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*.	Civ. Action No. 18-cv-00080 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

InterVarsity Graduate Christian Fellowship has been a respected student organization at the University of Iowa for 25 years. Throughout that time, it has welcomed all students to participate in its Bible studies, worship, prayer, and community service. To maintain the integrity of its ministry, InterVarsity asks that the students leading its religious activities affirm InterVarsity's Christian faith. Many other religious groups on campus have had similar standards for leaders. But in Summer 2018, the University stripped InterVarsity of its registered status solely because it requires its student leaders to be Christians. Other religious groups were also deregistered, including Sikh, Muslim, Protestant, and Latter-day Saint groups. Now, even *encouraging* leaders of religious groups to affirm the fundamental tenets of the group's faith—such as the *Shema* or the *Shahada* or the Nicene Creed—is deemed by the University to be rank "religious discrimination."

The University took this drastic step after it was caught discriminating against another religious student group in *Business Leaders in Christ v. University of Iowa*. But the University's response just made a bad situation worse. For decades, the University had a common-sense approach to its nondiscrimination policy that accommodated the needs of Greek groups, sports clubs, minority support groups, ideological advocacy organizations, and religious groups—among others—to pursue their distinct missions by selecting leaders who sincerely embraced those missions. The University adopted that same approach for its internal programs, including its sports teams, minority outreach efforts, and religious accommodations, all of which make distinctions based on otherwise protected characteristics. But instead of either continuing that successful approach or strictly applying its policy across the board, the University has now taken a gerrymandered position that retains accommodations for virtually everyone but disfavored religious groups. Indeed, the University admits that its new policy grants "many exceptions" to "various clubs, sports teams, and even scholarship programs"—as well as to Greek groups that

make up almost 1/5 of the student body—and that it overlooks these "apparent violations" of its policy "for a variety of reasons," including to "provide safe spaces" for individuals favored by the University. *See* Univ. Br. at 17-18, *Business Leaders in Christ v. Univ. of Iowa*, No. 17-cv-80 (S.D. Iowa Nov. 5, 2018) ("*BLinC*"), ECF No. 81-1.

That is unconstitutional. If there is room at the University for single-sex clubs and ideology-driven student groups of every stripe (and there ought to be), then there must also be room for religious groups that need their leaders to be religious. Group leaders hold important and inherently expressive positions. The University's discrimination against religious leadership selection burdens InterVarsity's speech, association, and exercise of religion. And the University cannot hope to justify its swiss-cheese interpretation of its policy under the First Amendment's searching scrutiny. Even if it could, the new policy position would still fail under the Religion Clause's protection for religious leadership decisions. Indeed, the University's targeted entanglement in religious leadership selection means that it is interfering in precisely the type of sensitive leadership decisions that government entities are least permitted to intrude upon.

The University has temporarily reinstated InterVarsity and other deregistered religious groups. But it has not changed its position that religious groups cannot require—or even *encourage*—their leaders to affirm their faith. Thus, this Court should grant summary judgment and a permanent injunction to InterVarsity.

FACTUAL BACKGROUND

InterVarsity at the University of Iowa. InterVarsity Graduate Christian Fellowship is a religious student group that has been at the University for more than 25 years. SoF ¶ 4. It meets for weekly Bible study and monthly religious services, sponsors campus events on religious matters, and organizes service projects to serve both the University and the local community. *Id.*

The University has previously recognized and awarded InterVarsity for serving the entire University community. *Id.* InterVarsity is a chapter of InterVarsity Christian Fellowship/USA, a national ministry that has chapters on over 600 campuses across the country. SoF ¶ 3. Both groups exist to establish university-based "witnessing communities of students and faculty who follow Jesus as Savior and Lord," and who are "growing in love for God, God's Word, [and] God's people of every ethnicity and culture[.]" SoF ¶ 2. While membership and participation in the InterVarsity chapter at the University is open to all students, students who want to hold a leadership role must affirm the group's religious beliefs. SoF ¶¶ 4-5. Leaders hold distinct roles because they make a significant spiritual commitment, including leading InterVarsity's Bible study, prayer, worship, and acts of religious service. SoF ¶ 6. InterVarsity's student leaders are the primary embodiment of its faith and message to the University. SoF ¶ 8. Accordingly, InterVarsity trains its student leaders to prepare them for religious leadership roles, and it provides them regular religious support throughout the semester via an InterVarsity USA staff member assigned to the chapter. SoF ¶ 7.

Student Organization Registration. The University has long "encourage[d] the formation of student organizations around the areas of interests of its students." SoF ¶¶ 19-21. It recognizes that students benefit from "organiz[ing] and associat[ing] with like-minded" individuals, and thus has allowed student organizations to restrict membership to "any individual who subscribes to the goals and beliefs" of the organization." SoF ¶ 23. Hundreds of groups participate in this broad forum, from "Greeks" and political groups to religious organizations and sports clubs. *See, e.g.*, SoF ¶¶ 31-43. The University encourages this participation by giving student groups significant benefits for registering with the University, including access to communications resources, important recruitment events and tools, unique speech opportunities, free meeting facilities, and modest financial aid that groups can use to promote their missions, recruit new students, and

conduct activities. SoF ¶¶ 23, 204-05. The University is careful, however, to clarify that these groups are independent from the University and that registration "does not constitute an endorsement of [the organization's] programs or its purposes." SoF ¶¶ 20-22. Rather, registration "is merely a charter to exist" on equal footing with other registered student groups. *Id.*

The University also has a Human Rights Policy (the "Policy") that prohibits certain forms of discrimination, including categories long protected under federal nondiscrimination laws (*e.g.*, race, sex, national origin, religion, and disability), plus a variety of others found in some state and local nondiscrimination laws (creed, sexual orientation, gender identity, status as a veteran, etc.). SoF ¶ 26. The Policy applies to the University—in *all* of its activities, SoF ¶ 24 —and to all registered student organizations, including fraternities, sororities, sports clubs, and standard student groups, SoF ¶¶ 26-27, 42. Before 2018, the Policy had no written exceptions, but the University has always applied extensive exemptions for historical reasons, practical considerations, or to comply with federal and state laws and regulations.

For example, the University has allowed many exceptions for its own programs. Its NCAA sports teams, along with its sports camps, intramural leagues, and recreational clinics are all overwhelmingly segregated by sex. SoF ¶¶ 44-48. And the University has multiple programs, scholarships, grants, and awards designed to benefit individuals based upon their membership in a protected class, including racial minorities, women, veterans, and individuals with disabilities. SoF ¶¶ 49-50. Strictly applied, the Policy would condemn all these practices as status-based discrimination. *See, e.g.,* SoF ¶¶ 130, 188-90. But in applying the Policy, the University has steered clear of an extreme approach that fails to distinguish invidious discrimination from efforts to promote cultural diversity or support positive associations. *Id.*

Common sense has likewise been the prevailing principle in applying the Policy to registered student groups. The University's many student-run sports clubs are largely sex-segregated. SoF ¶ 43. The same is true for the campus's 53 fraternities and sororities, whose members make up 17% of the University's undergraduate student body. SoF ¶¶ 27, 39, 129, 183. And many, many groups have formed—and restricted membership—based on protected characteristics, including to generate recreational or networking opportunities for students from China; perform all-male or all-female vocal repertoire; or provide support for military veterans. SoF ¶¶ 32-34, 39. And still others have formed around missions to exclusively promote a particular protected class. SoF ¶ 40. Necessarily, then, the Policy is not now, and has never been, an all-comers policy. SoF ¶¶ 16-18.

For decades, the University has explicitly permitted registered student groups to restrict leadership and membership based on a group's mission. In 1999, it affirmed that the Christian Legal Society ("CLS") could require its members to sign a statement of faith affirming their Christian beliefs. SoF ¶¶ 51-56. In 2004, Defendant Thomas Baker sent CLS written assurance that "[*a*]*sking prospective members to sign the CLS statement of faith would not violate the UI Human Rights policy*." SoF ¶ 65 (emphasis in original); *id* at ¶¶ 57-69. The University reaffirmed that principle over the next several years, including when the student government tried to deny funding to CLS individually, when other student groups complained about CLS's religious standards, and when the student government revised its bylaws to bar funding to "exclusive religious groups." SoF ¶¶ 70-98. The University repeatedly warned *student* members of the student government association that they could face personal liability if they discriminated against religious groups because of their religious associational requirements. SoF ¶¶ 79, 90.

The University deregisters InterVarsity. That all changed in the summer of 2018. Then, for the first time, the University ordered InterVarsity to remove its religious leadership requirement,

stating that InterVarsity could not even encourage its leaders to agree with its faith, and warning that the University would deregister InterVarsity unless the requirement was removed. SoF ¶¶ 10-12; 191-201. The University explained that it interpreted and applied its Policy to forbid any limitations on a student's ability to "hold leadership positions" that are based on the nondiscrimination criteria listed in the Policy, including "religion." SoF ¶¶ 11, 196. The University "recognize[d] the wish to have leadership requirements based on Christian beliefs," but refused to allow them because "[h]aving a restriction on leadership related to religious beliefs is contradictory" to the Policy's prohibition on religious discrimination. SoF ¶ 194. Because InterVarsity did not change its religious leadership standard, the University deregistered InterVarsity in summer 2018. SoF ¶¶ 13, 201. The University also deregistered other religious groups, including the Christian Pharmacy Fellowship, the Chinese Student Christian Fellowship, the Geneva Campus Ministry, the Imam Mahdi Organization, the J. Reuben Clark Law Society, the Latter-day Saint Student Association, and the Sikh Awareness Club. SoF ¶¶ 14, 202.

The new Policy is not applied equally. For instance, fraternities and sororities are still excused from complying with the prohibition against sex discrimination—indeed, the University has explicitly amended the Policy to formalize their exemption. SoF ¶¶ 27, 142, 186. The University's own sports teams, programs, scholarships, awards, and grants continue to violate the Policy with impunity. SoF ¶¶ 188, 215. Nor is the University ending its gender-based limitations on intramural sports, children's sports camps, or recreational services. SoF ¶¶ 48, 215. Groups with political and ideological missions are still permitted to require their leaders or members sign statements affirming the group's beliefs. SoF ¶¶ 33-34, 39, 212. Student sports clubs may still discriminate based on sex. SoF ¶¶ 43, 189-90. And those groups without explicit membership requirements can

still serve one protected class over the exclusion of others, or pursue missions that favor one particular class at the exclusion of other protected classes. SoF ¶¶ 40, 214.

After InterVarsity USA and InterVarsity filed the instant lawsuit, the University agreed to temporarily reinstate InterVarsity and all other deregistered religious groups. SoF ¶ 15. But the University's position on the Policy has not changed. It still insists that InterVarsity cannot remain a registered student organization if it requires its leaders to agree with its faith. *Id*.

LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017). A permanent injunction is appropriate where the movant shows (1) irreparable harm, (2) that the balance of harms favors the movant, (3) that the movant has proven actual success on the merits, and (4) the public interest favors the movant. *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). And qualified immunity for individual-capacity defendants should be denied where the plaintiff shows that those defendants violated constitutional rights that were clearly established at the time of the violation. *Gerlich*, 861 F.3d at 704; *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"); *New v. Denver*, 787 F.3d 895, 899 (8th Cir. 2015) (qualified immunity should "always" be determined "as a matter of law" when there is no material factual dispute).

ARGUMENT

InterVarsity is entitled to summary judgment on its Free Speech Claims (Counts VII-VIII), Free Association Claim (Count VI), Free Exercise Claims (Counts III-IV), and Religion Clause Claims (Counts I-II).

I. The University infringed InterVarsity's Free Speech, Freedom of Association, and Free Exercise rights without sufficient justification.

A. The University infringed InterVarsity's rights under the Free Speech Clause.

1. Unreasonable or viewpoint discriminatory limits on registered student group speech must pass strict scrutiny.

State universities are not obligated to grant official recognition to student-led organizations. But once they do, they have created a limited public forum that is governed by the First Amendment. *Gerlich*, 861 F.3d at 704-05; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). While "some content- and speaker-based restrictions may be allowed" in the forum, *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), universities face at least two restrictions: (1) they "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'" and (2) they may not "discriminate against speech on the basis of viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (citation omitted); *accord Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 684 (2010); *see also Healy v. James,* 408 U.S. 169, 181 (1972) (universities cannot deny "recognition . . . to college organizations" based on their views). Where a university's restriction on a student group's speech or access to the forum is either unreasonable in light of the forum's purpose or discriminates based on viewpoint, the restriction must undergo strict scrutiny. *Gerlich*, 861 F.3d at 705.

A content-based limitation "may" be reasonable if it "preserves the purposes of th[e] limited forum," but only where it "respect[s] the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829-30. Thus, for instance, a forum dedicated to the free exchange of *students'* ideas about *art* can reasonably insist on student speech and exclude content about public transit, but it could not make "other content-based judgments" that disrespect the forum's own boundaries. *Martinez*, 561 U.S. at 703 (Kennedy, J., concurring).

Viewpoint discrimination occurs when government action stems from the "ideology or the opinion or perspective of the speaker," *Gerlich*, 861 F.3d at 705 (quoting *Rosenberger*, 515 U.S. at 829), or when they "proscribe[] views on particular disfavored subjects and suppress[] distinctive ideas conveyed by a distinctive message." *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 925-26 (S.D. Iowa 2018) (citation omitted). Courts "use the term 'viewpoint' discrimination in a broad sense." *Matal*, 137 S. Ct. at 1763. Where a viewpoint fits "within the forum's limitations," restrictions on it are "presumed impermissible." *Rosenberger*, 515 U.S. at 830. Nor are outright bans or censorship the only impermissible restrictions. Ideological favoritism also qualifies: "[t]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal*, 137 S. Ct. at 1757 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

These principles have long and repeatedly been affirmed by the Supreme Court. Thus, it is well established that a university's denial of official recognition to a student group because of its views violates the First Amendment. *See Healy,* 408 U.S. at 186-89 (public college can never "deny[] rights and privileges solely because of a citizen's association with an unpopular organization" or "because [the school] finds the views expressed by any group to be abhorrent"); *Widmar*, 454 U.S. at 264-65 (a public university that "makes its facilities generally available" to student groups could not "close its facilities" to a "group desiring to the use the facilities for religious worship and religious discussion"); *Rosenberger*, 515 U.S. at 829 (because public university chose to reimburse publications presenting a secular point of view, it could not deny reimbursement to those addressing the same issues from a religious perspective).

The Eighth Circuit has likewise long held that a public university cannot restrict a student group's speech or limit access simply because it disfavors the group's viewpoints. *Gay Lib v. Univ.*

of Mo., 558 F.2d 848, 856 n.16 (8th Cir. 1977) ("It is of no moment, in First Amendment jurisprudence, that ideas advocated by an association may to some or most of us be abhorrent, even sickening. The stifling of advocacy is even more abhorrent, even more sickening."); *see also Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 368 (8th Cir. 1988) (stating that while "[c]onduct may be prohibited or regulated . . . [the] government may not discriminate against people because it dislikes their ideas"). In a recent case, the Eighth Circuit, and this Court, found that Iowa State University violated the First Amendment when it discriminated against a student chapter of the National Organization for the Legalization of Marijuana for advocating marijuana legalization. *Gerlich*, 861 F.3d at 700. Once the university "create[d] a limited public forum for speech," it could not single out a group for disfavored treatment because of its position on controversial topics. *Id.* at 704-05.

2. Deregistering InterVarsity was unreasonable and discriminatory.

Unreasonable. The University's Registered Student Organization policy ("RSO policy") creates a limited public forum for the specific purpose of letting students associate based on shared beliefs and interests. The policy explicitly "encourages the formation" of groups "around the areas of interest *of its students*" and grants these student groups freedom to "organize and associate with *like-minded students*." SoF ¶¶ 20, 23 (emphases added). It expressly anticipates that groups will limit membership to "any individual who subscribes to the goals and beliefs" of the organization. SoF ¶ 23. And the University guarantees that all student groups will have an "equal opportunity" to apply for University resources without having their "exercise of First Amendment rights of free expression and association" inhibited. *Id.*

In light of these purposes, the University acted unreasonably by refusing to let InterVarsity select leaders who affirm its beliefs. Refusing to let groups select mission-aligned leaders would destroy the University's purpose of allowing students to form interest-based organizations. Just as

an organization cannot form around hidden beliefs, it cannot survive without leaders who agree with its beliefs. Thus, denying InterVarsity the ability to select religious leaders not only failed to "preserve[] the purposes of th[e] limited forum," *Rosenberger*, 515 U.S. at 829-30, but was a direct violation of the RSO policy's core purposes. Excluding InterVarsity specifically because of its *religious* leadership criteria accordingly constituted an impermissible "content-based judgment[]" limiting participation in the forum. *Martinez*, 561 U.S. at 703 (Kennedy, J., concurring).

Viewpoint Discrimination. The University's discriminatory limit on InterVarsity's leadership selection also constitutes viewpoint discrimination. Personnel is policy, and leadership selection is message control. Leaders shape and embody the message of a group, making leadership selection inescapably expressive. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (ruling against a state law which interfered with political parties' ability to select voting members, since their "choice of a candidate is the most effective way in which that party can communicate"). And this point "applies with special force with respect to religious groups" because their "very existence is dedicated to the collective expression . . . of shared religious ideals" and because "the content and credibility of a religion's message depend vitally upon the character and conduct of its teachers." *Hosanna-Tabor Evangelical Lutheran Sch. v. EEOC*, 565 U.S. 171, 200-01 (2012). (Alito, J., joined by Kagan, J., concurring). Thus, courts have insisted that religious groups must have "the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message.'" *Id.* at 201 (Alito, J., joined by Kagan, J., concurring) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)).

But rather than according religious groups the "special solicitude" that the First Amendment requires for their leadership decisions, *id.* at 189, the University has subjected them to a special burden. Under its gerrymandered revision to its Policy enforcement, the University has largely

retained its longstanding, common-sense exemptions from its Policy. Greek groups, sport clubs, ideological organizations, and certain favored minority groups remain free to select leaders who authentically embody the message of the organizations they lead. But not religious groups. That is viewpoint discrimination.

3. *Martinez* does not support the University's unreasonable, discriminatory actions.

Martinez does not help the University. First, the Supreme Court's consideration was limited to policies that "mandate acceptance of all comers." 561 U.S. at 671. And the Court expressly refused to bless policies that "target solely those groups whose beliefs are based on religion . . . and leave other associations free to limit membership and leadership to individuals committed to the group's ideology." 561 U.S. at 675. But as shown above, the University's Policy does just that. Second, *Martinez* is also inapplicable because, under *Hosanna-Tabor*, it cannot be applied to religious groups' selection of their leaders. Indeed, *Martinez* itself recognized that limits on leadership selection raise unique constitutional problems. *Id. at* 692-93 (finding it unlikely that students would "seek leadership positions in . . . groups pursuing missions wholly at odds with their personal beliefs" and stating that if a student did so, a group could decline to "elect her as an officer"); *id.* at 706 (Kennedy, J., concurring) (finding that even with a true all-comers policy, a religious student group would have a "substantial case" if the policy was used to "challenge [group] leadership"). Third, the University loses under *Martinez* for the reasons noted above: the University's actions are unreasonable and viewpoint discriminatory.

Thus, the University's targeting of InterVarsity for selecting leaders who affirm its beliefs is a clear infringement of InterVarsity's freedom of speech and must face strict scrutiny.

B. The University infringed InterVarsity's right to freedom of association.

The University's actions also violate InterVarsity's freedom of association. Under the First Amendment, "the ability of like-minded individuals to associate for the purpose of expressing

commonly held views may not be curtailed" by the government. *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309 (2012). This is just as true in the face of nondiscrimination policies as against any other law. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000).

Courts use "a three-step analysis" for free association rights. *Our Lady's Inn v. City of St. Louis*, No. 4:17-CV-01543, 2018 WL 4698785, at *10 (E.D. Mo. Sept. 30, 2018). First, they determine whether the private organization "was an expressive association," using "expansive notions of expressive association" in their analysis to broadly protect the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* (citations omitted). Here, InterVarsity qualifies as an expressive association because it exists to express its religious beliefs. Indeed, religious groups are quintessential examples of such associations, since their "very existence is dedicated to the collective expression . . . of shared religious ideals." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., joined by Kagan, J., concurring).

Second, courts determine whether the government restriction would "significantly affect the [association's] ability to advocate [its] viewpoints." *Dale*, 530 U.S. at 650. Here again, courts broadly construe the right and "must also give deference to an association's view of what would impair its expression." *Id.* at 653. And here again, the answer is clear: InterVarsity's student leaders are charged with significant spiritual commitments, including leading worship, teaching Bible studies, and conducting prayer and other religious services. SoF ¶ 6. Being forced to accept as leaders individuals who reject its faith would undermine InterVarsity's religious message, mission, and identity. SoF ¶ 8. Thus, the University's policy would force InterVarsity "to propound a point of view contrary to its beliefs," *Dale*, 530 U.S. at 654, which is an impermissible restriction on its expressive association. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (finding

that university violated free association rights by derecognizing religious student group for requiring leaders to agree with its faith).

Third, courts will uphold such restrictions "only if they serve 'compelling state interests' that are 'unrelated to the suppression of ideas'—interests that cannot be advanced 'through . . . significantly less restrictive [means].'" *Our Lady's Inn*, 2018 WL 4698785, at *11 (quoting *Martinez*, 561 U.S. at 680). As shown below, the University cannot meet that standard.

C. The University infringed InterVarsity's rights under the Free Exercise Clause.

The University violated the Free Exercise Clause by discriminating against InterVarsity's religious exercise. The Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny" laws that disfavor religion. *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993)). Restrictions on religion are thus subject to strict scrutiny unless they are both "neutral" and "generally applicable." *Id.* at 2021; *accord Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 9 (Iowa 2012). The University's actions here are neither.

General Applicability. A law is not generally applicable if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Zimmerman*, 810 N.W.2d at 16; *accord Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004). Here, the University's Policy is not generally applicable for at least three reasons.

First, it was not and is not enforced equally by the University. *Lukumi*, 508 U.S. at 545-46 (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"); *see also Tenafly Eruv Ass'n v. Borough of Tenalfy*, 309 F.3d 144, 167-68 (3d Cir. 2002) (rejecting a "selective,

discretionary application of [the law] against" religiously motivated conduct). This is reflected, for example, in the University's toleration of the Iowa Edge student group, which employs race-based preferences for its officers; the UI Veteran's Association, which requires members be veterans; and student sports clubs, which discriminate based on sex. SoF ¶¶ 39, 43, 49(a), 189-90. Indeed, the University does not even enforce the Policy equally against religious groups, as Love Works, 24-7, and CLS expressly require leaders to share their respective faiths and were never among the deregistered religious groups. SoF ¶ 213; *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (enforcing law against Jehovah's Witnesses while exempting other religious groups violated Free Exercise Clause). The University likewise does not evenly enforce the Policy in its own programs, including its Iowa Edge Program and Iowa First Nations Summer Program (which limit eligibility based on race), its National Education for Women Leadership program (which limits eligibility based on sex), and the Military Veteran and Student Services program (which limits eligibility based on veteran status). SoF ¶¶ 49(a)-(e), 215; *see also* ¶ 48 (intramural sports leagues and recreational programs). And the University does not enforce its Policy in the context of dozens of its scholarships, awards, and funds that discriminate based on race, color, national origin, status as a U.S. veteran, and service in the U.S. military, among others. SoF ¶¶ 50; 215. Finally, the University acknowledges that the sex-segregated sports teams of its $100-million Athletics Department technically violate the Policy, but it justifies nonenforcement on the grounds of "long established" tradition. SoF ¶¶ 45-46, 188.

The University attempted to excuse some of its discriminatory enforcement as the result of its choice to engage in complaint-driven enforcement of its Policy as against student groups. *See* Order at 27, *BLinC* (Jan. 23, 2018), ECF No. 36. That was a dubious contention when made, *see id.* (finding that the facts "refute that contention"), and it is obviously false here since InterVarsity

was deregistered despite no complaints ever having been filed against it. SoF ¶ 9. Nor does complaint-driven enforcement explain the University's refusal to equally enforce its Policy against its own programs. Further, a complaint-driven scheme doesn't alleviate the harm of selective enforcement, since complaints are far more likely to be filed against unpopular or minority viewpoints on campus. *Cf. Tenafly*, 309 F.3d 151-53 (finding unlawful selective enforcement when an ordinance was enforced in response to "vehement objections" from neighbors); *Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (rejecting complaint-driven restrictions on speech); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (striking down an ordinance that was enforced in response to the "negative attitudes" and "fear" of neighbors). Under the University's enforcement scheme for student groups, the University can knowingly turn a "blind eye" to Policy violations that would otherwise be controversial to enforce because they are socially acceptable to the University culture, such as in the context of sports and some Greek groups. *See* SoF ¶¶ 43-48, 188-190, 216. The University's approach thus "effectively empower[s] a majority to silence dissidents" with a heckler's veto. *Cohen v. California*, 403 U.S. at 15, 21 (1971).

Second, the University has categorically exempted a huge swath of student organizations from the reach of its policy, both historically and currently. While "[a]ll laws are selective to some extent, . . . categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Zimmerman*, 810 N.W.2d at 11 (quoting *Lukumi*, 508 U.S. at 542). Where a categorical exemption threatens the government's interests "in a similar or greater degree than [the prohibited religious exercise] does," it must face strict scrutiny. *Id.* (quoting *Lukumi*, 508 U.S. at 543). Thus, in *Rader v. Johnston*, the court found that a university's broad secular exemptions to a residential housing requirement triggered (and, ultimately, failed) strict scrutiny when similar exemptions were not afforded for religious reasons. 924 F. Supp. 1540, 1553

(D. Neb. 1996); *accord Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d. Cir. 1999) (scrutiny triggered by "categorical exemption for individuals with a secular objection [to a challenged policy] but not for individuals with a religious objection").

The most obvious categorical exemption to the Policy is the express exemption the University created to allow sex-based discrimination by Greek groups. The exemption is huge: it covers over fifty fraternities and sororities, which alone constitute about 10% of the University's registered student groups and collectively have a membership of almost 20% of the University's undergraduate class. SoF ¶ 183. The exemption also blesses a much more restrictive policy than InterVarsity's, since it allows Greek groups to exclude students from *both* leadership and membership. SoF ¶¶ 27, 129, 183-87, 216. The net result is that the University punishes InterVarsity for its religious selection of the 3-4 leadership positions open each year, while broadly exempting Greek policies that annually exclude half of humanity from thousands of possible membership positions. And far from deregistering Greek groups, the University has welcomed them for over 150 years, actively advertising for them and telling students that they are the "largest and most successful support networks available to Hawkeye students." SoF ¶ 217.

Third, a similar but more stealthy general-applicability problem arises via not *express* exemptions, but rather when categories of "secular activities that equally threaten[] the purposes" of the Policy are left unprohibited, and are "therefore approved by silence[.]" *Zimmerman*, 810 N.W.2d at 10 (citing *Lukumi*, 508 U.S. at 543). This problem arises here through the University's decision to ban any "restriction[s] on leadership related to religious beliefs," while failing to ban any leadership restrictions based on *ideological* or *political* beliefs. SoF ¶ 194, *id.* ¶¶ 195-201, 24-27. This "underinclusion" acts as a silent categorical exemption for *non*-religious beliefs, and thereby "undermines its general applicability." *Zimmerman*, 810 N.W. 2d at 16.

In all three forms of discrimination above, the University "devalues religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537; *accord Tenafly*, 309 F.3d at 168 (same). Such governmental value judgments against religious motivations must face "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019.

***Neutrality*.** The "minimum requirement of neutrality" is that a law "not discriminate on its face." *Lukumi*, 508 U.S. at 533. But "[f]acial neutrality" is not enough. *Id.* at 534. Rather, the Free Exercise Clause forbids "covert suppression" of religion and "subtle departures from neutrality"; hostility that is "masked" as well as "overt." *Id.*; *Zimmerman*, 810 N.W.2d at 10 (same).

Here, the University's new interpretation of its policy *is* facially discriminatory: it bans any "restriction on leadership related to *religious* beliefs." SoF ¶ 12. That alone fails neutrality. Laws that fail to operate "without regard to religion" or that otherwise "single out the religious" for disadvantages "clear[ly] . . . impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2020-21.

Moreover, the University has for decades knowingly approved numerous other student group constitutions that made both leadership and membership distinctions based on protected characteristics, and it still provides exemptions for many secular groups and programs. The "difference in treatment" between how the University has treated religious groups like InterVarsity and how it treats other organizations and programs provides "[a]nother indication of hostility" and compels strict scrutiny. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (2018); *see also id.* at 1732 ("disparate consideration" of religious and secular entities suggests a violation of "the requisite religious neutrality"). For instance, though the university's policy in *Rader* was "certainly neutral on its face," the university's refusal to make an "exception[ ] to the policy" for a religiously-motivated request while "routinely" granting them for secular

requests was sufficient to show a lack of neutrality. 924 F. Supp. at 1554-55. So too here. And thus, again, the University must undergo strict scrutiny.

D. The University cannot justify its infringements of InterVarsity's rights.

Because the University's action against InterVarsity unreasonably discriminates against religious groups and religious viewpoints, "it is invalid unless . . . it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). And it is the University that must prove that its Policy meets this high standard, *Gerlich*, 861 F.3d at 705, which is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The University thus bears a "heavy burden" to justify excluding an organization from the full "range of associational activities" it otherwise permits. *Healy*, 408 U.S. at 184. There are multiple reasons why the University cannot satisfy that burden.

First, far from banning InterVarsity's longstanding selection of religious leaders, the written Policy both permits and supports that selection. SoF ¶¶ 20, 23, 26-27. So the University has no compelling interest in restricting InterVarsity's leadership selection.

Second, as discussed above, the University does not extend the same stringent standard that it has set for InterVarsity's *leadership* to even the *membership* requirements of other student organizations. "Where government . . . fails to . . . restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546-47. So, again, no compelling interest is at stake.

Third, the Policy cannot override InterVarsity's First Amendment rights here because the University does not apply it fairly or uniformly. "Precision of regulation must be the touchstone in First Amendment context." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 314 n.3 (2012). But here, the categorical exemptions and selective enforcement in favor of vastly larger student

organizations and hugely expensive University programs leave the Policy "wildly underinclusive," which "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802; *see* SoF ¶¶ 18-35. And, again, 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 and alteration marks omitted).

Even if the University could show that it has a compelling interest, complete deregistration is not narrowly tailored to accomplishing that interest. The University bears the burden of proving that other less-restrictive approaches would not suffice. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (government flunked the narrow-tailoring test where it had "identified no evidence" to "prove" tailoring). And that the University has long managed to accommodate its own programs, scholarships, sports programs, and so forth, along with the missions of other student groups without sacrificing the overall interests promoted by the Policy is alone compelling evidence that the University cannot meet its burden. *Lukumi*, 508 U.S. at 546 (underinclusiveness suggests the government's "interests could be achieved by narrower [policies] that burdened religion to a far lesser degree"); *see also* SoF ¶ 3 (noting that other Iowa universities permit InterVarsity chapters to have religious leadership). On tailoring alone, then, the University fails strict scrutiny.

* * * *

The University's discrimination burdens InterVarsity's speech, association, and religion without sufficient justification. This Court should accordingly grant summary judgment to InterVarsity. It should also award nominal damages. *Lowry*, 540 F.3d at 762 ("nominal damages must be awarded when a plaintiff establishes a violation of the right to free speech").

II. The Religion Clauses protect InterVarsity's religious leadership selection.

Government interference with a religious organization's leadership selection "runs headlong into the Religion Clauses of the First Amendment." *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361 (8th Cir. 1991). Affirming decades of consensus among the courts of appeals, the Supreme Court unanimously held in 2012 that "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor*, 565 U.S. at 184, 196 & n. 2 (listing cases). The Free Exercise right "protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188. And the Establishment Clause structurally safeguards courts from being "impermissibly entangle[d] . . . in religious governance and doctrine" by "categorically prohibit[ing] federal and state governments from becoming involved in religious leadership disputes." *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 121 & n.4 (3d Cir. 2018) (internal citation omitted).

While courts have often labeled this Religion Clause protection as the "ministerial exception," they have "t[aken] pains to clarify that the label was a mere shorthand." *Hosanna-Tabor*, 565 U.S at 199, 202 (Alito, J., joined by Kagan, J., concurring). The substance of the protection concerns the internal "autonomy of religious groups," ensuring they are "free to determine who is qualified to serve in positions of substantial religious importance." *Id.* at 199-200. And there "can be no clearer example of an intrusion into the internal structure or affairs" of a religious student group than forcing it to accept leaders who do not share its faith. *Walker*, 453 F.3d at 861, 863 (protecting religious student group's leadership policy).

The Religion Clauses apply to bar governmental interference in religious leadership selection where (1) the group in question is a "religious group," and (2) the leadership position in question

is for "one of the group's ministers." *Hosanna-Tabor,* 565 U.S. at 176-77; *accord Scharon*, 929 F.2d at 362 (considering nature of the "institution" and the "position"). Both factors are met here.

A. InterVarsity is a religious group.

A group is a religious organization for purposes of the Religion Clauses if its "mission is marked by clear or obvious religious characteristics." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (citation omitted). Courts have found that this test covers a broad variety of religious organizations, including schools, a nursing home, and a hospital that was "primarily a secular institution." *See Scharon*, 929 F.2d at 362 (hospital); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 201 (2d Cir. 2017) (elementary school); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (nursing home). *Conlon* specifically applied the ministerial exception to InterVarsity USA because its purpose was "to advance the understanding and practice of Christianity" on campus. 777 F.3d at 833-34.

InterVarsity likewise qualifies in this context. It is a voluntary religious ministry that exists to grow and share its faith. SoF ¶¶ 2, 20. Its national organization was founded almost 150 years ago as a Christian campus ministry, and the entirety of its 25-year history as a chapter at the University has been focused on helping graduate students and faculty grow in their faith and integrate their faith into their studies and careers. SoF ¶¶ 2-6. Throughout that time, InterVarsity has engaged in ministry by holding Bible studies, worship services, prayer meetings, and serving the community. *Id*. Indeed, even just its name denotes InterVarsity as a "*Christian* Fellowship."

Nor is such a wholly religious status unusual among student groups. The University has long welcomed religious student groups on campus, which include one groups that is a formal part of a local church and another group that administers Mass several times per week. SoF ¶ 147. And the University admits that student groups are permitted to engage in virtually all of the religious

activities that would make them the "functional equivalent" of a house of worship, including preaching sermons, holding worship services, conducting prayer meetings, observing sacraments such as baptism and communion, and celebrating holy days. SoF ¶¶ 132, 147.

B. InterVarsity's officers hold religious leadership positions.

InterVarsity's leadership selection is protected by the Religion Clauses because its leaders hold unique roles that require them to "minister to the faithful," "personify its beliefs," and "convey[]the [ministry's] message and carry[] out its mission." *Hosanna-Tabor*, 565 U.S. at 188, 192-195; *Fratello*, 863 F.3d at 207 (noting the doctrine's application to a "press secretary," "Jewish nursing-home staff," and "music director").

InterVarsity's student leaders are the primary embodiment of InterVarsity's faith and Christian message to the University community. SoF ¶ 8. They personally lead many of the religious meetings and Bible studies; lead and participate in prayer, worship, and religious teaching; determine the religious content of meetings; select guest speakers; minister individually to their peers; plan and schedule ministry events on campus; and determine what kind of outreach and service activities to engage in to advance the group's religious mission. SoF ¶¶ 6, 8. InterVarsity provides religious training and support to ensure that its student leaders can fulfill these duties. SoF ¶ 7. The vast majority of a student leaders' time is spent on ministry; very little is dedicated to administrative or other nonreligious functions. SoF ¶ 8. Because of the unique religious importance of their leadership roles, InterVarsity's officer candidates are required to affirm InterVarsity's religious beliefs. SoF ¶¶ 5, 8. InterVarsity's student officers accordingly qualify as holding protected religious leadership positions.

The Religion Clauses forbid the University from "dictat[ing] to a religious organization who its spiritual leaders would be." *Conlon*, 777 F.3d at 835-36. And because the ministerial exception

is a categorical structural limitation, there is no strict scrutiny affirmative defense. *Hosanna-Tabor*, 565 U.S. at 196. Summary judgment should accordingly be granted.

III. This Court should grant permanent injunctive relief.

As established above, InterVarsity has "prove[n] actual success on the merits" of its legal claims, which is the third factor for permanent injunctive relief. *Lowry*, 540 F.3d at 762. It is also the key factor in First Amendment cases. Showing that factor establishes factors one and four, irreparable harm and public interest, since loss of First Amendment rights "unquestionably constitutes irreparable injury" and "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.,* 697 F.3d 678 (8th Cir. 2012). And the second factor, balance of equities, "generally favors the constitutionally-protected freedom of expression." *Id.* Further consideration of each factor supports granting a permanent injunction.

Irreparable harm. Defendants have argued that RSO status is a government benefit to which groups like InterVarsity are not entitled. But Defendants may not condition even a "gratuitous benefit" on "disavow[ing] [InterVarsity's] religious" beliefs and conduct, since that "inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)); *accord Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2002).

Further, courts have rejected the argument that merely having the "possible ability to exist outside the campus community" would "ameliorate significantly the disabilities imposed by the [university's] action." *Healy*, 408 U.S. at 183. This is true for two reasons. First, deregistered student groups are undisputedly "denied university money and access to . . . university facilities for meetings," which is a clear burden. *Walker*, 453 F.3d at 864. That burden shows up in unique ways here, because InterVarsity's membership is disproportionately made up of commuter

students and international students, constituencies for whom registered status is particularly important. SoF ¶¶ 205-06. Second, discrimination is itself a harm. *Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) ("being subjected to discrimination is by itself an irreparable harm"). When government "makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the injury includes "the denial of equal treatment," not just "the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Trinity Lutheran*, 137 S. Ct. at 2022.

Balance of Harms. Defendants identify no injury from a permanent injunction, which would simply preserve the status quo, allowing InterVarsity to operate on campus in the same manner that hundreds of other student organizations have done for decades. By contrast, InterVarsity will suffer irreparable injury if it continues to be punished for its faith. *See Lowry*, 540 F.3d at 762.

Public Interest. By vindicating First Amendment rights, an injunction would also further the public's interest in the "open marketplace" of ideas, where "differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 567 U.S. at 309. And "nowhere" is this interest "more vital than in the community of American schools." *Walker*, 453 F.3d at 864 (quoting *Healy*, 408 U.S. at 180). By contrast, the University's exclusionary Policy has a chilling effect on InterVarsity's expression of its beliefs, impermissibly "cast[ing] a pall of orthodoxy" over the marketplace of ideas at the University of Iowa. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

CONCLUSION

For all the foregoing reasons, InterVarsity respectfully urges the Court to grant this motion for partial summary judgment, award nominal damages, and issue a permanent injunction. InterVarsity respectfully requests oral argument on this motion.

Respectfully submitted this 13th day of December, 2018.

Respectfully submitted,

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