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

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, *et al*., *Plaintiffs*, v. THE UNIVERSITY OF IOWA, *et al*., *Defendants*.	Civil Action No. 18-cv-00080-SMR-SBJ **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

In June 2018, after being enjoined by this Court from selectively enforcing University policies, Defendants accused InterVarsity of discrimination, publicly declared it "defunct," froze its bank account, and left it deregistered until August 2018—all while knowingly exempting other groups from the requirements they placed on InterVarsity. Yet Defendants now claim they didn't know better since the law forbidding their discriminatory actions was not clearly established at the relevant time. That argument may have had a chance if Defendants had not selectively enforced their newly conjured policy of prohibiting leadership standards. But the groups targeted for enforcement were those which, like InterVarsity, had *religious* leadership standards. Numerous groups with standards based on sex, race, veteran's status, and other categories protected in the registered student organization (RSO) policy were deliberately left untouched. Defendants even created a written exemption to carve out the largest groups on campus. And Defendants allowed some religious groups—specifically, those like Love Works that Defendants deemed to provide "safe spaces" for marginalized individuals—to keep their religious leadership standards. Still other groups, such as political organizations, were never subjected to the policy at all. Indeed, Defendants admitted that their policy discriminated based on the religious content of belief, permitting leadership standards about political beliefs on certain subjects while banning standards about religious beliefs on the same subject.

Defendants' treatment of InterVarsity constitutes clear viewpoint discrimination. And the law that viewpoint discrimination is unconstitutional has been well established for decades, as noted by this Court in the related *BLinC* litigation well before the University deregistered InterVarsity. Defendants' request for qualified immunity must accordingly be rejected.

The final quarter of Defendants' brief offers a grab-bag of arguments seeking dismissal of over a dozen claims. First, Defendants argue that, as a condition of access to a limited public forum,

they can require religious groups to abandon their right to select religious leaders free from government entanglement. But that argument violates black letter law. First Amendment rights cannot be purchased so cheaply, nor can government in any event buy the ability to entangle itself in religion. The argument also goes too far, threatening the rights of churches statewide that rent government facilities for worship services. Second, Defendants try to toss out all of InterVarsity's state constitution claims on a technicality, neglecting to mention that the Iowa Supreme Court has found that technicality inapplicable to state constitutional claims. Finally, without abandoning their argument that InterVarsity is in violation of federal civil rights law *or* their argument that they have a duty to enforce federal civil rights law against InterVarsity *or* their argument that the First Amendment provides no protection for InterVarsity from federal civil rights law, Defendants assert that InterVarsity's request for declaratory and injunctive relief should be dismissed as moot in light of a new *state* law. But that is not how mootness works.

InterVarsity respectfully requests that this Court deny Defendants' motion, grant InterVarsity's pending motion for partial summary judgment, and set a date for trial on damages.

FACTUAL BACKGROUND

The University's brief fails to include a factual background section, and its statement of material facts includes only two paragraphs that have nothing to do with the constitutionality of its actions. But the full factual record is critical to this case and fatal to the University's motion. InterVarsity thus incorporates by reference the Factual Background section of its motion for partial summary judgment and the related statements of material fact. *See* IVCF Br. [Dkt. 24]; IVCF Reply SoF [Dkt. 40-1]; IVCF Resp. SoF [Dkt. 40-2]; IVCF Suppl. SoF [Dkt. 57].

To summarize: InterVarsity Graduate Christian Fellowship is a chapter of a national religious ministry, InterVarsity USA. IVCF Reply SoF ¶ 3. For 25 years, it was also a registered student

organization at the University of Iowa. *Id.* ¶ 4. InterVarsity's membership is open to all students, but its leadership is limited to Christians who can embody and express its religious mission, including by leading Bible study, prayer, worship, and acts of religious service. *Id.* ¶¶ 4-8.

In Summer 2018, the University changed how it enforced its RSO policy to selectively forbid certain groups from picking leaders based on criteria identified in the policy, such as race, sex, and—as relevant to this case—religion. *Id.* ¶¶ 10-13, 27-31. The new enforcement policy banned InterVarsity from requesting, or even encouraging, its leaders to embrace its faith, a ban that directly undermined its ability to accomplish its religious mission and express its religious message. *Id.* ¶¶ 5-13; IVCF Suppl. SoF ¶¶ 317-321, 366-67. But the University excepted other groups from this requirement, allowing them to select leaders *and* members based on race, sex, and religion. Examples include Iowa Edge (race), Hawkapellas (sex), Love Works (religion), and all sports clubs (sex again). IVCF Suppl. SoF ¶¶ 269-82; IVCF Reply SoF ¶¶ 39, 49, 213. The University also added an express exemption to its policy allowing social fraternities and sororities to restrict both leadership and membership based on sex, even though such groups comprise almost 1/5 of the student body and are the "largest and most successful support networks available to Hawkeye students." IVCF Reply SoF ¶¶ 39, 183, 217.

Because of this combination of policy-change-plus-special-exemptions, InterVarsity was de-registered and accused of illegally discriminating while the other groups were not. IVCF Suppl. SoF ¶¶ 269-82; Dkt. 52-1, Defs.' MSJ Br. 9. InterVarsity incurred thousands of dollars in costs trying to get re-registered, had to forgo meetings and other aspects of its ministry, and suffered its sharpest membership decline in over 20 years. IVCF Suppl. SoF ¶¶ 228, 230, 242-46. Several InterVarsity members have stated they are terrified of what the University's accusations and de-registration may mean for their educations and careers, especially since the University is both

educator and employer for some of these members. *Id.* ¶¶ 239-41. Likewise, the current president admits that she probably wouldn't have signed up had she known what the University was going to do, and she's having difficulty recruiting replacement officers since she doesn't want to put them through what she has experienced. *Id.* ¶¶ 224, 229-31.

Defendants still claim that InterVarsity's request that its leaders be Christians is "in direct conflict with state and federal civil rights law" and that InterVarsity is "seeking special dispensation" to "discriminate against [its] peers." Defs.' MSJ Br. 9, 16, 23. Defendants ignore both the broad exemptions they've granted for student groups that involve about 20% of students on campus, IVCF Reply SoF ¶ 183, and the rulings of this Court that their selective application of the RSO policy against religious groups violates the First Amendment, *BLinC v. Univ. of Iowa*, 360 F. Supp. 3d 885 (S.D. Iowa 2019). *See also BLinC* Dkts. 36, 55. But Defendants now assert that they plan to start accommodating InterVarsity due to a new state law. Defs.' MSJ Br. 33. They do not explain how a change in state law has freed them from the federal requirements that they said required them to restrict InterVarsity's leadership selection standards. Indeed, after the new state law was passed, the University testified at depositions in this case that InterVarsity's religious leadership requirement still violates University policy. IVCF Suppl. SoF ¶¶ 333-34. To date, InterVarsity still does not have full registered status. The University has its status listed as "pending" the outcome of this suit. Dkt. 47-1, Defs.' Suppl. SoF ¶ 104.

ARGUMENT

I. The Individual Defendants are not entitled to qualified immunity.

To determine qualified immunity, courts examine "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether the right was clearly established at the time of the defendant's alleged misconduct." *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017). Both of these elements are met here.

A. The Individual Defendants violated InterVarsity's First Amendment rights.

While courts may take up the two immunity questions "in either order," *id.*, they "generally look first at whether the official's alleged conduct violated the [plaintiff's] federal rights." *Woodard v. O'Brien*, 2011 WL 65941, at *17 (N.D. Iowa Jan. 10, 2011) (quoting *Norman v. Schuetzle*, 585 F.3d 1097, 1103 (8th Cir. 2009), *overruled on other grounds in Pearson v. Callahan*, 555 U.S. 223 (2009)); *Pearson*, 555 U.S. at 242 (this ordering is "often . . . advantageous").

Here, that ordering also makes sense because the first issue is straightforward: for the reasons identified in *BLinC*, the Individual Defendants violated InterVarsity's First Amendment rights to freedom of speech, association, and religion by subjecting InterVarsity to viewpoint discrimination that disfavored its religious leadership selection policies and favored the leadership and membership policies of numerous other groups. *BLinC*, 360 F. Supp. 3d at 895-903; Dkt. 59, IVCF Suppl. Br. 5-13 (applying *BLinC*); *see also* Dkt. 40, IVCF Reply Br. 1-11 (making free speech, association, and religion arguments); Dkt. 24, IVCF Br. 8-20 (same). This Court should so rule.

Defendants make no argument to the contrary, but simply assert that it would be more "fair and efficient" to skip this issue and address only the second qualified immunity question. Defs.' MSJ Br. 8. But fairness and efficiency favor putting first things first. *See Gerlich*, 861 F.3d at 704 (resolving constitutional violation question first); *accord BLinC,* 360 F. Supp. 3d at 895-903 (same). This Court has already determined the unconstitutionality of the Defendants' discrimination towards BLinC. And this Court must in any event resolve the constitutionality question in InterVarsity's pending motion for partial summary judgment. So there is no efficiency value in punting. And there is significant fairness value in deciding the constitutional question, both because the University has steadfastly refused to acknowledge the applicability of this Court's *BLinC* ruling to protect InterVarsity, and because the University has repeatedly argued that the law is unsettled in this area and that it needs guidance. *See* Dkt. 45, Status Report at 3-4 (University

position reflecting view that *BLinC* ruling does not change its analysis); Defs.' MSJ Br. 9, 23 (case raises "a difficult question" in "unsettled area of law" that has "been the subject of much academic debate"; "the law is hardly 'clearly established'"). Indeed, even after *BLinC* and the passage of SF 274, Defendants *continue* to make the same arguments this Court rejected in *BLinC*, including the argument that InterVarsity is in "direct conflict with state and federal civil rights law," that it is "seeking special dispensation in order to discriminate," and that it wants a unique "'pass' to discriminate against [its] peers." Defs.' MSJ Br. 9, 16, 23. Both InterVarsity's reputation and this Court's ruling would benefit from clarifying the law. *See also infra*, Section IV.

B. The law against viewpoint discrimination was clearly established when the Individual Defendants discriminated against InterVarsity.

A right is "clearly established" when its contours are "sufficiently clear so that a reasonable official would understand when his actions would violate the right." *Gerlich*, 861 F.3d at 708 (citation omitted). Rights can be clearly established even where there is no "case directly on point," *id.*, and "even in novel factual circumstances," *id.* at 711 (Kelly, J., concurring) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). And despite Defendants' suggestion that college administrators are graded on a curve, the "same standard" for all qualified immunity cases equally applies to "university officials in cases involving the First Amendment." *Id.* at 710-11 (Kelly, J., concurring) (collecting Eighth Circuit cases). Most recently, in *Gerlich*, both this Court and the Eighth Circuit found that the law was sufficiently clear to deny qualified immunity in a case concerning a university's viewpoint discrimination against a student group's access the benefits of registered status.

The issue here tracks the issue in *Gerlich*: "the question here is whether plaintiffs' right not to be subject to viewpoint discrimination when speaking in a university's limited public forum was clearly established." 861 F.3d at 708. The answer here also tracks the answer there: yes. *See* IVCF Suppl. Br. 13-15. Defendants acknowledge that their RSO program constitutes a limited public

forum. Defs.' MSJ Br. 13. And it is clear that InterVarsity's leadership selection was a form of speech. *BLinC*, 360 F. Supp. 3d at 896 (limiting "who speaks on the group's behalf colors what concept is conveyed" (quoting *Christian Legal Society v. Martinez*, 561 U.S. 661, 680 (2010) (cleaned up)). Thus, "[i]f a state university creates a limited public forum for speech," it is well established that "it may not 'discriminate against speech on the basis of its viewpoint.'" *Gerlich*, 861 F.3d at 704–05 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); *id*. at 710-11 (Kelly, J., concurring) (universities have long been "on notice" that they must treat "recognized student group status in a viewpoint neutral manner" (collecting cases)).

Moreover, even if *BLinC* may have presented a "close call" on qualified immunity, 360 F. Supp. 3d at 909, this case does not. For *twenty-five years*, the University permitted InterVarsity to require its leaders to be Christians. IVCF Reply SoF ¶ 4. The University *repeatedly* re-affirmed that religious groups had a right to select leaders who shared their religious mission, just as secular groups had a right to do the same on secular criteria. *Id*. ¶¶ 51-98, 107-08, 137. In fact, the University—with the participation of Individual Defendants to this action—repeatedly warned *students* in the University's Student Senate that if they failed to respect that right, they would face personal liability. *Id.* ¶¶ 79, 87. And far from coming to the realization that InterVarsity's leadership selection was harming the University's interests, the University *awarded* InterVarsity for its service to the campus. IVCF Reply SoF ¶¶ 4-5, 9. Indeed, the University admits that, unlike the situation in *BLinC*, it had not ever received a student complaint about InterVarsity's leadership policies. IVCF Suppl. SoF ¶¶ 298-99. Yet when InterVarsity respectfully requested to retain continued access to the RSO forum, it was summarily denied and deregistered. "No reasonable university official could have believed post facto closing a forum that was previously open was . . . permissible." *Gerlich*, 861 F.3d at 714-15 (Kelly, J., concurring).

Nor could any reasonable official have believed that it was permissible to forbid InterVarsity's Christian leadership requirement *solely because of its religious content*. "[T]argeting religious beliefs as such is never permissible." *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 n.4 (2017); *see also Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (forbidding university's viewpoint discrimination against religious speech). But that is precisely what Defendants have admitted that they did to InterVarsity, preferring political belief standards to religious ones *solely* because the latter were religious. IVCF Suppl. SoF ¶¶ 301, 350 (political groups can require leaders to hold political beliefs regarding poverty, but religious groups cannot do so for same beliefs held from religious viewpoint, such as based in parable of the Good Samaritan). For decades, it has been "quite clear" that government may not consider that reliance on religious beliefs "taints" a viewpoint "in a way that other foundations for thought or viewpoints do not." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-11 (2001); *see also* IVCF Reply SoF ¶¶ 12-13, 201, 208 (InterVarsity deregistered solely because it required leaders to embrace its faith).

Further, even if the "close call" in *BLinC* presented a somewhat "novel" issue, 360 F. Supp. 3d at 909, that was no longer true by the time of Defendants' unconstitutional actions against InterVarsity. *See also Gerlich*, 861 F.3d at 711 (Kelly, J., concurring) (officials can "still be on notice" in "novel" cases). By then, this Court had *twice* granted preliminary injunctions that expressly forbade discriminatory closure of the RSO forum to religious groups. *BLinC* Dkts. 36, 55. And the Court noted that, while its rulings were preliminary, the injunctions were nonetheless an "extraordinary remedy" that BLinC obtained because it was likely to succeed on the merits of its claims. *BLinC* Dkt. 36 at 11-12; *see also Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) ("granting of preliminary injunctions is not favored unless the right to such relief is clearly established"). Crucially, both injunction decisions clearly explained that viewpoint

discrimination is unconstitutional. *BLinC* Dkt. 36 at 17, 28; *BLinC* Dkt. 55 at 2. The Individual Defendants were thus aware of this Court's warnings that the First Amendment specifically forbids selective enforcement of University policy against a religious RSO's religious leadership. IVCF Suppl. SoF ¶¶ 251, 338-340.

Nor was there any reason for confusion on that point. The Individual Defendants reasonably *should* have been aware of the numerous Supreme Court and Eighth Circuit rulings on this point going back decades and continuing to as recently as the 2017 *Gerlich* decision against Iowa State University. Indeed, as this Court has explained, viewpoint discrimination has long been recognized as an "egregious" restriction on First Amendment rights that is "presumed impermissible." *BLinC*, 360 F. Supp. 3d at 896 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 830 (1995)); *see also Martinez*, 561 U.S. 685 (emphasizing that universities may not discriminate on the basis of viewpoint); *Gerlich*, 861 F.3d at 711 ("viewpoint-based discrimination is impermissible in all forums") (cleaned up).

Yet the Individual Defendants still chose to *expand* their discriminatory conduct in the wake of the *BLinC* injunctions, deregistering InterVarsity and many other religious groups for their religious leadership standards at the same time that Defendants granted exemptions to numerous other groups governed by the RSO policy, including the religious organization Love Works. IVCF Suppl. SoF ¶¶ 268-280, 293, 315, 347-356. That was a knowing violation of clearly established First Amendment rights. And Defendants understood as much, admitting that their uneven enforcement of University policy was "a problem" and in "conflict" with the First Amendment. *Id.* ¶¶ 253, 323-24, 345-47; IVCF Reply SoF ¶¶ 145-51, 154; *see also Burnham v. Ianni*, 119 F.3d 668, 677 n.15 (8th Cir. 1997) (en banc) (denying qualified immunity while noting university defendant's awareness that plaintiffs would have "good case" against him).

The violation was also knowingly unjustifiable. The University could not identify a good reason why the University could accommodate other groups' leadership standards and not InterVarsity's. IVCF Suppl. SoF ¶ 322. Defendants made no attempt to identify any specific evidence of harms caused by InterVarsity's religious leadership standards. *Id.* ¶¶ 357-65. Indeed, while Defendants were aware that other public universities, such as Iowa State University, accommodated student groups' leadership selection, they made no attempt to determine that the University could not adopt a similar approach to accommodate InterVarsity. *Id.* ¶¶ 304-07; 377-78. To the contrary, Defendants made an explicit judgment to tolerate massive harms to its interests from secular groups while treating comparatively miniscule harms from InterVarsity as intolerable. IVCF Suppl. SoF ¶¶ 290-94, 301-03. Defendants that they were simply willing to accept harms from other groups, such as political or ideological groups, but not from a religious group. *Id.* ¶¶ 302-303. That is a textbook violation of clearly-established law. IVCF Suppl. Br. 15 (listing cases).

Defendants' violation was also simply unnecessary. While the University apparently disagreed with this Court's selective enforcement rulings in *BLinC*, there was no need to end InterVarsity's 25-year-old registration in Summer 2018, to publicly identify it as "defunct," or to start accusing it of having "sincerely held religious beliefs [that] are in direct conflict with state and federal civil rights law." MSJ Br. 9. At a minimum, the University could have instead waited for an orderly disposition of the *BLinC* case, especially given its view that the law was unsettled. Indeed, that is effectively what it did later, but only *after* InterVarsity was first forced to sue to regain registered status. IVCF Reply SoF ¶ 15 (University agreed to temporarily treat InterVarsity and other deregistered religious groups as if they were registered); *see also* Defs.' Suppl. SoF ¶ 104 (showing all religious groups—and only religious groups—as permitted on campus "pending" litigation).

In sum, Defendants' sole qualified immunity argument—that the law was not clearly established to put them on notice regarding the constitutionality of their actions—fails. This Court should so rule and set a trial date to determine damages. *See*, *e.g.*, IVCF Suppl. SoF ¶¶ 228 (identifying examples of financial damages); *Pac. Shores Props., LLC v. Newport Beach*, 730 F.3d 1142, 1166-67 (9th Cir. 2013) (recoverable damages includes diverted staff time and legal fees).

II. Defendants are not entitled to judgment on InterVarsity's Religion Clauses claims.

The University moves for judgment as a matter of law on InterVarsity's two claims arising from the Religion Clauses of the First Amendment: the ministerial exception claim and the internal autonomy claim. Defs.' MSJ Br. 25. Both claims are related—the latter is a right against government interference in internal religious affairs, and the former is a specific application of that right to a religious ministry's selection of its ministers. *See*, *e.g.*, *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952) (internal autonomy); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 556 U.S. 171, 181 (2012) (ministerial exception). *See also* IVCF Br. 21-24; IVCF Reply Br. 12-13; IVCF Suppl. Br. 11-13.

The University is right that there are no disputes about material fact on these claims. For instance, the University admits that InterVarsity is a religious group and that the Supreme Court has ruled that "a religious group may select its own leaders without government interference." Defs.' MSJ Br. 29 (citing *Kedroff*); *see also Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (finding InterVarsity USA to be protected by the ministerial exception). The University also admits that RSOs like InterVarsity may, consistent with University policy, function as the "functional equivalent" of a church, including by engaging in religious activities such as praying, worshiping, preaching, administering sacraments, and holding religious services such as a Mass. IVCF Reply SoF ¶ 147; *accord id.* ¶ 132. Indeed, one RSO at the University is "an actual church." *Id.* ¶ 32. Further, the University admits that this case concerns only whether it can require

InterVarsity, as a Christian organization, to "include non-Christians in its leadership team." Defs.' MSJ Br. 14; *accord* IVCF Reply SoF ¶ 201.

The University's argument against the ministerial exception and internal autonomy claims is twofold: first, that both claims are cognizable solely as affirmative defenses and cannot be raised as independent causes of action; and second, that they can arise only when there is a live dispute within a "private church" and not as result of direct regulation by a governmental entity over a "limited public forum." Other than this Court's decision in *BLinC*, the University fails to cite a single case relying on either of these arguments to allow the government to force a religious group be led by non-believers. That authority is lacking because the arguments are wrong. *See*, *e.g.*, IVCF Suppl. Br. 13-15.

As an initial matter, the University's affirmative-defense-only argument fails on statutory grounds. Categorically barring any causes of action under the Religion Clauses is inconsistent with 42 U.S.C. § 1983, which "provide[s] a remedy" for "deprivations of '*any* rights, privileges, or immunities secured by the Constitution.'" *Dennis v. Higgins*, 498 U.S. 439, 443-45 (1991) (emphasis in original). Section 1983 must be "broadly construed" and protects against "all forms of official violation of federally protected rights." *Id*. And the Supreme Court has repeatedly "rejected attempts to limit the types of constitutional rights" protected under Section 1983. *Id.* Thus, Section 1983 is an appropriate vehicle for InterVarsity's claims arising under the Religion Clauses.

To be sure, the Religion Clauses protect against *governmental* infringement. But that's precisely how they are being raised here: to defend against the University's intrusion into InterVarsity's religious leadership selection. Whether InterVarsity's rights are asserted via defenses or causes of action, the Religion Clauses still function as a "structural limitation" on *governmental power*, a limitation which "categorically prohibits federal and state governments from becoming

involved in religious leadership" issues. *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (quoting *InterVarsity Christian Fellowship*, 777 F.3d at 836). The upshot is that the government can neither *sue* to control a religious group's ministerial selection—thus requiring the group to raise the Religion Clauses as an affirmative defense, *see Hosanna-Tabor*, 565 U.S. at 195 (rejecting EEOC lawsuit)—nor *legislate* to, say, "vest[ ] the governor with the power to [appoint] ministers," *id.* at 183—thus requiring the group to raise the Religion Clauses as a claim. Either way, governmental attempts to influence a religious group's leaders raise the same entanglement and free exercise concerns, and are equally forbidden by the Religion Clauses. Indeed, the University ultimately seems to recognize as much, conceding that the First Amendment prevents "direct intervention *by a state legislature* into matters of church governance." Defs.' MSJ Br. 30 (emphasis added); *see also Hosanna-Tabor*, 565 U.S. at 183 (legislative intrusion into religious autonomy were among the evils that the First Amendment was intended to forbid).

Accepting the University's affirmative-defense-only position would also mean that freedom-of-association claims, like those frequently asserted by secular organizations, *see e.g., Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), would be far easier to vindicate than the protection provided by the Religion Clauses for religious organizations. But the Supreme Court explained that this "remarkable view" is "untenable," because the Religion Clauses provide more protection for religious associations, not less. *Hosanna-Tabor*, 565 U.S. at 189 (while the "right to freedom of association is a right enjoyed by religious and secular groups alike," the Religion Clauses give "special solicitude" for "a religious organization's freedom to select its own ministers").

Next, the University leans heavily on the argument that a religious group's rights to select its leaders "are not protected in the context of a student group which exists in a limited public forum created by a public university." Defs.' MSJ Br. 26. The University suggests that InterVarsity's

choice to access the RSO forum transforms it into an appendage of the University and ends its status as a "private religious group." Defs.' Suppl. Br. 31; *see also* Defs.' MSJ Br. 29 (describing RSOs at the University as "its" student groups). But InterVarsity isn't a creature of the RSO program; it is "its own Christian ministry that, as a chapter of InterVarsity USA, is distinct from the University." IVCF App. 1956. When InterVarsity was deregistered, it didn't dissolve; it lost access to the RSO forum. That loss of access was damaging, but it wasn't existential. *Id.* Indeed, Defendants admit that RSO regulations make clear that RSOs are voluntary private groups with a separate legal identity from the University and may exist regardless of whether they are registered by the University. IVCF Reply SoF ¶¶ 20-22; *see also Gerlich*, 861 F.3d at 713 (Kelly, J., concurring) (noting that the activities of RSOs "spring[] from the initiative of the students, who alone give [them] purpose and content"). Thus, it is simply wrong to suggest that InterVarsity is somehow a public entity by virtue of participating in a limited public forum.

And of course that must be true. It is entirely constitutional, as the University has conceded, for *InterVarsity* to engage in worship and prayer and celebration of sacraments and devotional theological training. It would be quite another thing for *the University itself* to purport engage in those religious exercises.

The University also tries to make the forum point as a type of express *quid pro quo*: "Plaintiff may select any leader it likes, if it chooses to forgo the benefits associated with RSO status." Defs.' MSJ Br. 30. But that route fails as a matter of black letter law. The University cannot condition a religious group's access to benefits on the deprivation of its First Amendment rights. *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)). As the Seventh Circuit explained in *Christian Legal Society v. Walker*, it does not matter that a University's deregistration of a student group "is not forcing [the student group] to do anything at all, but is only

withdrawing its student organization status." 453 F.3d 853, 864 (7th Cir. 2006). A university "may not do indirectly what it is constitutionally prohibited from doing directly." *Id*. at 864. For the same reason, government cannot condition access to a limited public forum on a religious group's sacrifice of its internal autonomy on religious matters. Defs.' MSJ Br. 27.

Thus, having voluntarily chosen to create a forum that includes actual churches, IVCF Reply SoF ¶ 32, the University cannot now try to coerce those churches into its own image. *Burnham*, 119 F.3d at 676. Whether in a limited public forum or pursuant to a "neutral law of general applicability," the government is structurally forbidden from entangling itself in internal religious affairs. *Hosanna-Tabor*, 565 U.S. at 190 (rejecting application of *Smith/Lukumi* line of free exercise cases, since those concern "government regulation of . . . outward physical acts," whereas minister selection cases, which "concern[] government interference with an internal church decision that affects the faith and mission of the church itself").

Ruling otherwise would mean that other types of limited public forums could condition access to the forum on a church's relinquishment of its core First Amendment rights. Under the University's theory, schools and other government facilities that regularly rent space to churches across the nation could condition access to the space on a church's compliance with hiring nondiscrimination policies. *See*, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 390 (1993) (school); *Powell v. Noble*, 36 F. Supp. 3d 818, 832–33 (S.D. Iowa 2014), *aff'd and remanded,* 798 F.3d 690 (8th Cir. 2015) (fairgrounds). It would also mean that the University could insist on the Newman Center allow a non-Catholic to officiate the Mass that the center holds on campus for students several times per week. IVCF Reply SoF ¶ 147. This Court should reject such a sweeping argument and its attendant crabbed view of the Religion Clauses.

III. InterVarsity's claims arising under the Iowa constitution are not barred.

The University briefly trots out two novel arguments regarding InterVarsity's state-constitution claims for damages, neither of which it raised against very similar claims at issue in *BLinC*.

First, it argues in a footnote that the Individual Defendants are entitled to qualified immunity on the state-law claims because InterVarsity's state-law rights were not "clearly established." Defs.' MSJ Br. 12 n.1. Setting aside the propriety of tucking such an argument in a footnote, that argument is entirely contingent on the success of the federal qualified immunity defense. The Iowa Supreme Court has emphasized that the Iowa constitution is *at least* as solicitous of constitutional rights as the federal constitution. *Godfrey v. State*, 898 N.W.2d 844, 862–65 (Iowa 2017) (listing "cutting-edge" Iowa constitutional cases and explaining that "[i]t would be incongruous to hold that our constitution is a drier source of private rights than the federal constitution"). The Court also found that the federal immunity standard is "overly protective" and adopted a more stringent state qualified immunity standard requiring defendants to "exercise[] all due care to comply with the law." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 280 (Iowa 2018). Thus, to the extent that the federal qualified immunity defense fails, *a fortiori*, the state-law one does too. Moreover, the Iowa defense places "the burden of proof . . . on the defendant" to "plead and prove" that she or he "exercised all due care." *Id.* Defendants' footnote does not even try to make that showing.

Second, the University cites a few old cases to argue that the claims for damages against it must be dismissed for failing to comply with the Iowa Tort Claims Act (ITCA). But it fails to mention that in the last two years, the Iowa Supreme Court has twice explained that claims arising under the Iowa constitution are not subject to the ITCA where state law does not provide an adequate remedy and instead are self-executing claims akin to federal *Bivens* actions. *See Godfrey*, 898 N.W.2d at 895–96 (due process); *Baldwin*, 915 N.W.2d at 281 (unreasonable search and seizure). Further, while those two cases did not specifically address the rights at issue here, there is

no reason to think that the Iowa constitution is more solicitous of due process and security from searches and seizures than it is of freedom of speech, association, and religion. *See also McCabe v. Macaulay*, 551 F. Supp. 2d 771, 775 (N.D. Iowa 2007) (recognizing that Iowa constitutional claims provide *Bivens*-like protections for freedom of speech and association). Nor does Defendants' brief argument try to show that the ITCA would provide an adequate remedy here.

That said, there is likely no need for this Court to try to predict what the Iowa Supreme Court would do with the Iowa constitution claims at issue in this case. Should this Court follow its approach in *BLinC* and rule for InterVarsity on the leading federal claims, the state-law claims would also likely take the same track as *BLinC* and fall out of the case.

IV. InterVarsity is entitled to declaratory relief and a permanent injunction.

Declaratory Relief. Because the University violated First Amendment rights, "nominal damages must be awarded" against the University "as a matter of law." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008); *accord BLinC*, 360 F. Supp. 3d at 905; *see also Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000) (nominal damages are awarded to remedy lost First Amendment rights to ensure that such rights are "scrupulously observed"). And ruling in favor of InterVarsity on damages "amounts to a declaratory judgment." *McCurry v. Tesch*, 738 F.2d 271, 276-77 (8th Cir. 1984). Thus, this Court must enter declaratory judgment.

Further, it is well-established that "[a] court may grant declaratory relief even though it chooses not to issue an injunction." *See Powell v. McCormack*, 395 U.S. 486, 499 (1969) (finding request for injunction moot, but entering declaratory relief and remanding for a trial on damages); *accord Crue v. Aiken*, 370 F.3d 668, 677-78 (7th Cir. 2004); *see also Davison v. Loudoun Cnty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 723 (E.D. Va. 2017) (declining injunction, but granting declaratory judgment to remove uncertainty regarding viewpoint discrimination in speech forum). So

too in cases where individual defendants might be entitled to qualified immunity. *McCurry*, 738 F.2d at 276-77 (entering declaratory judgment and remanding for the trial court to consider defendants' qualified immunity). Particularly in cases involving constitutional rights, "courts that have held [government action] unconstitutional have generally found it appropriate to enter declaratory relief even where defendants may also have been separately entitled to immunity from damages." *Konop for Konop v. Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189, 1193 (D. S.D. 1998).

That approach "clearly" appropriate in cases like this one, where defendants argue that the rights at issue "are not well defined" and that "no reasonable [] official" would have known that the defendants' conduct "would violate the plaintiffs' Constitutional rights." *Id.*; *see*, *e.g.*, Defs.' MSJ Br. 9, 16, 23 (accusing InterVarsity of illegal discrimination, and arguing that First Amendment law is unsettled); *see also* Defs.' Suppl. Br. 6-7 (same). Declaratory relief is thus necessary here to "terminate and afford relief from [the] uncertainty, insecurity, and controversy giving rise to the proceedings." *Alsager v. District Court of Polk Cnty., Iowa*, 518 F.2d 1160, 1165 (8th Cir. 1975); *accord Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp.*, 729 F.3d 846, 853 (8th Cir. 2013).

Permanent Injunction. The University claims that no injunction is needed because Iowa Governor Kim Reynolds recently signed SF 274, a law which the University claims protects InterVarsity's leadership selection standards. Defs.' MSJ Br. 31-34. This argument suffers from the same defects InterVarsity identified in its supplemental brief, including that the only University testimony on record is that—as of the day *after* SF 274 became law—InterVarsity's constitution was still "noncompliant" and that if InterVarsity resubmitted its constitution, it would still be rejected, IVCF Suppl. SoF ¶¶ 333-34, 344.

Further, SF 274 itself states that it may not be interpreted to limit any available remedies. Dkt. 51-3 at 7. Thus, the statute expressly forbids the University's attempt to use it to prevent InterVarsity from obtaining permanent protection for its constitutional rights.

In any event, the University can't have it both ways. It can't argue on the one hand that accommodating InterVarsity's beliefs violates "federal civil rights law," Defs.' MSJ Br. 9, and then argue on the other hand that the request for injunctive relief is moot. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (case not moot where government still "vigorously defends the constitutionality of its" original policy); *DeJohn v. Temple University*, 537 F.3d 301, 310 (3d Cir. 2008) (injunctive relief not moot because university had defended both "the constitutionality of its prior . . . policy" and even "the *need* for the former policy"). Given the University's current position regarding InterVarsity's constitutional rights and the alleged requirements of federal statutory law, InterVarsity's right to relief remains active because the University is maintaining its ability to return to its discriminatory conduct. Defs.' Suppl. Br. 6, 16 ("The University has a duty to ensure . . . civil rights laws are upheld," and the RSO policy simply "enforce[d] state and federal civil rights law"); *id.* at 18 (RSO policy "subsumes state and federal nondiscrimination laws"); *id.* at 11-31 (arguing that the University's actions were constitutional); *see also* Status Report at 4 (same). For instance, in *Trinity Lutheran*, a policy change did not moot a claim for injunctive relief where the original policy had been and continued to be justified by controlling law, thus leaving the defendant free to "revert to its [original] policy of excluding religious organizations." 137 S. Ct. at 2019 n.1. At a minimum, then, the University must disavow its current position regarding controlling federal law, and this Court should memorialize that disavowal in its opinion and hold the University to its representation. *Wheaton College v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) ("We take the government at its word and will hold it to it").

CONCLUSION

InterVarsity respectfully requests that the Court reject Defendants' motion and, pursuant to InterVarsity's outstanding motion for partial summary judgment, grant partial summary judgment for InterVarsity, award nominal damages against the University, issue a permanent injunction and declaratory relief, find that the Individual Defendants are not entitled to qualified immunity, and set a date for a trial on damages.

Respectfully submitted,

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