APPEAL NO. 24-4101

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOUTH 71FIVE MINISTRIES,

Plaintiff-Appellant,

v.

CHARLENE WILLIAMS, Director of the Oregon Department of Education, in her individual and official capacities, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 1:24-cv-00399-CL

OPENING BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Youth 71Five Ministries is a religious, nonprofit corporation. It issues no stock and has no parent corporation.

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STATEMENT OF JURISDICTION

Youth 71Five Ministries ("71Five") filed this lawsuit in the United States District Court for the District of Oregon under 42 U.S.C. § 1983, alleging violations of its First Amendment rights. The district court properly exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On June 26, 2024, the district court denied 71Five's motion for a preliminary injunction and dismissed the case with prejudice based on qualified immunity. 1-ER-20. The district court entered final judgment on July 1, 2024, 1-ER-2, and 71Five filed its notice of appeal the same day, 3-ER-415–19. The appeal was filed within the 30-day period established in 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

71Five is a Christian, youth-mentoring ministry that has participated in Oregon's Youth Community Investment Grant Program for many years. 71Five has successfully fulfilled the Program's goals and objectives for all the years it has participated, and it was again awarded grants for the 2023-25 grant cycle. But in late 2023, state officials booted the ministry out of the Program and stripped it of over $400,000 in grant awards. They did so because an anonymous person complained that 71Five's website states the ministry hires employees and engages volunteers who share its Christian faith.

The district court denied 71Five's request for a preliminary injunction and instead dismissed the entire lawsuit based on qualified immunity, even the official-capacity claims for prospective relief. This Court has since granted 71Five's emergency motion for an injunction, finding Oregon allows secular grantees to discriminate in violation of the same nondiscrimination rule it relied on to deny funding to 71Five.

This appeal raises two issues:

1. Whether Oregon likely violated 71Five's rights to free exercise, religious autonomy (including its ministerial hiring rights), or expressive association.

2. Whether 71Five's complaint, taken as true, plausibly alleges a violation of a clearly established constitutional right.

PERTINENT STATUTES AND REGULATIONS

Pertinent constitutional provisions, statutes, regulations, and rules are attached as an addendum to this brief.

INTRODUCTION

71Five has participated in Oregon's Youth Community Investment Grant Program for many years without issue. The Program, administered by the state's Department of Education, provides reimbursement grants to support existing services for at-risk youth. That included 71Five's programs until the Department changed the rules—now demanding that religious institutions like 71Five certify they will hire those who reject their faith, including for their ministerial positions ("Certification Rule").

The sudden rule change hit 71Five hard. After the Department awarded 71Five grants for the 2023-25 cycle, an anonymous person complained that 71Five's website says the Christian ministry hires only Christians. Although that fact was well known and had never been a problem before, the Department kicked 71Five out of the Program and rescinded over $400,000 in grant awards. Worse, the Department singled out 71Five while giving a free pass—and millions of dollars—to secular organizations whose websites admit they discriminate *when providing their services*. In contrast, 71Five serves everyone.

The district court denied 71Five's motion for a preliminary injunction despite the double standard, believing that the secular organizations' prioritization of "particular demographics" is "culturally responsive." 1-ER-9. It also dismissed the entire lawsuit with prejudice based on qualified immunity, even the official-capacity claims. 1-ER-20.

But qualified immunity is only "an affirmative defense to damage liability" and "does not bar actions for declaratory or injunctive relief." *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989). So dismissing the entire lawsuit was error, as the Department has correctly conceded. Appellees' Resp. to Emergency Mot. for Inj. Pending Appeal 2 n.1 ("Resp. to Em. Mot."), ECF No. 13.

Fortunately, a motions panel of this Court stepped in, held that 71Five is likely to succeed on the merits, and granted an injunction pending appeal. Order Granting Mot. for Emergency Inj. Pending Appeal 1–2 ("Em. Inj. Order"), ECF No. 18. The motions panel determined that the Department has not acted "neutrally" because "it continues to fund secular organizations that favor certain groups based on race and gender identification in violation of the same non-discrimination policy that [it] relied on in denying funding to 71Five." *Id.* at 2. Such unequal treatment puts this case "well within the heartland of" this Court's en banc decision in *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education* ("*FCA*"), 82 F.4th 664 (9th Cir. 2023). *Id.* at 8. The motions panel also held that 71Five was likely to suffer irreparable harm because "revocation of the grant[s] ... hamper[s] its ministry and mission." *Id.* at 11.

The motions panel got it right. Besides ending the obvious constitutional violations, a preliminary injunction is vital because the Department's actions have forced the nonprofit ministry to spend

hundreds of thousands of dollars—a sum that grows each passing day—to continue critical grant-related programs and services. The financial strain has forced 71Five to forgo many ministry opportunities and prevented it from pursuing others. 2-ER-25–26. This includes making much-needed repairs to one of its youth centers, replacing worn bikes and safety equipment for its youth mountain-biking program, expanding its VoTech program to other needy communities, and hiring for an open staff position. 2-ER-25–26.

What's more, the state officials have argued (and the district court agreed) that they are entitled to qualified immunity. So if the Department can exclude 71Five from its grant programs and ultimately has its way with qualified immunity, there will be no remedy for the past violations and injuries even if 71Five prevails in the end. That makes a preliminary injunction even more important.

The Court should reverse, reinstate all 71Five's claims, and direct the district court to issue 71Five's requested preliminary injunction.

STATEMENT OF THE CASE

A. 71Five is a Christian, youth-mentoring ministry.

71Five is a Christian, youth-mentoring ministry in Medford, Oregon, that has served the Rogue Valley community for 60 years. 3-ER-195. Its name derives from Psalm 71:5, which states: "Lord God, you are my hope. I have trusted you since I was young." 3-ER-195. Consistent with this theme verse, 71Five believes that a young person will experience a lifetime of hope when he or she learns to trust in God. 3-ER-195. So while the ministry strives to meet the physical, mental, and emotional needs of those it serves, its "primary purpose" is "to teach and share about the life of Jesus Christ." 3-ER-195–96.

71Five fulfills its mission through voluntary (and free) programs that provide at-risk youth with social interaction, vocational training, and one-to-one mentoring, among other things. 3-ER-196, 225–26. All are welcome, and 71Five does not require participation in any religious activities (such as Bible studies) as a condition to receiving its free services. 3-ER-196, 235.

71Five shares its faith through the supportive and trusting relationships that naturally develop between youth and its employees or volunteers. 3-ER-196. And because the ministry relies on staff and volunteers to faithfully teach and model its religious message, it only hires those who share its faith. 3-ER-197. Indeed, 71Five expects all employees to communicate the ministry's religious beliefs to those it

serves and to actively "[p]articipat[e] in regular times of prayer, devotion, and worship." 3-ER-199; *see also* 3-ER-285–319 (position descriptions showing religious job duties and functions). 71Five's volunteers also fulfill its religious mission by mentoring students, leading prayers and devotionals, and providing staff with spiritual support and encouragement, among other things. 3-ER-200.

By hiring employees and volunteers that share its religious beliefs, 71Five maintains a community of likeminded individuals who can articulate and advance its Christian messages and beliefs to youth, parents, and the broader community. 3-ER-200. Keeping an internal community of coreligionists also facilitates discipleship among board members, staff, and volunteers, creating an environment of spiritual growth and fellowship. 3-ER-200. The ministry has about 30 employees and over 100 volunteers. 3-ER-197.

B. 71Five has for years successfully participated in Oregon's Youth Community Investment Program.

71Five has successfully participated in Oregon's Youth Community Investment Grant Program ("Program") for the past three grant cycles, beginning in 2017. 3-ER-201–202. That Program, administered by the state's Department of Education, offers reimbursement grants to support existing services for youth who are at risk of disengaging from school, work, and community. 2-ER-23; 3-ER-201. 71Five has used prior awards to provide valuable support and assistance to youth, purchase

needed supplies and equipment, and partially cover personnel and operating costs. 3-ER-202. No one questions that 71Five has admirably fulfilled the Program's objectives for all the years it has participated.

C. The Department suddenly excluded 71Five and rescinded its grant awards because the ministry prefers employees who share its faith.

71Five again applied for—and was awarded—grants for the 2023-25 grant cycle, which runs from July 1, 2023, to June 30, 2025. 3-ER-202. In July 2023, the Department notified 71Five that it was awarded a $220,000 grant to support its youth centers and a $120,000 grant to support its "Break the Cycle" program, a mountain-biking program that serves youth in juvenile correction facilities. 3-ER-203, 205. The ministry also learned it would receive an additional $70,000 as a subgrantee to a separate grant the Department awarded to another organization. 3-ER-205.

Yet for the first time ever, the Department added a new provision requiring applicants to certify that they do not discriminate in their "employment practices, vendor selection, subcontracting, or service delivery with regard to race, ethnicity, religion, age, political affiliation, gender, disability, sexual orientation, national origin or citizenship status" ("Certification Rule"). 3-ER-204, 345. The Certification Rule was not based on any statute or regulation but added at the Department's discretion. Although 71Five saw the rule when completing its grant

applications, it considered itself in compliance because it serves everyone, and it did not understand the Department to be asking it to give up its legally protected hiring practices. 3-ER-234–35. But when an anonymous person complained that 71Five's website said the ministry expects employees and volunteers to share its faith (which has always been the case), the Department invoked the Certification Rule, rescinded over $400,000 in grants, and kicked the ministry out of the Program. 2-ER-180; 3-ER-236–38.

The Department explained that 71Five was disqualified because it "requires all staff and volunteers to affirm a 'Statement of Faith'" and asks applicants to "discuss their 'Church' affiliation and attendance." 3-ER-411–13. In response, 71Five's Executive Director noted that the ministry's employment practices were legally protected, that it was important to align staff and volunteers with the ministry's religious mission, and that the ministry had always "been clear on this point in [its] interactions with [Department] staff." 3-ER-410.

The Department made its "final" decision in November 2023, more than four months after the grant cycle began. 3-ER-408. And even then, the Department official delivering the bad news asked for "patience" while he "work[ed] on a more detailed, thoughtful, and meaningful response." 3-ER-406. But a more thoughtful response never came, and the Department stood by its decision, forcing 71Five to sue.

D. The district court denies 71Five's motion for a preliminary injunction and dismisses the case.

71Five's complaint alleged violations of its clearly established First Amendment rights to free exercise, religious autonomy (including its ministerial hiring rights), and expressive association. 3-ER-241–46. It named the responsible Department officials in both their official and individual capacities and sought declaratory and injunctive relief, as well as nominal and compensatory damages. 3-ER-222–23, 247.

71Five filed a motion for a preliminary injunction shortly after filing its complaint in March 2023. The officials then moved to dismiss *only* the damages claims brought against them in their individual capacities based on qualified immunity. 3-ER-423–27. The district court denied 71Five's motion, granted the Defendants', and dismissed the entire case "with prejudice." 1-ER-20.

Preliminary Injunction. On the motion for a preliminary injunction, the district court first held that 71Five was not likely to succeed on the merits. The district court believed the Certification Rule was "neutral and generally applicable" because all grant applicants had to certify compliance with the rule at the application stage and could not "opt out." 1-ER-7–8. The district court did not address 71Five's argument that exceptions could be made at the later grant-negotiation and agreement phase, where the Department expressly allows applicants to "negotiate some provisions of the final Grant" and does not

limit which "terms and conditions" are "reserved for negotiation." 3-ER-397. 71Five also identified secular grant recipients whose websites openly admitted to discriminating in their services. 1-ER-8–9. But the district court rejected these secular comparators, believing that "simply directing an organization's services to particular demographics in the community, in culturally responsive ways," is not "'discrimination' as contemplated by the nondiscrimination clause." 1-ER-9.

The district court then avoided the Supreme Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* by describing the funding restrictions in those case as "categorically" denying benefits based on the "religious character of the institutions or their religious activities." 1-ER-10. Because the Department awarded grants to a few faith-based applicants—and initially awarded grants to 71Five despite it being a religious organization—the district court said enforcement of the Certification Rule "had nothing to do with [71Five's] religious character or its planned use of the funds." 1-ER-11.

The district court next held that 71Five was unlikely to succeed on the merits of its religious-autonomy claims. 1-ER-11–13. Although it expressed no doubts about 71Five's freedom to select its ministers or its right to prefer coreligionists as employees, the district court believed these First Amendment rights served only as "an affirmative defense against suit by a disgruntled church employee, not a standalone right that can be wielded against a state agency." 1-ER-12.

The district court did not address 71Five's expressive-association claim, even though it was fully briefed by both parties.

For the other preliminary-injunction factors, the district court said that "monetary injury" usually is not "irreparable" unless it leads to the "complete closure of the organization." 1-ER-15–16. It also believed 71Five sought a disfavored mandatory injunction because it "did not contest [the Certification Rule] until the grant funding was denied." 1-ER-15. In its view, the injunction would alter the status quo and not be in the public interest because it would require "disburs[ing] money" and "monitor[ing] a currently unfunded grant award." 1-ER-15, 18.

Qualified Immunity. On the motion to dismiss, the district court held that qualified immunity applied because 71Five's rights were not clearly established for the same reasons it was not likely to succeed on the merits. 1-ER-19. The district court reiterated its conclusion that the Certification Rule was "neutral and generally applicable" and "does not turn on [71Five's] religious exercise." *Id*. It also stated there was "no precedent" showing 71Five's "right to use discriminatory employment practices can be the basis for an affirmative claim against a government agency who denies grant funding for that reason." *Id*. Even though "[q]ualified immunity is an affirmative defense to damage liability" and "does not bar actions for declaratory or injunctive relief," *Presbyterian Church (U.S.A.)*, 870 F.2d at 527, the district court dismissed 71Five's *entire* case "with prejudice," 1-ER-20.

The district court entered final judgment on July 1, 2024, and 71Five filed its notice of appeal the same day. 1-ER-2. 71Five moved the district court for an injunction pending appeal two days later, which the district court denied on July 18. 3-ER-429.

E. This Court grants an emergency injunction pending appeal.

71Five then immediately sought an injunction pending appeal from this Court. Along with detailing the constitutional violations, 71Five's emergency motion explained that the Department's actions kept it from seeking reimbursement for over $145,000 spent since July 2023 to continue critical grant-related programs and services, forcing it to forgo many ministry opportunities. 2-ER-25. 71Five had been prevented from filling an important open staff position, replacing worn bikes and safety equipment for its "Break the Cycle" program, making critical building repairs at one of its youth centers, and expanding existing ministries like its VoTech program. 2-ER-25.

On August 8, 2024, this Court granted 71Five's motion and issued an injunction pending appeal. The motions panel held that 71Five was likely to succeed on its free-exercise claim because the record showed that "many other participants in the Program discriminate in violation of the Certification Rule" yet the Department "continues to fund these groups while it has revoked 71Five's grants." Em. Inj. Order 8. By

choosing "to enforce the rule only against 71Five," the Department's actions triggered strict scrutiny, which it could not satisfy. *Id.* at 10.

The motions panel also determined that 71Five would suffer irreparable harm without an injunction given the ongoing constitutional violation and the fact that the grant revocation "hamper[s] its ministry and mission." *Id.* at 11. Finally, the motions panel held that the balance-of-equities and public-interest factors favored an injunction because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc)).

The motions panel issued an injunction that: "(1) allows 71Five to participate in the 2023-25 Program such that it can seek reimbursement for eligible costs and expenses, and (2) prohibits the state from requiring 71Five to abide by the Certification Rule to the extent that it bars 71Five from only hiring people of its own faith." Em. Inj. Order 12.

SUMMARY OF ARGUMENT

As a religious organization, 71Five has the constitutional right to select its ministers without government interference and to ensure that its employees and volunteers both share its faith and believe in its mission. But the Department stripped 71Five of grant awards and now excludes the ministry from future grant programs because it exercises that right. Because this violates the First Amendment, 71Five is entitled to a preliminary injunction.

The Department violates the Free Exercise Clause in two ways. *First*, the Certification Rule burdens 71Five's religious exercise but is neither neutral nor generally applicable. As the motions panel held, the Department does not act neutrally by strictly enforcing the rule against 71Five's religious employment practices while still funding secular grantees that openly discriminate in their services in violation of the same rule. *Second*, the Department excludes 71Five from a public benefit program solely because of its religious character and exercise. That, too, triggers strict scrutiny, which the Department cannot satisfy.

The Department also violates both Religion Clauses by interfering with 71Five's autonomy (1) to select its ministerial employees and (2) to prefer coreligionists for all positions. The district court did not doubt that 71Five has these rights, only whether the ministry could raise them as affirmative claims. But federal law provides the answer to that question: civil-rights plaintiffs may assert an "action at law" against

state officials who cause a "deprivation of *any* rights ... secured by the Constitution." 42 U.S.C. § 1983 (emphasis added). By holding otherwise, the district court contradicted the plain terms of Section 1983 and treated the rights of religious organizations as less valuable than other constitutional rights that can be vindicated.

The Department's enforcement of the Certification Rule similarly violates 71Five's right to expressive association. That is because the rule's prohibition of religious employment discrimination would force 71Five to associate with staff who do not hold the same religious views and thus cannot express the same message.

Given that 71Five is likely to succeed on the merits of one or more of these claims, and will suffer irreparable harm without an injunction, the district court should have granted 71Five's motion.

The district court also wrongly dismissed the entire lawsuit based on qualified immunity. Such immunity is a defense only to damages liability and does not bar claims for prospective declaratory and injunctive relief. And at the motion-to-dismiss stage, the complaint's allegations must be taken as true and construed in 71Five's favor. Viewed through that proper lens, 71Five alleges violations of clearly established rights. So its request for damages should also be reinstated and allowed to proceed.

STANDARD OF REVIEW

Preliminary Injunction. This Court reviews preliminary-injunction denials for abuse of discretion and the underlying legal principles de novo. *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 934 (9th Cir. 2022). But in First Amendment cases, this Court reviews even factual findings de novo. *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1115 (9th Cir. 2023).

To obtain a preliminary injunction, 71Five must establish (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Likelihood of success is the "most important" factor in cases like this one. *Meinecke v. City of Seattle*, 99 F.4th 514, 521 (9th Cir. 2024).

Qualified Immunity. This Court reviews de novo a district court's decision on qualified immunity. *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1159 (9th Cir. 2020). And at the motion-to-dismiss stage, allegations must be taken as true and construed in the light most favorable to the non-moving party. *Hyde v. City of Willcox*, 23 F.4th 863, 869 (9th Cir. 2022).

ARGUMENT

I. 71Five is entitled to a preliminary injunction.

The motions panel correctly held that 71Five is entitled to a preliminary injunction. 71Five is likely to succeed on the merits of its claims and will suffer irreparable harm without an injunction.

A. The Department's enforcement of the Certification Rule violates the Free Exercise Clause.

The Department's enforcement of the Certification Rule triggers strict scrutiny under the Free Exercise Clause for two reasons. First, it burdens 71Five's religious exercise but is neither neutral nor generally applicable. *Fulton v. City of Phila.*, 593 U.S. 522, 533 (2021). Second, it excludes 71Five from a public benefit program solely because of its religious character and exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 475–76 (2020); *Carson v. Makin*, 596 U.S. 767, 778–80 (2022).

1. The Department funds secular groups that discriminate in violation of the Rule, so its actions are not neutral or generally applicable.

This Court recently distilled "three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny." *FCA*, 82 F.4th at 686. "First, a purportedly neutral generally applicable policy may not have a mechanism for individualized exemptions." *Id.* (quoting *Fulton*, 593 U.S. at

533) (cleaned up). "Second, the government may not treat comparable secular activity more favorably than religious exercise." *Id.* (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam)) (cleaned up). "Third, the government may not act in a manner hostile to religious beliefs or inconsistent with the Free Exercise Clause's bar on even subtle departures from neutrality." *Id.* (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018)) (cleaned up).

The Department violated all three requirements. It disparaged and denied an exception for 71Five's religious exercise while applauding and approving exceptions for "secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 533–34 (cleaned up). The Department claims the Certification Rule serves an interest in ensuring an inclusive environment with "equitable access" to programs and services funded by the grants. 2-ER-179; Resp. to Em. Mot. 20–21. But it is undisputed that 71Five serves everyone, 3-ER-205, and its successful grant applications explain how 71Five provides an inclusive environment, 3-ER-335–36, 361–62. Yet the Department punished 71Five while accommodating secular groups that undermine the government's asserted interests in far worse ways.

Indeed, the Department scrutinized 71Five's website for any signs of religious discrimination—and punished 71Five for what it found. But it allows many secular grantees to openly discriminate based on race, ethnicity, national origin, gender, and gender identity:

- Ophelia's Place limits its services to girls, explaining on its FAQ page that it serves "youth who have experienced girlhood at some point in their lives." 2-ER-103, 110 ("Why not boys?").
- Black Parent Initiative only "serve[s] African and African American families." 2-ER-101, 113; *see also* Black Parent Initiative, *About BPI*, https://perma.cc/7LSW-6CFP ("focused solely on supporting Black/African American families with children").
- CAPECES Leadership Institute lists "[w]ho we serve & work with" as "Latin/e/o/a/x, immigrant, Indigena, Afrodescendiente, and farmworker children, youth, adults, and elders." 2-ER-101, 106, 108, 123.
- The Center for African Immigrants and Refugees Organization (CAIRO) says its mission is to serve "African refugees and immigrant children, youth and families." 2-ER-107, 128.
- Adelante Mujeres "focus[es] on the needs of marginalized immigrant Latine women" and touts a staff where "[m]ore than 80% ... identify as Latine." 2-ER-101, 135–36.
- Girls Inc. of the Pacific Northwest seeks to foster a "girl-centered environment" and offers specific programming

for "those who identify as girls," "those who are exploring their gender identity or expression," and "those who are gender non-conforming or non-binary." 2-ER-102, 141.

The district court was apprised of these glaring examples of secular discrimination. And while just one is enough to trigger strict scrutiny, *see Tandon*, 593 U.S. at 62, it doesn't end there. Even more examples are readily apparent from secular grantees' websites:

- The Center for Intercultural Organizing "prioritize[s] immigrants, refugees, and people of color for leadership council positions." 2-ER-101; Unite Oregon, *Our Chapters*, https://perma.cc/9V22-WEYQ (last visited Aug. 21, 2024).
- HOLLA describes itself as "a culturally responsive mentoring organization that matches Black, Brown and Indigenous children with mentors that look like them and represent their ways of being in the world." 2-ER-103; HOLLA Mentors, *Programs*, https://perma.cc/JPW2-W8WV (last visited Aug. 21, 2024).
- The Latino Network is "a Latino-led education organization, grounded in culturally-specific practices and services." 2-ER-103; Latino Network, *About Us*, https://perma.cc/S5Y9-ULD3 (last visited Aug. 21, 2024).

- The Samoa Pacific Development Corporation "serves the Samoan community in Oregon through educational and economic resources and cultural empowerment." 2-ER-104; SPDC, *Welcome*, https://perma.cc/576J-J3MA (last visited Aug. 21, 2024).
- REAP offers programs "designed to meet the academic and social needs of young males of color" based on "the unique cultural and gender-specific needs of these students." 2-ER-107; REAP, *Renaissance*, https://perma.cc/4C7J-SKMQ (last visited Aug. 21, 2024).

The motions panel correctly held that the Department's double standard brings this case "well within the heartland of [this Court's] en banc decision in *FCA*," and that "[t]he district court erred in holding that Oregon's actions were neutral." Em. Inj. Order 8–9. The record shows the Department went out of its way to scrutinize 71Five's website while giving the benefit of the doubt—and millions of dollars—to secular organizations whose discrimination is on full display in their websites and organizational names. That triggers strict scrutiny.

The district court excused the unequal treatment by adopting the Department's characterization of the secular grantees' practices as "culturally responsive." 1-ER-9. But this Court has rejected such distinctions: "While inclusiveness is a worthy pursuit, it does not justify

… exceptions from the broad non-discrimination policies, which undermine their neutrality and general applicability and burden Free Exercise." *FCA*, 82 F.4th at 687. The Department's double standard also reveals a mechanism of individualized assessments and reflects its religious hostility. The Department celebrated the secular grantees' conduct as "culturally responsive" yet demeaned 71Five's commitments as "discrimination." This the First Amendment does not allow.

Nor was the district court correct to suggest that the secular grantees do not categorically "exclude[ ]" or "refuse[ ] services" to those outside their "target demographics." 1-ER-9. Such a suggestion was neither supported by evidence nor consistent with how the grantees described themselves. *See* Em. Inj. Order 9 ("This finding ignores the programs' own websites that explicitly admit that they discriminate in the provision of their services" and thus was "without support in the inferences that may be drawn from the facts in the record") (citation omitted).

Either way, the legal conclusion is the same. In *FCA*, this Court held that a school district's nondiscrimination policies were not generally applicable when the district prohibited a religious student group from requiring its leaders to be Christians yet allowed a secular group to "*prioritize* acceptance of south Asian students." 82 F.4th at 678 (emphasis added). Such an exception "removes" non-discrimination policies "from the realm of general applicability." *Id.* at 688.

Finally, the Department cannot escape responsibility for its actions by saying it did not know about the secular grantees' discrimination. The Department carefully "evaluate[s]" all applicants through a "competitive process" to determine whether they meet "the eligibility and other application requirements[.]" 2-ER-177. And even after a grant is awarded, the Department "monitors the grantee's programs." 2-ER-178. This ongoing obligation to monitor compliance undermines any argument that it is too late to apply the Certification Rule equally.

2. Excluding 71Five solely because it hires coreligionists triggers strict scrutiny under *Trinity Lutheran*, *Espinoza*, and *Carson*.

The Department further violates the Free Exercise Clause by excluding 71Five from a government benefit program solely because of its religious character and exercise.

The First Amendment "protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson*, 596 U.S. at 778 (citation omitted). So the Supreme Court has "repeatedly held" that a State cannot "exclude[] religious observers from otherwise available public benefits" because of their "religious character," "religious activity," or "religious exercise." *Id.* at 778–81.

In *Trinity Lutheran*, the Court held that Missouri's exclusion of churches from a grant program violated the Free Exercise Clause because it disqualified otherwise-eligible recipients "from a public

benefit solely because of their religious character." 582 U.S. at 462. Such an exclusion, the Court explained, imposed a "penalty on the free exercise of religion that trigger[ed] the most exacting scrutiny." *Id.*

In *Espinoza*, the Court struck down the Montana constitution's no-aid provision because it barred religious schools from participating in its scholarship program "solely because of the religious character of the schools." 591 U.S. at 476. The Court explained that when a state decides to "subsidize private education," it cannot then "disqualify some private schools solely because they are religious." *Id.* at 487.

And in *Carson*, the Court denied Maine's attempt to avoid the broad principles set out in *Trinity Lutheran* and *Espinoza*. In that case, Maine argued that private schools were excluded from its tuition assistance program based not on their religious *status* but their religious *activity*. Maine claimed that "a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith." 596 U.S. at 787 (citation omitted). The Court rejected that argument, noting that the very reason religious schools exist is to teach their faith. *Id.* "[T]he prohibition on status-based discrimination under the Free Exercise Clause," the Court held, "is not a permission to engage in use-based discrimination." *Id.* at 788.

This Supreme Court trilogy controls. Oregon cannot subsidize private programs serving at-risk youth but then exclude otherwise

eligible organizations because of their religious character or exercise. *Carson*, 596 U.S. at 787. Yet that is what the Certification Rule does.

The district court held otherwise by claiming that 71Five was excluded because of its "employment practices," not its religious character or exercise. 1-ER-11. But that is a distinction without a difference when the employment practice is essential to the ministry's mission and message. 71Five's ability to remain a *Christian* organization depends on having *Christian* employees and volunteers. Those who do not believe in the Christian faith cannot be expected to share it—let alone accurately and compellingly. And if 71Five cannot share its faith, its mission and message must change completely. 71Five might still be a youth-mentoring organization, but it wouldn't be a Christian one.

This is undeniable. In fact, this Court recognizes in related contexts that an organization's composition cannot be separated from its character. For example, in *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 462 (9th Cir. 1993), this Court evaluated whether private schools qualified for Title VII's religious exemption by asking whether the schools "consistently adhered to the[ir] Protestant-only requirement" for teachers, whether they "required their teachers to maintain active membership in a church," and whether they "inquire[d] into the substance of a teacher's beliefs."

Other courts do the same. *E.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (asking whether "member-

ship is made up by coreligionists"); *Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (finding that a university was religious in large part because the school's trustees "must be ... Baptist" and the school required faculty to "subscribe to" a statement of faith and commit "to advancing Christianity").

In other words, hiring coreligionists is a *defining* characteristic of most religious organizations. So the district court was wrong to say 71Five's exclusion "had nothing to do with [its] religious character." 1-ER-11. The Department may have "known" in some general sense that 71Five was religious when it awarded the grants, *see* 1-ER-11, but that does not change the fact that it ripped them away after learning more about the nature of 71Five's religious character and exercise.

There is no denying 71Five would have remained in the Program had it agreed to hire non-Christians for all positions, including leadership. But the First Amendment forbids forcing religious organizations to choose between "an otherwise available benefit program" and "remain[ing] a religious institution." *Trinity Lutheran*, 582 U.S. at 462. Because the Department's actions put 71Five to that choice, strict scrutiny applies.

3. The Department's actions fail strict scrutiny.

To survive strict scrutiny, the Department's actions "must advance interests of the highest order and must be narrowly tailored in

pursuit of those interests." *Carson*, 596 U.S. at 780 (cleaned up). The Department cannot rely on a "broadly formulated" interest in "equal treatment" or in "enforcing its non-discrimination policies generally." *Fulton*, 593 U.S. at 541. It must instead establish that "denying an exception" *to 71Five* is necessary to achieving its goals. *Id.* The Department did not even try to carry this burden in the district court. Nor can it do so here.

There is no legitimate reason for excluding 71Five from the Program, let alone a compelling one. The Department previously awarded grants to the ministry without forbidding its preference for Christian employees, and the ministry has for years fulfilled all the Program's goals and purposes. Nothing justifies the sudden exclusion.

To the contrary, the Department allows secular groups to openly discriminate in violation of the Certification Rule and "has given no persuasive reason why" it allows them to do so. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). Such exemptions undermine the "contention that its non-discrimination policies can brook no departures." *Fulton*, 593 U.S. at 542. And they "raise[ ] serious doubts" that Oregon "is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802.

Nor is the Certification Rule narrowly tailored. If the Department "can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. And here, both federal and state

law prove accommodation is more than possible. *See* 42 U.S.C. § 2000e-1(a) (religious organizations can prefer "individuals of a particular religion to perform work connected with the carrying on . . . of its activities"); Or. Rev. Stat. § 659A.006(4) (religious institutions can "prefer an employee" of the same religion). As the motions panel recognized, such laws show that there are less restrictive alternatives that advance the government's purported interests while still respecting 71Five's religion. *See* Em. Inj. Order 10 (concluding that the Certification Rule "likely is not narrowly tailored" because it "reaches even beyond the strictures of Oregon's anti-discrimination policy").

B. Penalizing 71Five for exercising its religious hiring rights violates both Religion Clauses.

By penalizing 71Five for exercising its religious hiring rights, the Department also violates the ministry's religious autonomy.

This autonomy, rooted in both Religion Clauses, "protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (cleaned up). The Supreme Court has explained that such "[s]tate interference ... would obviously violate the free exercise of religion" and that "any attempt by government to dictate *or even to influence* such matters would constitute one of the central attributes of an establishment of religion." *Id.* (emphasis added). So while religious institutions do not

"enjoy a general immunity from secular laws," the First Amendment "does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.*

Two components of this autonomy apply here.

First, 71Five's "independence on matters of faith and doctrine requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Id.* at 747. Otherwise, "a wayward minister's preaching, teaching, and counseling could contradict [71Five's] tenets" and lead others "away from the faith." *Id.* The "ministerial exception" secures 71Five's "independent authority in such matters." *Id.*; *accord Behrend v. S.F. Zen Ctr., Inc.*, 108 F.4th 765, 766 (9th Cir. 2024) (exception "broadly ensures that religious organizations have the freedom to choose who will preach their beliefs, teach their faith, and carry out their mission") (cleaned up).

Here, the Certification Rule extends to *all* employees, so it necessarily implicates the ministerial exception. Indeed, 71Five's leadership, and many of its employees, fit comfortably within the exception because they are "entrusted with the responsibility of transmitting the [Christian] faith to the next generation." *Our Lady*, 591 U.S. at 754 (cleaned up); *see* 3-ER-197–99 (explaining religious job duties and functions). And it makes no difference that the Certification Rule results in "indirect coercion or penalties" rather than "outright prohibitions." *Carson*, 596 U.S. at 778 (citation omitted). As the Supreme Court has explained,

the ministerial exception prohibits governmental action that "would operate as a penalty" on a religious organization's decision to hire or fire a minister, not just actions that would "overturn[ ]" a minister's "termination." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012).

Second, the Religion Clauses also protect 71Five's freedom to prefer coreligionists for all positions (not just ministers), though it only shields employment decisions for *non*-ministers when rooted in the organization's religious beliefs. *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657–58 (10th Cir. 2002).[1] Here, 71Five's "primary purpose" is to share its faith, 3-ER-196, 252, and it has determined that every position is essential to that mission, 3-ER-197. The First Amendment demands deference to that determination. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (deference given "to an association's view of what would impair its expression").

The district court did not question either of these rights, only whether 71Five could assert them. In its view, "the church autonomy doctrine, or ministerial exception, is an affirmative defense against suit by a disgruntled church employee, not a standalone right that can be wielded against a state agency." 1-ER-12. This is wrong.

[1] In contrast, the ministerial exception applies even when the decision to hire or fire a minister was *not* "made for a religious reason." *Hosanna-Tabor*, 565 U.S. at 194.

For starters, it ignores the facts. This is not a pre-enforcement action. The Department enforced the Certification Rule against 71Five, so the ministry "wield[s]" these First Amendment rights as a "shield," not a "sword." 1-ER-12–13.[2] In any event, Section 1983 authorizes plaintiffs to assert an "action at law" against state officials who cause a "deprivation of *any* rights ... secured by the Constitution." 42 U.S.C. § 1983 (emphasis added). Indeed, such an action was the *only* way 71Five could assert its rights under these circumstances. To carve out the First Amendment right to religious autonomy from § 1983, as the district court effectively did here, contradicts the statute's plain terms and relegates the rights of religious institutions to "second-class." *Shurtleff v. City of Bos.*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring).

C. Penalizing 71Five for preferring coreligionist employees violates its right to expressive association.

The district court did not address 71Five's expressive-association claim even though it was fully briefed. But the Certification Rule undeniably interferes with 71Five's right "to associate with others in pursuit of ... educational [and] religious ... ends." *Dale*, 530 U.S. at 647.

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[2] Although this is not a pre-enforcement action, the district court's ruling also conflicts with binding precedent that teaches a plaintiff need not "first expose himself" to penalty to challenge a law that "deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *accord Union Gospel Mission of Yakima Wash. v. Ferguson*, No. 23-2606, 2024 WL 3755954 (9th Cir. Aug. 12, 2024) (allowing church-autonomy claims to proceed in a pre-enforcement action).

This right to expressive association includes the "freedom not to associate" with people who "may impair the [group's] ability" to express its views. *Id.* at 648 (citation omitted). So when an association expresses a message, the First Amendment prohibits the government from forcing the association to admit those who disagree or would express a contrary view. *Id.* The right applies if (1) "the group engages in 'expressive association,'" and (2) "[t]he forced inclusion" of a person "affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648. 71Five satisfies both elements.

First, "[r]eligious groups" like 71Five "are the archetype of" expressive associations. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). The ministry's purpose is "to teach and share about the life of Jesus Christ," 3-ER-196, and it "exists to share God's Story of Hope with young people," 3-ER-196, 259. 71Five accomplishes this through likeminded staff and volunteers who affirm and communicate its faith through prayer, Bible study, and religious discussion. 3-ER-196–97.

Second, the Certification Rule would force 71Five to associate with staff and volunteers who do not hold the same religious views and thus cannot express the same message. Courts must "give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. And the ministry here rightly believes it can express its message "only through staff and volunteers who are willing and able to faithfully teach the Bible and relationally share [their faith]." 3-ER-197. "The

right to expressive association allows [71Five] to determine that its message will be effectively conveyed only by employees who sincerely share its views." *Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023).

Because the Certification Rule would require 71Five to accept employees and volunteers who can neither affirm nor communicate the ministry's religious beliefs, it "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). So strict scrutiny applies for this reason too. And as explained, the Department cannot withstand "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

D. 71Five satisfies the other preliminary-injunction factors.

In First Amendment cases like this one, 71Five's likelihood of success on even one of its claims is "determinative" and the Court may "confine [its] analysis to that factor." *Mobilize the Message*, 50 F.4th at 934 (citation omitted). But the remaining preliminary injunction factors—irreparable harm, balance of equities, and public interest—also all favor an injunction.

1. 71Five will suffer irreparable harm without an injunction.

Irreparable harm is "relatively easy to establish in a First Amendment case" because the plaintiff "need only demonstrate the existence of a colorable First Amendment claim." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022) (citations omitted). This is because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (citation omitted). Because 71Five is likely to succeed on at least one of its First Amendment claims, it has shown that it will suffer irreparable harm without an injunction.

Although 71Five's likelihood of success on the merits is decisive, the district court made three other errors regarding irreparable harm.

First, the district court suggested that 71Five only suffered "a discrete past harm" without prospective injuries. 1-ER-16–18. But this overlooks the fact that the Certification Rule doesn't just apply to the current grant cycle; it will be added as a condition to future grants, and the Department will again solicit applications for the Program in early 2025. 2-ER-179–80. Because 71Five "intends to apply for and participate in future grant programs," 3-ER-208, preliminary and permanent injunctive relief is needed to ensure future access.

Second, the district court characterized 71Five's injuries as merely monetary and said its financial injuries were insufficient without organizational "extinction." 1-ER-15–16. But that misses the point. An inability to seek reimbursement for hundreds of thousands of dollars forces 71Five to forgo *future* ministry activities, which itself is a constitutional violation and irreparable harm. Because of the Department's actions, 71Five has been prevented from:

- Filling an open Campus Ministry Director position;
- Expanding its ministry, including its VoTech program;
- Making critical building repairs at one of its youth centers;
- Replacing worn bikes and purchasing needed bike equipment to maintain a safe and functional fleet;
- Providing additional trauma-informed care training for staff; and
- Helping the nonprofit organizations Life Art and Familia Unida recover the funds they spent on grant-related programs.[3]

2-ER-25–26. The loss of ministry opportunities constitutes irreparable harm that only an injunction can fix. *Cf. Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("[T]hreatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm.").

[3] These two organizations were subgrantees to 71Five's grants and should have each received $20,000 last year. *See* 2-ER-25.

Third, the district court said 71Five's injuries could be remedied by monetary damages—and thus are not irreparable—yet held that qualified immunity precludes 71Five's ability to recover damages. 1-ER-15–16, 19–20. That makes no sense. And this Court has held that monetary injury *is* irreparable when sovereign immunity prevents the plaintiff from recovering damages. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *see also Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009) (finding irreparable harm when the plaintiff "can obtain no remedy in damages against the state because of the Eleventh Amendment"). The district court ignored this precedent.

Because 71Five will continue to suffer irreparable harm without its requested relief, this Court should reverse the district court's order and judgment.

2. The public interest and balance of equities strongly favors an injunction.

When a government entity is the party opposing injunctive relief, "the third and fourth factors—the balance of equities and the public interest—'merge.'" *FCA*, 82 F.4th at 695 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Because "it is always in the public interest to prevent the violation of a party's constitutional rights," *Am. Beverage Ass'n*, 916 F.3d at 758 (citation omitted), the motions panel correctly held that these factors also favor an injunction, Em. Inj. Order 11.

Beyond erring on the merits, the district court held that these factors disfavor an injunction because the grant funds have already been disbursed to other applicants and the Department would need to enter into a grant agreement with 71Five, disburse unbudgeted money, and engage in multiple steps to monitor a currently unfunded grant award. 1-ER-18. But 71Five is not asking the Department to cancel or change its agreements with other grantees. Nor has the Department shown that it must pull money from other grantees to reinstate 71Five. And none of the district court's arguments justify excluding 71Five from participating in *future* grant cycles.

Plus, when comparing the competing parties, the Department cannot reasonably argue, given its $5.8 *billion* budget for 2023-2025,[4] that it will suffer more harm than a nonprofit ministry with limited resources that will dwindle each passing day without an injunction. And a superlative injustice would result if the Department were allowed to keep excluding 71Five from its grant programs while approving secular grantees that openly discriminate in violation of the very same policy. The balance of equities and public interest favor an injunction.

[4] State of Oregon Legislative Fiscal Office, *2023-25 Budget Highlights* at 31, https://perma.cc/EH3N-WEMT (last visited Aug. 21, 2024).

II. The district court improperly dismissed the case based on qualified immunity.

The district court's motion-to-dismiss ruling is also deeply flawed. The Court should reverse and reinstate all 71Five's claims.

A. The Department concedes dismissal of 71Five's claims for declaratory and injunctive relief was improper.

The Department sought dismissal of *only* the individual-capacity claims based on qualified immunity. And even then, the Department did not dispute that 71Five's complaint plausibly alleged constitutional violations for all claims, arguing instead that 71Five's rights were not "clearly established" at the time of their violation. Yet the district court dismissed the *entire* lawsuit, including 71Five's official-capacity claims for prospective declaratory and injunctive relief.

The Department concedes this was error. Resp. to Em. Mot. 2 n.1. And rightly so: "Qualified immunity is an affirmative defense to damage liability" and "does not bar actions for declaratory or injunctive relief." *Presbyterian Church (U.S.A.)*, 870 F.2d at 527. This Court should reverse and allow 71Five to pursue prospective declaratory and injunctive relief.

B. The district court also erred by dismissing 71Five's request for damages.

This Court should also allow 71Five to proceed with its request for damages because the complaint, taken as true, plausibly alleges a violation of a clearly established right.

Qualified immunity does not apply if the state officials "(1) violated a constitutional right that (2) was clearly established at the time of the violation." *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022). At the motion-to-dismiss stage, "'dismissal is not appropriate unless [the court] can determine, based on the complaint itself, that qualified immunity applies.'" *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023) (quoting *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016)).

Given this standard, it is "generally inappropriate to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *MacIntosh v. Clous*, 69 F.4th 309, 315 (6th Cir. 2023) (cleaned up); *accord Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018) ("Determining claims of qualified immunity at the motion-to-dismiss stage raises special problems for legal decision making."). That is because courts assess the constitutional right "in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (citation omitted). And that often requires "an evidentiary record ... developed through discovery." *O'Brien*, 818 F.3d at 936.

Here, the district court based its qualified-immunity analysis on its determination that 71Five was "unlikely to succeed on the merits of [its] claims." 1-ER-19. But that was not the question. For qualified immunity, the district court was supposed to consider if the complaint—taken as true and construed in 71Five's favor—plausibly alleges a violation of a clearly established First Amendment right. It does.

Start with the free-exercise claim. 71Five's complaint alleges that: (1) the Department officials have not "applied or enforced" the Certification Rule "consistently"; (2) that they have "retained discretion to create exceptions" to the rule and have "in fact done so"; and (3) that the effect of the rule in real operation was "to exclude only those organizations with religious beliefs and practices like 71Five." 3-ER-244–45. All these allegations, taken together as true, assert a violation of a clearly established constitutional right. *See, e.g.*, *FCA*, 82 F.4th at 686 (explaining that a "bedrock requirement[ ] of the Free Exercise Clause" is that "the government may not treat comparable secular activity more favorably than religious exercise") (cleaned up). What's more, the preliminary-injunction record proves what 71Five alleged, putting this case "well within the heartland of [this Court's] en banc decision in *FCA*." Em. Inj. Order 8.

That alone is enough to reverse the district court. *See Keates*, 883 F.3d at 1235 ("plaintiffs are entitled to go forward with their claims" if the complaint alleges "even one ... harmful act that would constitute a violation of a clearly established constitutional right") (citation omitted). But the complaint alleges even more violations of clearly established rights.

For instance, the complaint alleges that the officials enforced the Certification Rule against 71Five because the ministry's beliefs require it to hire those who share its faith, thereby excluding 71Five solely

because of its "religious character and exercise." 3-ER-241–42. Such allegations assert a violation of a clearly established constitutional right under *Trinity Lutheran*, *Espinoza*, and *Carson*. The district court's contrary conclusion that the officials' actions did "not turn on [71Five's] religious exercise," 1-ER-19, conflicts with the allegations of the complaint and improperly construes them in the Department's favor.

The complaint also alleges the officials violated 71Five's clearly established rights under the Religion Clauses by interfering with its rights to (1) freely select ministerial employees and (2) prefer coreligionists for non-ministerial positions. 3-ER-242–44. The district court did not question these rights—or even that they are clearly established.[5] Instead, it held that "no precedent" shows they "can be the basis for an affirmative claim against a government agency." 1-ER-19. But this "conflates the existence of a constitutional right with the availability of a remedy for a violation of that right." *Polanco*, 76 F.4th at 933. In any event, 71Five *can* assert these rights as affirmative claims in an "action at law" and thus seek the same remedies available to all other plaintiffs. 42 U.S.C. § 1983.

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[5] They are clearly established. *See infra* Section I.B.; *see also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them," is a fundamental "means by which a religious community defines itself.").

The complaint similarly asserts a violation of 71Five's clearly established right to expressive association. The district court did not analyze this claim, but the complaint plainly alleges the Certification Rule would require 71Five to associate with people who reject its beliefs and thus would impair its "ability to advocate public [and] private viewpoints." *Dale*, 530 U.S. at 648; *see Keates*, 883 F.3d at 1235.

Finally, if the district court thought that overcoming qualified immunity requires a case *exactly* like this one, *see* 1-ER-19, that is not the law. 71Five need not identify "a case directly on point." *Perez v. City of Fresno*, 98 F.4th 919, 924 (9th Cir. 2024). All that's required is that "the contours of [the] right" be "sufficiently clear such that any reasonable official in his shoes would have understood that he was violating it." *Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1038–39 (9th Cir. 2018) (cleaned up). The contours were sufficiently clear here.[6]

CONCLUSION

This Court should reverse, reinstate all 71Five's claims, and direct the district court to enter a preliminary injunction that ensures 71Five is reinstated and can freely apply for and participate in future programs without giving up its religious hiring practices.

[6] The City of Medford's response to a similar complaint about 71Five's religious employment practices proves the point, as city officials there concluded that "directly on point" Supreme Court precedent prevented it from excluding 71Five from a city grant program. 3-ER-213–18.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiff-Appellant is unaware of any related cases currently pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2024 I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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