

No. 19-3389

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTERVARSITY CHRISTIAN FELLOWSHIP/USA
and INTERVARSITY GRADUATE CHRISTIAN FELLOWSHIP,
PLAINTIFFS-APPELLEES,

v.

THE UNIVERSITY OF IOWA, ET AL.,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Southern District of Iowa
No. 3:18-cv-00080 (Hon. Stephanie M. Rose)

**BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY AND
THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES IN
SUPPORT OF APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

None of the *amici curiae* is a subsidiary of any other corporation.

Each *amicus curiae* is a non-stock corporation; therefore, no publicly held corporation owns 10% or more of its stock.

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TABLE OF AUTHORITIES

Cases:

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Christian Legal Society v. Martinez,
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Church of the Lukumi Babalu Aye v. City of Hialeah,
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Employment Div. v. Smith,
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Railway Express Agency v. New York,
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 Gerlich v. Leath, 861 F.3d 697 (8th Cir. 2017) (No. 16-1518), 2016
 WL 3157519. 7

Vanessa Miller, *University of Iowa De-recognizes Another 38 Groups:
 Christian Student Group’s Lawsuit Prompted Campuswide Review*,
 The Gazette, July 20, 2018,
 [https://www.thegazette.com/subject/news/education/university-of-
 iowa-deregisters-another-38-groups-20180720](https://www.thegazette.com/subject/news/education/university-of-iowa-deregisters-another-38-groups-20180720). 20

Eboo Patel, *Should Colleges De-Register Student Groups?, Inside
 Higher Education, Conversations on Diversity Blog*, Sept. 28, 2018,
 [https://www.insidehighered.com/blogs/conversations-
 diversity/should-colleges-de-register-student-groups](https://www.insidehighered.com/blogs/conversations-diversity/should-colleges-de-register-student-groups). 31-33

Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the
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United States Commission on International Religious Freedom, *2019 Annual Report* 34, <https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf>..... 36

University of Florida, *Student Organization Constitution Requirements 2019-2020*, Student Activities and Involvement, <https://www.studentinvolvement.ufl.edu/Student-Organizations/Organization-Resources/Policies/Non-Discrimination> 9

University of Iowa, *International Student Profile*, <https://admissions.uiowa.edu/future-students/international-student-profile>. 36

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Tish Harrison Warren, *The Wrong Kind of Christian, Christianity Today*, Aug. 27, 2014, <https://www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html>. 30, 33-34

**Statement of Identity of *Amici Curiae*, Interest in the Case,
and Source of Authority to File¹**

Founded in 1961, **Christian Legal Society (CLS)** is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that it has had a student chapter meeting at the University of Iowa since 1980. As detailed below, since 1999, the University has given the CLS chapter repeated assurances that it could require its leaders to agree with its religious beliefs by affirming its statement of faith and could expect its leaders to conduct themselves in accordance with its religious beliefs. On June 1, 2018, however, the CLS student chapter received an email from the University informing it that it needed to place the University's Human Rights Clause verbatim in its constitution and that any contradictory material needed to be removed. The email warned that if this was not done by June 15, it would be

¹ Pursuant to FRAP 29(E), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amici curiae*, their members, or their counsel) contributed money that was intended to fund its preparation or submission. Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this brief.

deregistered. But the CLS constitution already had the Human Rights Clause in it, as it had included that provision in its constitution since 2004; therefore, the CLS chapter re-submitted its constitution without any change and awaited word from the University as to whether the University would deregister CLS. When the University deregistered 38 groups in July 2018, the CLS chapter was not among the groups deregistered. On August 14, 2018, the University agreed to reinstate the deregistered religious groups until the Court below issued its decision on the merits. On February 1, 2019, the University provided the court below with a list of the groups that would be deregistered if the University prevailed. The list was remarkable: 32 religious groups would be excluded, including the CLS chapter; no nonreligious groups would be excluded; and the 32 religious groups to be deregistered included Jewish, Muslim, Catholic, Evangelical Christian, Orthodox Christian, Sikh, and other faith groups. IVCF App. 2754, 2756.

The Council for Christian Colleges & Universities (CCCU) is the national voice for Christian higher education. The CCCU is a higher education association of more than 180 Christian institutions around

the world, including more than 150 in the U.S. and Canada. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCU's interest in this case is two-fold. First, its students often enroll in graduate programs at public universities and will become part of the religious student groups on campus. Second, the CCCU believes that religious freedom serves the public good, and the CCCU has an associational duty and privilege to advocate for policies that allow religious freedom to flourish in our society.

SUMMARY OF ARGUMENT

As Part I details, over the past two decades, the CLS chapter at the University of Iowa has repeatedly been threatened with derecognition as a student organization because it requires its leaders to agree with its religious beliefs. ¶¶ 51-98, IVCF App. 2251-2266. As the experience of the CLS chapter at University of Iowa illustrates, for many years, the University stated that its Human Rights Policy allowed religious groups to require that their leaders agree with their religious

beliefs. The right of religious groups to select their leaders according to their religious beliefs is a basic component of religious freedom.

But since 2018, the University has attempted to rescind its longstanding exemption for religious organizations' religious leadership requirements. At the same time, it has reinforced its exemption for fraternities' and sororities' single-sex leadership and membership requirements. As Part II explains, the University would violate the Free Exercise Clause if it exempted single-sex organizations from compliance with its policy while refusing to exempt religious organizations from its policy. Title IX does not give the University legal grounds for such discriminatory treatment of religious organizations. Supreme Court precedent makes clear that such discriminatory treatment of religious groups is constitutionally impermissible. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

While there are many troubling aspects of the University's threatened exclusion of religious groups from campus, perhaps the most troubling is the lesson that the University is modeling for its 2500 international students. During their time on American campuses,

international students learn lessons not only inside the classroom but outside as well.

Many international students participate in the religious student groups at the University and are aware of its treatment of their groups. But regardless of whether they participate in a religious group, international students are likely aware of campus controversies, including this one in which the University is penalizing religious student groups because of their religious beliefs as expressed through their leadership requirements.

What lesson are the international students taking home regarding basic human rights like freedom of religion and speech? American colleges should resolutely exemplify the values of free speech and religious freedom with the hope that international students will return home inspired to improve protections for these most basic human rights for their fellow citizens.

Instead, the University seems intent on teaching international students that freedom of religion and speech are mere ideals to which lip service is paid. What a dangerous idea to instill, not only in

international students but also in American students, if we aspire to live in a world that respects religious freedom.

ARGUMENT

I. Since at Least 1999, the Christian Legal Society Student Chapter at the University of Iowa College of Law Has Been a Registered Student Organization with a Constitution that Requires Its Leaders to Affirm Their Agreement with Its Religious Beliefs.

A. CLS has long supported all students' freedom of speech and free exercise of religion.

Christian Legal Society has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech and beliefs. For that reason, CLS was instrumental in passage of the Equal Access Act (EAA), 20 U.S.C. §§ 4071-4074, that protects the right of all students to meet for “religious, political, philosophical or other” speech on public secondary school campuses. 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement) (noting CLS’s assistance in drafting).

For thirty-five years, the EAA has protected the right of both religious and LGBT student organizations to meet at public secondary

schools. *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990), *aff'g*, *Mergens v. Bd. of Educ.*, 867 F.2d 1076 (8th Cir. 1989) (requiring school officials to recognize religious student group); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (requiring school officials to recognize LGBT student group). CLS has supported the free speech rights of student organizations that promote views with which CLS strongly disagrees, such as the legalization of marijuana use. *See Br. Amicus Curiae of Students for Life, Christian Legal Society, et al., Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (No. 16-1518), 2016 WL 3157519 (supporting free speech rights of student chapter of National Organization for the Reform of Marijuana Laws at Iowa State University).

CLS student chapters typically are small groups of law students who meet for weekly prayer, Bible study, and worship at a time and location convenient to the students. Not only do CLS chapters frequently bring outside speakers into their law schools to address legal issues from a religious perspective, but they also frequently collaborate

with other student organizations to present panels of speakers who represent diverse viewpoints on a particular topic.

All students are welcome at CLS meetings. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of faith, signifying agreement with the traditional Christian beliefs that CLS holds. While an attorney member of CLS must affirm the CLS statement of faith, since 2011, a student may be a member of a CLS student chapter without being a member of CLS at the national level. However, once elected to office, a student must become a member of CLS and agree to the CLS statement of faith.

B. The CLS student chapter at the University of Iowa has withstood repeated threats to its recognition.

Beginning in 1993, CLS student chapters began to encounter the misuse of nondiscrimination policies to exclude religious student groups from campus simply because they require their leaders to agree with the groups' religious beliefs. For example, in 1994, the University of Minnesota threatened to derecognize a CLS chapter because of its requirement that its leaders and members agree with its statement of

faith.² But the University eventually changed course and now has a model policy that provides: “Religious student groups may require their voting members and officers to adhere to the organization’s statement of faith and its rules of conduct.” University of Minnesota, *Student Group Policies/Compliance*, Student Unions and Activities, <https://sua.umn.edu/get-involved/student-groups/student-group-policies> (last visited March 15, 2020).³

² Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 668-72 (1996) (detailing the University of Minnesota’s threat to derecognize CLS chapter).

³ Another excellent example of applying a nondiscrimination policy with sensitivity to religious freedom values is the University of Florida’s acknowledgment that: “A student organization whose primary purpose is religious will not be denied Registered Student Organization status on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy.” University of Florida, *Student Organization Constitution Requirements 2019-2020*, Student Activities and Involvement, <https://studentinvolvement.ufl.edu/wp-content/uploads/2019/11/19-20-SAI-Constitution-Requirements.pdf> (“Article IV. University Regulations”) (last visited Mar. 15, 2020). The University of Texas also acknowledges that: “[A]n organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization’s statement of faith.”

CLS student chapters have never tried to prevent other student groups from being recognized student organizations, no matter how much CLS might disagree with their views. Unfortunately, the same cannot be said of some student organizations that have tried to exclude CLS chapters from campus or to deny them the benefits available to registered student groups.

For example, University of Iowa student government officials objected to allocating student activity fees funding to the CLS student chapter because of its religious beliefs in 2004 and 2008-2009, even though University officials explained that CLS was eligible for funding. IVCF's Reply to the University's Response to the Statement of Material Facts (SoF) ¶¶ 57-74, 76-94; IVCF App. 29-40. In particular, in 2009, four registered student groups – The Outlaws, Law Students for Reproductive Justice, Iowa Campaign for Human Rights, and American Constitution Society – objected to funding the CLS student chapter

University of Texas, *Chapter 6. Student Organizations, Eligibility*, § 6-202(a)(3)(A), Appendix C: Institutional Rules on Student Services and Activities, <http://catalog.utexas.edu/general-information/appendices/appendix-c/student-organizations/> (last visited Mar. 15, 2020).

because of “its constitution and membership requirements.” SoF ¶ 82; IVCF App. 2261. These organizations all remain registered student organizations at the University of Iowa College of Law for the 2019-2020 academic year. University of Iowa College of Law, *Student Organizations*, <https://law.uiowa.edu/student-experience/student-organizations> (last visited Mar. 15, 2020).

1. 1999: CLS believes that it had a student chapter meeting at the University of Iowa as early as 1980. SoF ¶ 58; IVCF App. 2253. But it seems that the chapter’s existence may not have been continuous because two law students filed an application to gain recognition as a “new” CLS student chapter at the University of Iowa in 1999. SoF ¶ 51; IVCF App. 2251. The students’ letter to the dean of student services indicated their concerns about including the required nondiscrimination policy -- for all practical purposes the same policy required by the University twenty years later – in the chapter’s constitution. The students had “modified the non-discrimination provision of our constitution,” apparently by omitting “religion,” “sexual orientation,”

and “gender identity.” SoF ¶ 52, 53; IVCF App. 2252-53; 835-838 (full letter).

The students were “concerned that following our sincerely held religious beliefs may conflict with the non-discrimination pledge” on two grounds. *Id.* First, the students were concerned that the University would find the CLS chapter’s requirement that its officers affirm the CLS statement of faith, and that members “share the mission and purposes of the organization,” to be in conflict with the University’s nondiscrimination policy and its prohibition on discrimination on account of religion. *Id.* The students explained their belief that “the chapter cannot serve its purpose, fulfill its mission, and retain its identity unless its officers and those who proclaim the group’s message affirm those beliefs that define the group.” *Id.* The students hastened to add that “[t]his belief does not reflect any animus towards those who are unable to embrace these beliefs” because the group “earnestly desire[d] relationships with non-Christians” and “would be a failure if non-Christians were not welcomed.” *Id.* Second, the students were concerned that “an individual’s participation in conduct our faith deems

immoral might disqualify an individual, as either a formal or practical matter, from holding office in our chapter.” *Id.* The students explained their belief that “there is a meaningful difference between a person who sincerely struggles with sinful sexual inclinations and a person who unrepentantly and unremorsefully engages in conduct the Bible says is wrong.” *Id.* The students were concerned that the University might view this as “‘sexual orientation’ discrimination (or even . . . ‘gender identity’ discrimination, depending upon how that phrase is applied).” *Id.* The students emphasized that “a person’s sexual orientation . . . does not necessarily by itself disqualify someone from participating in the life of our chapter” but “[i]nstead, it is a person’s attitude towards those inclinations, their willingness to submit to Biblical authority, and the degree of their success in trying to live a life pleasing to God that really matters.” *Id.* The University’s Office of General Counsel reviewed the proposed CLS constitution, and it was approved. SoF ¶ 54; IVCF App. 2253.

2. 2003-2004: In the 2003-2004 academic year, CLS sought renewal of its registered status, but its constitution was rejected by the

Office of Student Life for not including verbatim the language of the University's nondiscrimination policy. SoF ¶ 59; IVCF App. 2254. In correspondence with Associate Dean of Students Thomas Baker, CLS asked the University to create a formal, written exemption for religious groups.

In response, Dean Baker sent a letter to CLS stating that it could not omit or modify the Human Rights Policy in its constitution, but that “[a]sking prospective members to sign the CLS statement of faith would not violate the UI Human Rights policy.” SoF ¶¶ 65; IVCF App. 2257; 1284 (original emphasis). The letter confirmed that “the Human Rights Policy does not prohibit student groups from establishing membership criteria,” that a “student religious group is entitled to require a statement of faith as a pre-condition for joining the group,” and that “[i]ndividuals who fail to observe the CLS statement of faith may be dismissed as members.” SoF ¶¶ 61, 64, 67; IVCF App. 2255, 2256, 2257; 1284. The letter further clarified that while a group could not “reject prospective student members solely on the basis of race, gender, or sexual orientation,” it “would not be required, and will not be

required, to condone the behavior of student members – after they join your group – that is contrary to the purpose of your organization and its statement of faith.” SoF ¶ 66; IVCF App. 2257; 1284.

Relying on the University’s own interpretation of its Human Rights Policy, CLS added the Policy to its constitution. SoF ¶ 68; IVCF App. 2257. The University approved the constitution for resubmission to the University of Iowa student government’s Student Organization Recognition Board. In a letter to the Board, the University explained that “[a]s long as prospective members are treated as individuals and not categorically barred from applying for membership, organizational leaders may require members to accept the CLS statement of faith as a condition for participation.” SoF ¶ 69; IVCF App. 2257.

Unfortunately, despite the University’s reassurances, the student chair of the Board refused to sign off on recognition of the CLS chapter because he objected “on both ethical and moral grounds to this organization’s recognition” and found CLS’s beliefs “ethically and morally repugnant.” SoF ¶ 70; IVCF App. 2258. The matter then went to the Student Senate. By memorandum, the Vice President for Student

Services and Dean of Students directed the Student Senate that “CLS is entitled to ask its members to adhere to the group’s statement of faith” and that “under the law and under University policy” the CLS students were “free[] to promote their beliefs through association.” SoF ¶¶ 72, 73; IVCF App. 2258. He advised the Senate that he would recognize CLS if it did not. SoF ¶ 74; IVCF App. 2259. As a result, the CLS chapter’s registration was renewed.

3. 2008-2009: In the 2008-2009 academic year, the student government again objected to the CLS constitution and denied CLS funding because members of the student government were “uncomfortable with your organization.” SoF ¶ 76; IVCF App. 2259. A University vice president instructed the student government that CLS “has been recognized as a University of Iowa student organization after full review of its application, including its constitution” and that “applicable law, including the United States Constitution . . . requires that funding requests from student organizations are processed in a content neutral manner” and “without any consideration of the organization’s viewpoint, including the Statement of Faith in the CLS

constitution.” SoF ¶ 78; IVCF App. 2259-2260. A week later, the University vice president directed the student government leaders to “process” a recognized student organization’s “request in a timely manner without consideration of membership rules as stated in the organization’s constitution.” SoF ¶ 80; IVCF App. 2260.

Three months later, four registered student groups – The Outlaws, Law Students for Reproductive Justice, Iowa Campaign for Human Rights, and American Constitution Society – wrote in opposition to the “recent decision to fund the Christian Legal Society” because its constitution and mandatory statement of faith conflicted with the Human Rights Policy. SoF ¶ 82; IVCF App. 2261. A University vice president responded by reiterating that the Human Rights Policy did “not prohibit student groups from establishing membership criteria” and that the First Amendment protected religious student groups’ right to require affirmation of a statement of faith “as a pre-condition for joining the group.” SoF ¶ 83; IVCF App. 2261.

Nonetheless, the student government attempted to change its bylaws to bar funding for “exclusive religious groups,” that is,

“organizations that restrict membership or access to programming according to religious belief.” SoF ¶ 84; IVCF App. 2262. In response to “the recently adopted bylaws,” CLS wrote the University to note that the student government’s actions “conflict[ed] with [the University’s] previous decisions.” SoF ¶ 85; IVCF App. 2262. The University vice president told the student government leaders that he would “consider[] suspended” the newly adopted bylaws banning funds to “exclusive religious organizations” and instructed the student government leaders to “remove [the bylaws] as soon as possible.” SoF ¶ 88; IVCF App. 2262. A few weeks later, the University informed CLS that the relevant student government bylaws had been removed and that “all religious student organizations will be permitted to apply for . . . funds,” which would be “allocated in compliance with constitutional standards.” SoF ¶ 94; IVCF App. 2264.

4. 2010: On June 29, 2010, *The Daily Iowan* ran an article that CLS understood to “suggest[] that the University was being pressed, yet again, by students hostile to CLS-Iowa to reconsider its status at the University” in the immediate aftermath of *Christian Legal Society v.*

Martinez, 561 U.S. 661 (2010). SoF ¶ 96; IVCF App. 2265. CLS sent a letter to the University explaining the legal and policy reasons why the University should not change its longstanding position of interpreting the Human Rights Policy to permit religious groups to require that their leaders agree with the groups' religious beliefs. The University continued to recognize the CLS chapter.

5. **2018-present**: In April 2018, the CLS chapter completed the annual re-registration process, using the same constitution that it had used since 2004. The CLS chapter thought that its re-registration was complete and that it was a registered student organization for the 2018-2019 academic year. But on June 1, 2018, the CLS chapter received an email from the University informing it that it needed to place the University's Human Rights Clause verbatim in its constitution and that any contradictory material needed to be removed. The email warned that if this was not done by June 15, it would be deregistered.

But the CLS constitution already had the Human Rights Clause in it, as it had included that provision in its constitution since 2004; therefore, the CLS chapter re-submitted its constitution without any

change other than to use bold font to highlight the Human Rights Clause in its constitution. The CLS student president then spent an anxious summer waiting for word from the University as to whether the University would deregister CLS like it had deregistered 38 groups, including several religious groups, in July 2018.⁴ On August 14, 2018, the University reinstated the deregistered religious groups pending a decision by the court below on the merits in this case.

On February 1, 2019, the University provided the court below with a list of the groups that would be deregistered if the University prevailed. The list was remarkable: 32 religious groups would be excluded, including the CLS chapter; the 32 religious groups to be deregistered included Jewish, Muslim, Catholic, Evangelical Christian, Orthodox Christian, Sikh, and other faith groups; and no nonreligious groups would be excluded. IVCF App. 2754, 2756.

⁴ See *University of Iowa De-recognizes Another 38 Groups: Christian Student Group's Lawsuit Prompted Campuswide Review*, *The Gazette*, July 20, 2018, <https://www.thegazette.com/subject/news/education/university-of-iowa-deregisters-another-38-groups-20180720> (last visited Oct. 28, 2018).

II. The University Would Violate the Free Exercise Clause If It Exempted Single-Sex Student Organizations and Refused to Exempt Religious Student Organizations.

As the experience of the CLS chapter at University of Iowa illustrates, the University has long interpreted its Human Rights Policy to allow a religious group to require its leaders to affirm agreement with its religious beliefs. The University has also long interpreted its Human Rights Policy to not require a religious group “to condone . . . behavior . . . that is contrary to the purpose of [its] organization and its statement of faith.” SoF ¶ 66; IVCF App. 2257. The University also has long interpreted its Human Rights Policy to allow single-sex organizations, including fraternities and sororities, as well as single-sex sports teams and music ensembles, to select their members and leaders on the basis of sex.

But since 2018, the University has attempted to rescind its longstanding exemption for religious organizations’ religious leadership requirements while reinforcing its exemption for fraternities’ and sororities’ single-sex leadership and membership requirements. The University’s decision has two important legal consequences, both of

which require the University to recognize religious organizations as registered student organizations while allowing them to retain their religious leadership requirements. The first legal consequence is that the University does not have an “all-comers” policy. The second legal consequence is that the University is in violation of the Free Exercise Clause’s basic requirement that government officials exempt conduct undertaken for religious reasons if they exempt analogous conduct undertaken for nonreligious reasons.

To be clear, even if the University were not exempting numerous nonreligious student groups, the Free Speech and Free Exercise Clauses would require that religious student groups be given an exemption for their religious leadership requirements. But the denial of an exemption for the religious student groups is particularly egregious in this case because the University is exempting numerous nonreligious student groups, creating an additional violation of the Free Exercise Clause.

A. Federal law does not require universities to exempt fraternities and sororities from university nondiscrimination policies.

Before turning to the legal consequences, it is necessary to clarify that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, does not help university officials who wish to exempt fraternities and sororities, but not religious groups, from university nondiscrimination policies. Title IX gives fraternities and sororities an exemption only from Title IX itself. 20 U.S.C. § 1681(a)(6)(A). It does not give fraternities and sororities a blanket exemption from state or local nondiscrimination laws or policies, including a university's own policy, whether that policy is a nondiscrimination policy or an "all-comers" policy. Title IX does not require state entities to exempt fraternities and sororities from their nondiscrimination policies. If the University gives fraternities and sororities an exemption from its Human Rights Policy, that is solely in the University's discretion, but it is *not* required by Title IX or any other federal law.

B. The University’s choice to exempt fraternities and sororities precludes the University from claiming to have an “all-comers” policy.

The University admits that the Human Rights Policy is a nondiscrimination policy and not an “all-comers” policy. SoF ¶ 97; IVCF App. 2265-2266. The University admits that it has not adopted an “all-comers” policy; therefore, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), does not apply.

But even if the University were tempted to claim an “all-comers” policy, the exemption for fraternities and sororities would be proof that it, in fact, does not have an “all-comers” policy. As the *Martinez* decision made clear, an “all-comers” policy may be applied to religious groups *only* if the University applies the policy to *all* groups without exception. *Id.* at 694, 697. The Court held that it was not enough for a university to adopt an “all-comers” policy: a university must actually apply the policy uniformly, with no exceptions, to all student groups. Justice Ginsburg emphasized that the policy was “one requiring all student groups to accept all comers.” *Id.* at 694 (original emphasis). *See also, id.* at 704 (Kennedy, J., concurring) (“the policy applies equally to all

groups and views”). Indeed, the constitutionality of the policy at issue in *Martinez* was never conclusively established because the case was remanded for further consideration regarding whether the “all-comers” policy had been “selectively enforce[d].” *Id.* at 697.

Thus, under *Martinez*, if a University exempts fraternities and sororities from its policy, it does not have an “all-comers” policy and forfeits any protection from that decision. Of course, as a practical matter, an “all-comers” policy is incompatible with the current Greek system at many universities, including at the University of Iowa. Social fraternities and sororities, as well as many professional fraternities and sororities, epitomize sex discrimination because they consist solely of male or female members. Moreover, with its highly subjective “rush” system for selecting members, the Greek system is the antithesis of an “all-comers” policy.

Besides requiring an end to selection of members and leaders on the basis of sex, an “all-comers” policy would require fraternities and sororities to adopt a “first-come, first-pledge” process, or some similarly blind selection process. The impact of an “all-comers” policy, uniformly

and consistently applied, on single-sex sororities and fraternities, singing groups, intramural and club sports teams, and other single-sex organizations would be dramatic.

C. The University's denial of an exemption for religious groups while granting an exemption for fraternities and sororities violates the Free Exercise Clause.

The Supreme Court has ruled that government cannot exempt conduct undertaken for nonreligious reasons while refusing to exempt analogous conduct undertaken for religious reasons. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). *See also, Rader v. Johnston*, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996).

Yet this is precisely what the University seems determined to do. On one hand, the University recently began to deny religious groups an exemption from the Human Rights Policy for leadership requirements based on religion. On the other hand, the University grants fraternities and sororities an exemption from the same Policy for leadership and membership requirements based on sex.

This violates the obligation of religious neutrality that the Free Exercise Clause imposes on government officials. The Free Exercise Clause protects “religious observers against unequal treatment.” *Lukumi*, 508 U.S. at 542. See *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1730-32 (2018); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). It is a fundamental violation of religious neutrality for government officials to exempt conduct undertaken for nonreligious reasons while refusing to exempt analogous conduct undertaken for religious reasons. Such a governmental policy is not generally applicable, and laws that are not generally applicable violate the Free Exercise Clause unless a compelling interest can be shown for the unequal treatment of religious persons. *Lukumi*, 508 U.S. at 546.

D. A corresponding exemption for religious groups is necessary to protect religious students from unequal treatment.

The requirement that a law be generally applicable is based on the commonsense observation that “there is no more effective practical guaranty against arbitrary and unreasonable government than to

require that the principles of law which officials would impose upon a minority must be imposed generally.” *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). As the Supreme Court instructed in *Lukumi*, a regulation that “society is prepared to impose upon [religious groups] but not upon itself” is the “precise evil . . . the requirement of general applicability is designed to prevent.” 508 U.S. at 545-46 (quotation omitted).

Moreover, when religious conduct is regulated and analogous secular conduct is not, the state implies a value judgment about the specific religious conduct and beliefs being regulated. The religious conduct is more objectionable, less deserving of protection, not important enough to overcome the state’s regulatory interests, as compared to the protected secular conduct. *See, e.g., id.* at 537; *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) (regulation not generally applicable because of single secular exception so religious exemption required).

The need for heightened vigilance in protecting religious groups from unequal treatment by the University in its application of its Human Rights Policy is compounded by the fact that the Policy itself was originally intended to protect religious students, not punish them. It is common sense and basic religious liberty – not discrimination – for religious groups to expect their leaders to agree with their religious beliefs. But when a university misinterprets its nondiscrimination policy to penalize religious groups for having religious leadership requirements, it actually misuses the nondiscrimination policy as a sword against students who hold the “wrong” religious beliefs, rather than a shield to protect those students.⁵ By misusing the Human Rights Policy to exclude religious student groups, the University actually undermines the Policy’s basic purpose.⁶

⁵ A personal account of religious student organizations being made to feel that their faith is “wrong” is provided by Tish Harrison Warren, *The Wrong Kind of Christian*, *Christianity Today*, Aug. 27, 2014, <https://www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html> (last visited Mar. 15, 2020).

⁶ University officials themselves noted in their “Executive Summary Student Organization Constitution Review” that:

Something has gone badly wrong when, in the name of inclusion, a university excludes religious groups from campus. Diversity itself is diminished when a university excludes religious students from campus because of their religious beliefs.

The idea that nondiscrimination policies are being misused to exclude unpopular religious groups from college campuses finds support in a recent series of articles by Eboo Patel, president of Interfaith Youth Core and author of Inside Higher Education's *Conversations on Diversity* blog. Eboo Patel, *Should Colleges De-Register Student Groups?*, *Inside Higher Education, Conversations on Diversity Blog*, Sept. 28, 2018, <https://www.insidehighered.com/blogs/conversations-diversity/should-colleges-de-register-student-groups> (last visited Mar.

Approximately 17% of the organizations were noted for additional review to further assess inconsistent language. Student organizations' documents containing language inconsistent with the Human Rights Statement, were primarily those associated with one of the protected classes/characteristics in the statement. The inconsistency was typically related to the class/characteristic with which the group is associated (i.e. a men's acapella group, or a women's sport group for example.

IVCF App. 491.

16, 2020). Mr. Patel explores whether colleges should deregister religious student groups that have religious leadership requirements.

Mr. Patel takes as his starting point the University of Iowa's decision to deregister BLinC and InterVarsity Graduate Christian Fellowship but branches out into a more comprehensive overview of how religious student groups are treated on many campuses. Mr. Patel approaches the topic from his perspective as the member of a religious minority, the Ismaili Muslim community. He concludes that the use of nondiscrimination policies to exclude religious groups from campus because of their religious leadership standards would have a detrimental impact on a hypothetical Ismaili Students Association, as well as other minority religious groups, which often have religious leadership requirements.

Mr. Patel also reports that in his general experience "based on visits to over a hundred campuses and attendance at literally dozens of conferences of college administrators there is also an instinctive suspicion of Evangelical Christianity" based on administrators' "own negative personal experiences with conservative churches." *Id.* He

believes that these negative personal experiences have “influenced [college administrators’] general view of Evangelicals, including the students on their campuses.” *Id.* He further observes that, in his experience, another reason for “the instinctive suspicion that many college administrators harbor toward Evangelical Christian groups” is the administrators’ belief that Evangelical Christians generally have political power that they use in ways that the administrators view to be negative.

But Mr. Patel questions whether this should have anything to do with how Evangelical student groups are treated on campus. As he notes, many Evangelical Christian groups are numerically small and “decidedly countercultural on most campuses where a norm of hard partying and sexual permissiveness reigns.” *Id.* And he further explains that, in his experience, Evangelical student groups “are building coalitions with individuals and groups with whom they disagree on the principle that everyone should have the freedom to express and associate as they wish – Muslims, Jews, atheists, gays, everyone, which includes Evangelical Christians.” *Id.*

The perception that religious student groups align with a particular political outlook is inaccurate. CLS is a nonpartisan organization, and the law students in CLS student chapters hold a wide range of political views – including liberal, conservative, libertarian, and apolitical. Tish Harrison Warren, an evangelical Christian who was on InterVarsity Christian Fellowship staff and identifies as politically liberal, described her attempts to communicate with Vanderbilt University administrators when it instituted a new policy in order to prohibit religious student groups' religious leadership requirements:

It didn't matter to [Vanderbilt administrators] if we were politically or racially diverse, if we cared about the environment or built Habitat homes. It didn't matter if our students were top in their fields and some of the kindest, most thoughtful, most compassionate leaders on campus. There was a line in the sand, and we fell on the wrong side of it.

Tish Harrison Warren, *The Wrong Kind of Christian*, *supra* note 5.

Nondiscrimination policies should provide vital protection for religious students who hold unpopular religious beliefs. But equally important, a commonsense exemption to a nondiscrimination policy that allows religious student groups to require their leaders to agree

with the groups' religious beliefs provides important protection for religious students who hold countercultural religious beliefs. For many years, the University of Iowa provided religious students with these vital protections. But recently, it has misused its Human Rights Policy to threaten religious students with exclusion from campus because of their religious beliefs.

As a practical matter, if interpreted with appropriate sensitivity, nondiscrimination policies and religious freedom are eminently compatible. Several major universities demonstrate that it is possible to create a sustainable campus environment in which nondiscrimination principles and religious freedom both harmoniously thrive. *See supra* note 3. Indeed, until 2018, the University's own interpretation of its Human Rights Policy achieved this desirable balance.

As a legal matter, the University's denial of a narrow exemption to religious groups for their religious leadership requirements sends a forbidden message to religious students that they are unwelcome at the University if they hold religious beliefs that the Supreme Court itself

has characterized as “decent and honorable.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

III. The University Is Teaching International Students an Appalling Lesson Regarding Religious Freedom and Freedom of Speech.

In Fall 2019, the University enrolled 2,568 international students.⁷ Over half of the international students are from China, a country that is ranked by the United States Commission on International Religious Freedom in the top tier of countries that engage in the ongoing suppression of religious freedom. The Chinese government’s interference in the Catholic Church’s selection of its bishops is only one example of its repressive measures.⁸

During their time on American campuses, the international students learn lessons not only inside the classroom but outside as well. Many international students participate in the religious student groups

⁷ *International Student Profile*, <https://admissions.uiowa.edu/future-students/international-student-profile> (last visited Mar. 14, 2020).

⁸ U.S. Commission on International Religious Freedom, *2019 Annual Report* 34, <https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf> (“the Vatican reached a provisional agreement with China that would allow the government a role in the appointment of new bishops”).

at the University and are aware of its treatment of their groups. But regardless of whether they participate in a religious group, international students are likely aware of campus controversies, including this one in which the University is penalizing religious student groups because of their religious beliefs as expressed through their leadership requirements.

What lesson are the international students taking home regarding basic human rights like freedom of religion and speech? American colleges should resolutely exemplify the values of free speech and religious freedom with the hope that international students—future leaders of their countries--will return home inspired to improve protections for these most basic human rights for their fellow citizens.

Instead, the University of Iowa seems intent on teaching its students that freedom of religion and speech are mere ideals to which lip service is paid. By its example, the University is teaching that government officials may penalize religious groups for requiring their leaders to agree with their religious beliefs. What a dangerous idea to

instill, not only in international students but also in American students, if we want to live in a world in which religious freedom and free speech are honored.

CONCLUSION

CLS respectfully urges the Court to affirm the district court's finding that Defendants violated the First Amendment's protections for speech, association, and religious exercise and affirm its denial of qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and 29(d) because this brief contains 6,494 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) and Circuit Rule 32 (b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolhouse font.

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CERTIFICATE OF VIRUS CHECK

The electronic version of the brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, I electronically submitted the foregoing *amicus curiae* brief to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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