations program also demonstrate that its officials' conduct is unreasonable. This is shown in at least two ways. First, the defendants say that they want to "provid[e] a space for students to associate based on shared beliefs." *Id.* at 970. Yet it undermines student efforts "to associate based on shared beliefs" if groups formed around those beliefs cannot ensure that their

leadership holds their shared principles. Leaders chart the group's course. Unless the captain affirms those core beliefs, the group will find itself adrift at sea.

Second, the University also claims an interest in "promoting diversity." *Id.* at 970. But derecognizing InterVarsity undercuts that purpose as well. Intellectual diversity is squelched when schools exclude groups with disfavored views. Recognizing religious groups only if they affirm a certain brand of beliefs promotes religious uniformity—not diversity. The defendants' actions are thus unreasonable in light of the purposes of their registered-organizations program.

III. The University defendants violated InterVarsity's free-exercise rights.

State action "that is not neutral" toward religion "or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. "Official action that targets religious conduct for distinctive treatment," *id.* at 534—including a "rule that is . . . discriminatorily applied to religious conduct," *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)—is neither neutral nor generally applicable. "The Free Exercise Clause bars even '*subtle* departures from neutrality' on matters of religion," and it applies "upon even *slight* suspicion that . . .

state [actions] stem from animosity to religion or distrust of its practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534, 547) (emphasis added).

The Supreme Court unambiguously condemned the discriminatory treatment of religion in *Lukumi*. There, a city prohibited the "unnecessary" killing of animals, but permitted broad exemptions, including hunting animals for sport and slaughtering them for food. *Lukumi*, 508 U.S. at 527–28. The Court held that this exception-laden scheme violated the free-exercise rights of Santeria adherents whose religious practices included animal sacrifice. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." *Id.* at 532. And the Court emphasized that the "Free Exercise Clause protects religious observers against unequal treatment." *Id.* at 542 (quotation marks, alteration, and citation omitted).

The Supreme Court echoed this in *Masterpiece Cakeshop*. The Court there found that one "indication" of the government's failure to act neutrally toward religion was "the difference in treatment" it afforded a person of faith. *Masterpiece Cakeshop*, 138 S. Ct. at 1730. State officials had punished a cake-shop owner who declined for religious reasons to

create a custom wedding cake celebrating a same-sex marriage. *Id.* But those same officials exonerated three other cake shops "who objected . . . on the basis of conscience" to requests for "cakes with images that conveyed disapproval of same-sex marriage." *Id.* The Court explained that such unequal treatment is evidence of a free-exercise violation. *Id.*; *see also Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (applying a rule to prohibit a religious service of Jehovah's Witnesses, but not religious services of Catholic or Protestant sects, violates the Free Exercise Clause because the government "prefer[ed] one [religious organization] over another").

The lower courts have also denounced the disparate treatment of people who hold certain religious beliefs. In *Axson-Flynn*, the Tenth Circuit reviewed the free-exercise claim of a university student enrolled in the school's acting program. 356 F.3d at 1280. School administration repeatedly "pressure[d]" the plaintiff—a Mormon student—to play roles requiring her to use "language that she found offensive" to her faith. *Id.* at 1282. In contrast, "a Jewish student . . . asked for and received permission to avoid doing an improvisational exercise on Yom Kippur without suffering adverse consequences." *Id.* at 1298. This evidence supported

the plaintiff's claim that the university "maintained a discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements." *Id.* at 1299. Such arbitrary state action burdening religious exercise raised serious free-exercise concerns, so the Tenth Circuit revived the plaintiffs' claims and remanded for further proceedings. *Id.*

And in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit applied the Free Exercise Clause to strike down a similar kind of disparate treatment. 170 F.3d 359, 364–66 (1999) (Alito, J.). The defendant police department had a policy banning its officers from wearing beards. *Id.* at 360. While it granted exemptions for officers who had medical reasons for growing beards, it denied the same treatment to Muslims whose faith required beards. *Id.* at 360–61. Free-exercise guarantees stand firmly against this disparity, the court explained, because government has no business "deciding that secular motivations are more important than religious motivations." *Id.* at 365. The department's "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.*

District courts within this Circuit have also applied these same principles in the university context. In *Rader v. Johnson*, the University of Nebraska–Kearney adopted a rule requiring full-time freshmen students to live on campus during their first year. 924 F. Supp. 1540, 1543 (D. Neb. 1996). But the school automatically exempted freshmen who lived with their parents near campus, were married, or were 19 years or older. *Id.* at 1551. And it afforded other arbitrary exemptions that were "not well defined or limited," such as exempting a student who wanted "to drive his pregnant sister to classes," another who wanted "to help care for her great-grandmother," and some who had "medical conditions." *Id.* at 1549, 1552.

Despite the wide leeway with which the university applied its policy, school officials refused to exempt religious students like the plaintiff who sought for faith-based reasons to live in a group house near campus operated by a religious organization. This violated the Free Exercise Clause, the court held, because "[s]tate actors may not without justification refuse to extend exceptions that they routinely grant to persons for non-religious reasons to those requesting the same exception based on sincerely held religious beliefs." *Id.* at 1555. It mattered not that

the university implemented its residency rule, like the University defendants did here, to "foster[ ] diversity" and "promote tolerance." *Id.* at 1556. The government cannot selectively pursue those interests in a manner the burdens religion. *Id.* at 1557.

Here, the University defendants have violated the Free Exercise Clause by subjecting particular "religious observers [to] unequal treatment." *Lukumi*, 508 U.S. at 542 (quotation marks and citation omitted). As discussed above, the defendants allow many nonreligious student groups to limit their members or leaders based on classifications listed in the University's nondiscrimination policy. And they even approve leadership selectivity by religious groups whose beliefs they find acceptable. But faith-based groups like InterVarsity are singled out for disfavored treatment. The Free Exercise Clause condemns this kind of "discriminat[ion] against some . . . religious beliefs." *Id.* at 532.

Nor can the University defendants justify their conduct under strict scrutiny. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (quotation marks, alteration, and cita-

tion omitted). Because the defendants "already allow[ ] numerous exemptions" to their policies, any argument that preventing InterVarsity from selecting leaders who share its beliefs "serves a compelling state interest is without . . . merit." *Quaring v. Peterson*, 728 F.2d 1121, 1127 (8th Cir. 1984), *aff'd Jensen v. Quaring*, 472 U.S. 478 (1985) (per curiam). Tellingly, after the Supreme Court identified the disparate treatment in *Masterpiece Cakeshop*, it did not even apply strict scrutiny. That makes sense because it is difficult to envision any compelling reason why the government would treat one religious belief worse than another.

CONCLUSION

Viewpoint discrimination against any student groups is a threat to the freedom of all student groups. This Court should affirm the district court's conclusion that the University officials violated InterVarsity's First Amendment rights.

Respectfully submitted,

Dated: March 12, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 4,105 words as determined by the word-counting feature of Microsoft Word 2016.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2016 in 14-point proportionally spaced Century Schoolbook.

And this brief complies with the electronic-filing requirements of Local Rule 28A(h)(2) because it was scanned for viruses using Windows Defender and no virus was detected.

Dated: March 12, 2020

/s/ James A. Campbell
James A. Campbell

CERTIFICATE OF SERVICE

I certify that on March 12, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that all parties to this case are represented by counsel of record who are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 12, 2020.

/s/ James A. Campbell
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