

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION**

INTERVARSITY CHRISTIAN
FELLOWSHIP/ USA, *et al.*,

Plaintiffs,

v.

THE UNIVERSITY OF IOWA, *et al.*,

Defendants.

Civil Action No. 18-cv-00080-SMR-SBJ

**PLAINTIFFS' REPLY TO
DEFENDANTS' SUPPLEMENTAL
BRIEF OPPOSING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. The University violated constitutional free speech, association, and exercise protections.	2
A. The University infringed InterVarsity’s rights to free speech and association	2
B. The University infringed InterVarsity’s free exercise rights	6
C. The University fails strict scrutiny.....	8
II. The University violated the Religion Clauses	11
III. InterVarsity is entitled to relief	13
A. InterVarsity is entitled to damages	13
B. InterVarsity is entitled to a permanent injunction.....	15
CONCLUSION	17

INTRODUCTION

In the last fifteen months, this Court has entered three injunctions against the University of Iowa for engaging in unlawful discrimination. Yet the University completely ignores these rulings. Instead, it continues to insist that it was justified in deregistering InterVarsity because of its religious standards for leaders, even as it allowed other religious, political, and fraternal groups to maintain *their* leadership standards. Tellingly, the additional discovery that the University sought from this Court factors not one whit into its supplemental brief. Instead, the University copied-and-pasted its original resistance from January, which tried to justify its discriminatory conduct, dropping out the old Rule-56(d) argument and adding a couple of paragraphs on the new Iowa law that undermines the claimed compelling interest the University had for deregistering InterVarsity.

While the University now states that it “has no plans” to violate the new law by enforcing its policy against groups’ leadership restrictions, Defs.’ Suppl. Resp. Br. at 32, the day *after* the law went into effect, the University—through its Rule 30(b)(6) witnesses—testified that its discrimination against InterVarsity’s religious leadership standards was constitutionally valid. Taking no account of this Court’s prior rulings, it argued that if InterVarsity re-submitted its constitution now, it would be rejected as noncompliant. IVCF Suppl. SoF ¶¶ 333-34. Moreover, it insisted that the double standards this Court condemned in *BLinC* were constitutional. The University testified that, under its policy, political groups could require their leaders to embrace *secular* anti-poverty principles, but that InterVarsity couldn’t require its leaders to accept *religious* anti-poverty principles, as expressed—for example—through the Parable of the Good Samaritan. *Id.* ¶¶ 300-301, 350. Women in Science and Engineering could “encourage” its members to be women, but InterVarsity couldn’t encourage its leaders to be Christian. *Id.* ¶¶ 270-73, 280-83. Hawkapellas could require the singers leading its group to be “all-female,” but InterVarsity couldn’t ask the students leading its worship services to believe in the God they praise. *Id.* And the University re-affirmed that Love

Works could ask its leaders to share its faith to preserve its mission, but that InterVarsity couldn't make the same request of its leaders, even though the University concedes this ban undermines InterVarsity's mission. *Id.* ¶¶ 315-16.

Finally, the University admitted that it had no InterVarsity-specific interest, let alone a compelling interest, in rejecting InterVarsity's 25-year-old religious leadership standards. IVCF Suppl. SoF ¶¶ 290-92, 304-07, 311, 322, 362-64, 369, 377-78. Nor did it make any attempt to choose the least restrictive means of serving its interests when it deregistered InterVarsity, *id.* ¶¶ 308-11, 363, 375-76, inflicting palpable harm on InterVarsity, including the biggest drop in membership levels in over 20 years, *id.* ¶¶ 242-46. In short, the additional discovery has served only to underscore the University's deliberate and harmful targeting of religious groups whose beliefs it does not favor.

The First Amendment does not permit that kind of discriminatory treatment of religion. The University was wrong to deregister InterVarsity, along with Sikh, Muslim, Latter-day Saint, and Protestant groups. This Court should enter summary judgment for InterVarsity, grant nominal damages against the University, issue a permanent injunction and declaratory relief, hold that the individual defendants are not entitled to qualified immunity, and set a date for a trial on damages.

ARGUMENT

InterVarsity incorporates by reference its prior briefing, which addresses the arguments that the University repeats for a second time in its supplemental brief. *See* IVCF Br. [Dkt. 24] *and* IVCF Reply Br. [Dkt. 40]. InterVarsity addresses below how the arguments for judgment in its favor have only become stronger in light of this Court's *BLinC* ruling and the additional discovery.

I. The University violated constitutional free speech, association, and exercise protections.

A. The University infringed InterVarsity's rights to free speech and association.

As this Court explained in *BLinC*, viewpoint discrimination is an "egregious" restriction on expression that is "presumed impermissible" and infringes both the rights to freedom of speech

and freedom of association. *BLinC v. Univ. of Iowa*, 360 F. Supp. 3d 885, 896 (S.D. Iowa 2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)). And because limiting “who speaks on the group’s behalf colors what concept is conveyed,” *id.* (quoting *Christian Legal Society v. Martinez*, 561 U.S. 661, 680 (2010) (cleaned up)), leadership selection policies can constitute viewpoint discrimination. *See also* IVCF Br. at 8-14 and IVCF Reply Br. at 1-7 (further articulating free speech and free association analysis). If they do, they are subject to strict scrutiny. *BLinC*, 360 F. Supp. 3d at 896.

In *BLinC*, this Court found that the University’s application of its policy was viewpoint discriminatory for two reasons: first, it granted express exemptions from its policy for other registered student organizations (RSOs), and second, it enforced its policy unevenly, allowing other RSOs to do what it banned InterVarsity from doing. 360 F. Supp. 3d at 899. Both flaws are here as well.

First, the University admits that it grants an exemption to student organizations that provide “safe spaces” to undefined minority populations. For instance, it allowed Love Works to require its leaders to agree with its religious beliefs and allowed House of Lorde to require its leaders to identify as black and queer. IVCF Suppl. SoF ¶ 316. The University explained that these exemptions were necessary to avoid undermining the purposes of the groups. *Id.* ¶ 317. But it admitted that failing to grant a similar accommodation for religious groups would undermine their missions just as much. *Id.* ¶ 318. For instance, as a Rule 30(b)(6) witness for the University, Defendant Andrew Kutcher admitted that it would impair the message of a Jewish student group if they had to have the Passover celebrations led by a Muslim, and do the same to a Muslim group if its celebration of Eid Al-Fitr were led by a Christian. *Id.* ¶ 319; *see also* JCRL/Uddin Amicus Br. at 10-12 [Dkt. 27] (explaining need for minority faiths to have representative leadership). And Kutcher

conceded that it would “significantly impair” the message of InterVarsity’s prayers and Bible studies if they were led by individuals who did not share InterVarsity’s Christian faith. IVCF Suppl. SoF ¶ 320. He also admitted that it would open InterVarsity up to charges of hypocrisy, and thus that it was reasonable for InterVarsity to ask its leaders to sincerely believe in its faith. *Id.* 321. The University’s other Rule 30(b)(6) witness, Defendant Dr. Melissa Shivers, agreed that sincere belief in the content of religious study or ritual was necessary to avoid changing the nature of the message being conveyed and to avoid damaging trust within a religious student group. *Id.* 366-68; *see also* IVCF App. 1953 (InterVarsity declaration explaining that core part of group’s message is that “Christian faith must be real and authentic to the individual,” which it believes is undermined by “leaders who express our faith without personally accepting it”).

Second, the University does not enforce its policy equally as against non-exempt groups. For instance, the University informed InterVarsity that its constitution could not “encourage” its leaders to agree with its faith. IVCF Suppl. SoF ¶¶ 273-76. But the University approved the constitution of Women in Science and Engineering, which explicitly “encourage[s]” members to be “a woman.” *Id.* ¶ 273. Similarly, the University “allows groups, such as Hawkapellas . . . , to limit leadership based on protected traits in violation of the Human Rights Policy,” while InterVarsity may not. *BLinC*, 360 F. Supp. 3d at 899; IVCF Suppl. SoF ¶¶ 280-82 (listing Hawkapellas among other compliant RSOs). “That,” as this Court has explained, “is viewpoint discrimination.” *BLinC*, 360 F. Supp. 3d at 899.

Finally, the policy is not neutral on its face. First, it provides an express exemption to social fraternities and sororities, allowing them to express their viewpoints “through their leadership [and membership] criteria” while denying that same opportunity to InterVarsity. *Id.* Second, and similarly, the policy categorically exempts political and ideological leadership selection. Thus, the

University admits that, under its policy, a political group can exclude leadership candidates who do not hold its political beliefs about poverty alleviation, but InterVarsity cannot ask its leaders to hold substantively similar beliefs that are rooted in religious conviction, such as the Parable of the Good Samaritan. IVCF Suppl. SoF ¶¶ 301, 346. That is textbook viewpoint discrimination. *BLinC*, 360 F. Supp. 3d at 896 (citing *Rosenberger*, 515 U.S. at 829 (viewpoint discrimination arises when “the government targets . . . particular views taken by speakers on a subject”), and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-09 (2001) (finding viewpoint discrimination where forum permitted subject matter but banned religious views on that subject matter)).

The University does not make a single attempt to address this Court’s rulings regarding speech and association in *BLinC*. And its sole new factual argument is to produce a self-serving list of RSOs, a list similar to the one this Court twice rejected in *BLinC*. See *BLinC*, 02/01/2019 Hr’g Trans. 39:15-40:2 [Dkt. 114]; see also *BLinC*, 02/13/2019 Text Order Striking Attachment [Dkt. 120]. But far from proving that the University has treated all RSOs “on an equal and fair basis,” Defs.’ Resp. Br. at 15-16 [Dkt. 50], the list is primarily meant to artificially move Love Works from the “compliant” list to the “pending review” list, IVCF Suppl. SoF ¶¶ 325-29; see also Defs.’ App. ¶¶ 223-24. This move is meaningless for several reasons. First, it doesn’t address the numerous other groups that enjoy express or *de facto* exemptions. *BLinC*, 360 F. Supp. 3d at 890-91, 895, 899 & n.9. Second, it ignores that the University both represented to this Court and testified under oath in this case that Love Works’s constitution was and is compliant with the University’s policy. IVCF Suppl. SoF ¶¶ 279-83, 316, 327. Third, and most importantly, Love Works was never told to remove its constitutional faith requirements, never threatened with deregistration, and never deregistered. *Id.* By contrast, InterVarsity was ordered in the middle of the summer to change its constitution in just two weeks, ordered to immediately remove leadership selection provisions that

previously had been permissible for decades, deregistered for failing to abandon its religious leadership standards, and thereafter publicly (and falsely) held out by the University as “defunct” due to “lack of interest.” *Id.* ¶¶ 232-33; *see also* 220, 277-78, 286; *accord* ¶¶ 287-289 (admitting that “defunct” message would harm recruitment).

Those are big differences and came with big costs. It cost InterVarsity USA over 40 staff work hours and thousands of dollars in legal fees just to regain temporary equal access to campus. IVCF Suppl. SoF ¶ 228. Deregistration also meant that InterVarsity missed meetings over the course of the summer that it normally would have held. *Id.* ¶ 230. It also took a toll on InterVarsity’s membership and leadership. Current members are “terrified” and worried, particularly due to the University’s influence over students’ educations and careers. *Id.* ¶¶ 239-41. The current president, Katrina Schrock, would not have accepted a leadership role had she known what the University was going to do, may not have even joined the group, and has been reluctant to recruit new leaders and members because she doesn’t want to put others through what she’s been through. *Id.* ¶¶ 229-231. And InterVarsity’s membership suffered its steepest decline in over 20 years, having dropped by about a third since deregistration. *Id.* ¶¶ 242-46. In sum, InterVarsity has suffered significant costs, lost opportunities, frightened students, shrunken numbers, a smaller leadership pool to draw from, and fewer opportunities to recruit new members. None of that is true of groups like Love Works which never lost their registered status.

Because the University discriminated against InterVarsity, it must face strict scrutiny.

B. The University infringed InterVarsity’s free exercise rights.

The University concedes, as it must, that if its policy is not neutral or generally applicable, then “strict scrutiny applies” under the Free Exercise Clause. Defs.’ Resp. Br. 29 [Dkt. 36]; Defs.’ Suppl. Resp. Br. 25. This Court has already found in *BLinC* that the policy’s many exemptions for other student organizations triggers strict scrutiny under the Free Exercise Clause, 360 F. Supp. 3d

at 902, and the University—again—makes no effort to explain why this Court’s conclusion does not fully apply here. *See also* IVCF Br. 14-19; IVCF Reply Br. 7-9 (further detailing Free Exercise argument).

If anything, the Free Exercise violation is at its apex here, since the University admits that its policy forbids InterVarsity’s Christian leadership requirement *solely because of its religious content*. That much is clear from its briefing, which admits that it forbids InterVarsity from selecting leaders “on the basis of religion.” Defs.’ Suppl. Resp. Br. 7. And it is even clearer now that the University has conceded that its policy forbids the Good Samaritan while permitting the Great Society. IVCF Suppl. SoF ¶¶ 301, 350. Thus, the policy fails to meet even the “minimum requirement of neutrality” that a law operate “without regard to religion.” IVCF Br. 18; *see also Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 n.4 (2017) (noting that “a law targeting religious beliefs as such is never permissible”).

Further, the University’s testimony shows that the University has made an explicit judgment to tolerate massive harms to its interests from secular groups while treating comparatively miniscule harms from InterVarsity as intolerable. The University testified that it rejected InterVarsity’s leadership standards to avoid exclusion of non-Christian students from InterVarsity’s leadership positions. IVCF Suppl. SoF ¶ 290. But it admitted that InterVarsity only has a handful of leadership positions available annually, and that, by contrast, the University tolerates exclusion for *thousands* of social fraternity and sorority positions annually. *Id.* ¶¶ 291-94. Similarly, when asked to explain how its interests in avoiding exclusion weren’t implicated just as much by exclusions from political or ideological leadership positions, the University flatly admitted that there is not any difference in the harms and that it is just willing to accept the harm when it comes from a political or ideological group but not from a religious group. *Id.* ¶¶ 301-03. Finally, the University

could not identify any reason why the University could accommodate Love Works's religious leadership standards and not InterVarsity's. *Id.* ¶ 322.

Thus, the University completely fails to explain how its exemptions do not threaten its interests in equal access “in a similar or greater degree than” InterVarsity's leadership requirement. *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 11 (Iowa 2012) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993)). For these reasons, the University's actions trigger[] the most exacting scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2021.

C. The University fails strict scrutiny.

The University fails strict scrutiny for the reasons stated in InterVarsity's prior briefing and in this Court's *BlinC* ruling. *See* IVCF Br. 19-20; IVCF Reply Br. 9-12; *see also* *BlinC*, 360 F. Supp. 3d at 902-03. It also fails because it simply made no real effort to comply with strict scrutiny's high standard.

Compelling Interest. As discussed above, because the University's interpretation and application of its policy “leaves appreciable damage to [its] supposedly vital interest[s] unprohibited,” the ban on religious leadership selection “cannot be regarded as protecting an interest of the highest order.” *Lukumi*, 508 U.S. at 547 (quotation marks omitted). But the problems run deeper than that. The University never even attempted to protect sensitive First Amendment interests that it knew were implicated by its new policy.

First, the University has simply failed to show that there was an “actual problem” in need of solving. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (quotation marks and citation omitted). The University admitted that, after 25 years on campus before deregistration and in the eight months since regaining access to campus, there is no evidence anyone complained when InterVarsity was allowed to select leaders who embrace its faith. IVCF Suppl. SoF ¶¶ 298-99. Indeed, the only evidence in the record is that the University itself awarded InterVarsity for its

service to the student body at a time when InterVarsity was still allowed to select religious leaders. IVCF Reply SoF ¶¶ 4-5, 9 [Dkt. 40-1]. Nor did the University attempt to gather, discuss, or otherwise identify any specific evidence of harms that were caused by InterVarsity's religious leadership standards or that would result from granting InterVarsity an accommodation. IVCF Suppl. SoF ¶¶ 357-65.

Indeed, not only has the University failed to show that granting *InterVarsity* an accommodation would harm its interests, it has also failed to show that denying *fraternities and sororities* an accommodation would harm its interests. IVCF Suppl. SoF ¶¶ 312-13, 357-65, 369-78. That is, the University's balancing of comparative interests has been entirely unmoored from any sort of evidence-based analysis. *Id.* Nor has the University set up any sort of mechanisms to monitor whether the prohibition on InterVarsity's leadership selection and the allowance of Greek groups' membership exclusions either help or harm its interests. *Id.* The University seems entirely uncurious about the real-world effects of its policy. And that is fatal for their strict scrutiny showing. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821 (2000) (governmental failure to conduct "some sort of field survey" made it "impossible to know" if the regulation served its alleged interest, meaning it flunked strict scrutiny).

Least Restrictive Means. As a general rule, the government "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)). The University repeatedly failed to meet that burden.

For instance, the University admitted that it was aware of other public universities, such as Iowa State University, that are subject to the same federal and state laws to which it is subject, and

which had clear-cut policies that would accommodate religious leadership selection. IVCF Suppl. SoF ¶¶ 304-07; 377-78. Yet the University made no attempt to study or explain why those policies could not be adopted by the University, as they effectively had been in the previous 25 years of InterVarsity's registered status on campus. *Id.* There was no evidence reviewed by the University showing that those policies were ineffective at other institutions, nor was there any evidence showing that something about the University environment made them impracticable for the University. *Id.* Such "meager efforts to explain" why "the plans adopted by those other institutions would not work" for the University means that the University cannot show its policy is the least restrictive means. *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013).

The University also admitted that it made no effort to study or consider reasonable alternatives or accommodations. For instance, it gave only fleeting consideration to InterVarsity's suggestion about "strongly encouraging" its leaders to agree with its faith. And despite granting precisely the same accommodation to Women in Science and Engineering, the University denied it for InterVarsity with no explanation and no attempt to study the issue. IVCF Suppl. SoF ¶¶ 273-76, 363. Similarly, the University failed to consider or suggest whether *some* form of leadership selectivity might be sufficient, even though it permitted Hawkapellas to restrict its leading roles to women because it allowed men to participate in other ways. *Id.* ¶¶ 273, 308-11, 359-65. Further, there was no effort to study whether there could be some middle road between registration and complete deregistration. *Id.* ¶¶ 308-09. To be sure, these alternatives may have suffered from their own infirmities, but the University's failure even to consider them means that it cannot survive strict scrutiny. *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) (passing least restrictive means test requires proving that policy "is necessary," is "not underinclusive," and "could be replaced by no other regulation."); *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (government

flunked the narrow-tailoring test where it had “identified no evidence” to “prove” tailoring).

In sum, the University failed to get beyond the “broadly formulated” considerations that have long been held insufficient, thus failing to meet its burden to prove the “asserted harm of granting specific exemptions to particular religious claimants.” *Gonzales v. O Centro*, 546 U.S. 418, 431 (2006). Instead, the University has fallen back on what the Supreme Court has repeatedly called “the ‘classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.’” *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (quoting *O Centro*, 546 U.S. at 436; citing *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). And what makes that rejoinder even more inappropriate here is that while the University relied on an interest in consistency to deregister InterVarsity, it *immediately* abandoned that interest for all sorts of other favored groups.

The University accordingly fails strict scrutiny.

II. The University violated the Religion Clauses.

The Religion Clauses protect InterVarsity’s selection of its religious leadership. IVCF Br. 21-24; IVCF Reply Br. 12-13. The University counters that the Religion Clauses’ protection is restricted to “disputes within private churches.” Defs.’ Suppl. Resp. Br. 32. Not so. Courts have regularly applied the Religion Clauses to the selection of religious leaders by university campus ministries, including InterVarsity USA, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015), as well as universities, hospitals, and nursing homes. IVCF Br. 22; IVCF Reply Br. at 12-13. Further, courts regularly apply the ministerial exception when a governmental entity, such as the EEOC, seeks to enforce the law in a way that entangles government with the religious mission of a religious organization. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000). Nor should it matter whether the government’s interference arises from live

internal disputes within religious groups. Defs.’ Suppl. Resp. Br. 31; *see also* *BLinC*, 360 F. Supp. 3d at 885. The effect of the government’s interference with an organization’s “power to determine which individuals will minister to the faithful,” *Hosanna-Tabor*, 565 U.S. at 188-89, is the same, regardless of the government’s reasons for interfering. It is *always* “impermissible for the government to contradict a [religious organization’s] determination of who can act as its ministers.” *Id.* at 185.

Finally, the University argues that the Religion Clauses’ protection for leadership selection only functions as an affirmative defense against lawsuits. Defs.’ Suppl. Resp. Br. 31. But operating as an affirmative defense in employment cases is an *application* of this protection, not the entirety of it. As a matter of constitutional structure, the Religion Clauses together wholly “‘bar the government from interfering’ with a religious organization’s decisions as to who will serve as ministers.” *InterVarsity*, 777 F.3d at 836 (quoting *Hosanna-Tabor*, 565 U.S. at 181). Further, the University is wrong that defenses and claims are mutually exclusive. The “designation of a claim as an affirmative defense” does not prevent a party “from asserting that claim in a preemptive action for declaratory or injunctive relief.” Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1274 (3d ed.). Indeed, the Supreme Court itself has characterized the ministerial exception as an example of the “free-exercise *claims*” recognized and upheld by the Court. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (citing *Hosanna-Tabor*) (emphasis added). And the Court has previously applied the Free Exercise Clause to prohibit interference in religious leadership disputes, vindicating the rights of a plaintiff who raised the issue offensively. *See, e.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707 (1976) (noting that diocese was initially sued by defrocked bishop and then filed its own complaint against the bishop; both actions were then consolidated).

Accepting the University's position means that the Religion Clauses' leadership selection protections, alone among the universe of First Amendment rights, exists solely as an affirmative defense. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (plaintiffs generally need not await governmental enforcement lawsuits before vindicating First Amendment rights in court); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (ruling in favor of plaintiff political parties who sought injunctive and declaratory relief against a state law which interfered with their associational rights). That is incorrect.

III. InterVarsity is entitled to relief.

A. InterVarsity is entitled to damages.

Because the University violated InterVarsity's First Amendment rights, "nominal damages must be awarded" against the University "as a matter of law." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008); *accord BLinC*, 360 F. Supp. 3d at 905. "The protection of first amendment rights is central to guaranteeing our capacity for democratic self-government," and "an award of nominal damages to remedy [their] deprivation recognizes the importance to organized society that [they] be scrupulously observed." *Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (cleaned up).

InterVarsity is also entitled to a declaration that the individual defendants are personally liable for violating InterVarsity's First Amendment rights and an order setting a trial date for the determination of the amount of actual damages against them. *See, e.g., IVCF Suppl. SoF ¶¶ 228* (InterVarsity USA's paid staff expended more than 40 hours and over \$4,000 in legal fees over the summer to try to retain and then regain registration before the start of the lawsuit); *Pac. Shores Props., LLC v. Newport Beach*, 730 F.3d 1142, 1166-67 (9th Cir. 2013) (recoverable damages includes diverted staff time and legal fees expended as result of unconstitutional law).

There are no material facts in dispute, so this Court should reject the individual defendants' qualified immunity "as a matter of law." *New v. Denver*, 787 F.3d 895, 899 (8th Cir. 2015). Setting aside that the individual defendants wholly failed to raise the defense in their supplemental brief or otherwise prove it up in previous briefing, the law proscribing the individual defendants' conduct was clearly established before they began discriminating against InterVarsity. While this Court—on a "close call"—found qualified immunity in *BLinC*, 360 F. Supp. 3d at 909, the unlawfulness of the discrimination in this case is more stark.

Most obviously, the individual defendants had the benefit of this Court's first preliminary injunction in *BLinC*, which they knew forbade selective enforcement of the University's policy against religious student groups. IVCF Suppl. SoF ¶¶ 251, 338-340. Yet they admitted that they deregistered InterVarsity for its religious leadership requirements while exempting other student groups. *Id.* ¶¶ 278-280; 293, 315, 347-356; *see also* ¶¶ 268-273. The individual defendants knew that such uneven enforcement of the policy was in "conflict" with the First Amendment. *Id.* ¶ 345; *see also* ¶¶ 253, 323-24; 346-47. And they admitted that they made no attempt to accommodate InterVarsity's religious beliefs or consider reasonable alternatives that would preserve InterVarsity's religious mission, despite providing specific accommodations to other groups, such as the Hawkapellas and Love Works, in order to protect their missions. *Id.* ¶¶ 315-322; 366-76. The individual defendants were also aware that other public universities, including Iowa State, accommodated student groups' leadership requirements, but they made no effort to determine whether that approach—which had mirrored the University's approach to InterVarsity for 25 years—would be effective at the University. *Id.* ¶¶ 304-07; 377-78. And the individual defendants were aware that, just days after making the internal decision to deregister InterVarsity, this Court entered a second *BLinC* injunction forbidding selective enforcement against religious groups. *Id.* ¶¶ 251,

341. Yet the individual defendants still refused to re-register InterVarsity, leading to InterVarsity missing meetings, losing recruiting opportunities, suffering harm to its members and leaders, experiencing the biggest drop in membership in over 20 years, and incurring significant costs. *Id.* ¶¶ 224-247.

Further, the individual defendants testified that they discriminated against InterVarsity *because of its religious beliefs as such*: political groups can insist on poverty-reduction agreement, but InterVarsity can't insist on Good Samaritan agreement; Hawkapellas can insist on women to sing its songs, but InterVarsity can't insist on Christians to lead its worship. That kind of religious discrimination is "never permissible," *Trinity Lutheran*, 137 S. Ct. at 2024 n.4, and has long and repeatedly been rejected by the courts under both the Free Exercise and Free Speech Clauses. *See id.* (free exercise); *Rosenberger*, 515 U.S. at 829 (free speech); *Good News Club*, 533 U.S. at 108-09 (free speech); *Zimmerman*, 810 N.W.2d at 16 (free exercise); *see also Sundquist v. Nebraska*, 122 F. Supp. 3d 876 (D. Neb. 2015), *aff'd* 692 F. App'x 800 (8th Cir. 2017) ("[T]he Eighth Circuit subscribes to a 'broad view' of what constitutes clearly established law"). Moreover, the individual defendants long knew this to be true, which explains why they had previously approved InterVarsity's constitution for 25 years and warned student government officials against attempts to punish religious student groups for religious leadership selection. IVCF Reply SoF ¶¶ 4, 79, 87, 90.

The individual defendants knowingly enforced University policy selectively against InterVarsity on the basis of InterVarsity's religious leadership requirements. As a matter of law, they are not entitled to qualified immunity.

B. InterVarsity is entitled to a permanent injunction.

The University claims that no injunction is needed because the Governor Kim Reynolds recently signed Senate File 274, which should protect InterVarsity's leadership selection. Defs.'

Suppl. Resp. Br. 32. Yet the day *after* the Governor signed the bill the University testified through its Rule 30(b)(6) witness that its policy had not changed, that InterVarsity's constitution was still deemed "noncompliant," that if InterVarsity resubmitted its constitution, it would still be rejected, IVCF Suppl. SoF ¶¶ 333-34, but that political groups, fraternal organizations, and religious groups like Love Works that provide "safe spaces" were still allowed to maintain *their* leadership selection requirements, *id.* ¶¶ 315-16. Even the latest sample from the University's line of evolving charts (filed on April 10) still has the religious groups cordoned off and stuck in a holding pattern "pending" this lawsuit. Defs.' Suppl. SoF ¶ 104. All this despite this Court's orders, which were ignored, IVCF Suppl. SoF ¶¶ 330-33, 379-83, and despite the University having long been aware of and monitoring the new Iowa legislation, *id.* ¶ 384. Considering that there is no sworn testimony that the University intends to comply with the law, but rather sworn testimony that it *has not* changed its policy in response to either this Court's prior injunctions or the new law, any unsworn, unverified litigation positions in the University's brief should be disregarded.

Moreover, even the positions in the brief are hardly reassuring. The University states that it "has no *plans*" to continue its discrimination against InterVarsity; that "[a]t *this time*" InterVarsity is in good standing; and that InterVarsity "*currently*" faces no threat of irreparable harm. Suppl. Resistance at 32 (emphases added). Because the University promises only that it will "continue to evaluate [its] policies and determine if there are necessary changes," with no idea "what that timeframe would look like," IVCF Suppl. SoF ¶ 384, the Court should end the uncertainty and enter a binding, permanent injunction against all Defendants. At a minimum, the Court should reserve judgment on the permanent injunction until the University has revised its policy to expressly confirm that it will follow its obligations under the First Amendment.

CONCLUSION

InterVarsity respectfully requests that the Court grant summary judgment for InterVarsity, award nominal damages against the University, issue a permanent injunction and declaratory relief, find that the individual defendants are not entitled to qualified immunity, and set a date for a trial on damages.

Respectfully submitted,

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