

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

BUSINESS LEADERS IN CHRIST,

Plaintiff,

v.

THE UNIVERSITY OF IOWA, et al..

Defendants.

Civil Action No. 17-cv-00080-SMR-SBJ

**Proposed Brief of *Amici Curiae* Chabad
on Campus, 24:7, Chi Alpha, Christian
Medical & Dental Associations, and
Ratio Christi in Support of Plaintiff’s
Motion for Preliminary Injunction**

Table of Contents

STATEMENT OF INTEREST OF *AMICI CURIAE*..... 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

 I. RELIGIOUS STUDENT ORGANIZATIONS COMMONLY ORGANIZE AROUND SHARED
 RELIGIOUS VIEWS AND SEEK LEADERS WHO SHARE THEIR RELIGIOUS COMMITMENTS..5

 II. THE UNIVERSITY’S SUDDEN RE-INTERPRETATION OF ITS HUMAN RIGHTS POLICY TO
 PREVENT RELIGIOUS STUDENT GROUPS FROM SEEKING LIKE-MINDED LEADERS
 THREATENS MANY RELIGIOUS STUDENT GROUPS AT THE UNIVERSITY 9

 III. RELIGIOUS STUDENT GROUPS CONTRIBUTE TO THE UNIVERSITY COMMUNITY..... 11

CONCLUSION 12

CERTIFICATE OF SERVICE..... 13

STATEMENT OF INTEREST

All of the *Amici* are student organizations with active groups at the University of Iowa. Chabad on Campus is a non-profit ministry whose mission is to provide Jewish educational, cultural, social and spiritual programs, and resources for the students of the University of Iowa, with the goal of creating an awareness and appreciation of Jewish Heritage. With 210 chapters at universities across the world including the University of Iowa, Chabad on Campus serves the student body by acting as a home-away-from-home, providing educational, social, spiritual and holiday programming for Jewish students. Like Plaintiff Business Leaders in Christ (“BLinC”), Chabad on Campus’s adherence to its religious beliefs is essential to its identity and mission. While Chabad on Campus holds events, activities and meetings open to everyone, it offers leadership positions only to those who share its religious beliefs, and thus may be adversely affected by a decision against BLinC.

24:7 is a student organization, and non-profit ministry of Parkview Church. Its mission is to advance the Gospel of Jesus Christ and His Kingdom by sharing the love of Christ with other students at the University of Iowa. 24:7 serves the student body by creating a supportive community for students and offering unique community service opportunities both locally and internationally. 24:7’s events and activities are open to all students. However, it seeks leaders who share its religious beliefs. Like Plaintiff BLinC, 24:7’s belief in and adherence to fundamental orthodox Christian beliefs is essential to its identity and mission. For six months in 2017, 24:7 was the subject of a complaint by the student who also filed the complaint against BLinC, giving rise to this action. While the Defendants dismissed that complaint because the complainant ultimately chose not to follow through with seeking a freshman Bible study leader position with 24:7, 24:7

remains at risk of derecognition or other sanctions from the Defendants because of its requirement that its leaders share the group's religious convictions.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. Its mission is to reconcile students to Christ, equipping them through Spirit-filled communities of prayer, worship, fellowship, discipleship, and mission. With 313 chapters at universities across the country and the world, including the University of Iowa, Chi Alpha serves students through providing community groups, fostering creativity and diversity, and promoting excellence, integrity and student leadership. Chi Alpha also strives to find ways to serve the community. For instance, at the University of Iowa, Chi Alpha works to ensure that international students on campus are able to find housing and have support that they may need to make the transition to Iowa. While Chi Alpha's meetings, events and activities are open to all students, it seeks leaders who share and live by the religious convictions that are the basis for its ministry. Chi Alpha's belief in and adherence to its Pentecostal Christian beliefs is essential to its identity and mission, and thus Chi Alpha may be adversely affected by a ruling against BLinC.

Christian Medical & Dental Associations ("CMDA") is a non-profit ministry whose mission is to motivate, educate, and equip Christian healthcare professionals to glorify God by serving with professional excellence as witnesses of Christ's love and compassion to all peoples, and; advancing biblical principles of healthcare within the Church and to our culture. CDMA has 207 chapters at universities across the country including the University of Iowa at both the Carver College of Medicine and College of Dentistry. CMDA serves the student body through hosting meetings to foster community, hosting panels with experienced physicians, and mentoring students. CDMA also encourages community service and educational projects such as volunteering at women's shelters and food banks, running blood drives, hosting medical training

seminars and sponsoring international medical aid trips. Like Plaintiff BLinC, CMDA welcomes everyone to its meetings, activities and events, but it could not accomplish its mission without ensuring that its leaders share its core religious beliefs.

Ratio Christi is a non-profit ministry whose mission is to re-establish a strong and reasoned presence of Christian thinking in academia. With more than 500 chapters at universities across the country, including University of Iowa, Ratio Christi serves the student body through training students to discuss their beliefs in a rational manner, hosting events, and fostering dialogue on campus. Like Plaintiff BLinC, Ratio Christi's belief in and adherence to fundamental orthodox Christian beliefs is essential to its identity and mission. The outcome of this matter may effect Ratio Christi's interests, including Ratio Christi's chapters ability to maintain belief and conduct-based standards for its leadership that are consistent with its fundamental identity as a Christian organization with orthodox beliefs. Thus, because it is similarly situated, Ratio Christi may be adversely affected by a ruling against BLinC.

SUMMARY OF THE ARGUMENT

Because personnel is policy, any organization dedicated to advancing a particular cause must ensure that those who lead it are actually committed to that cause. For religious student groups, their faith is the basis of their mission and forms their institutional identity. While religious student groups, like *Amici*, invite everyone to their meetings and activities, they do require support of their basic religious convictions from individuals seeking to assume a leadership role. Anything less threatens their effectiveness and the very existence of these groups. These religious student groups have existed at the University of Iowa for years and have been a valuable part of the campus community. University officials' sudden enforcement of the Human Rights Policy in a manner that

would preclude religious groups from upholding their basic values is unprecedented and endangers the very existence of organizations that provide value and benefits to a diverse community.

ARGUMENT

I. RELIGIOUS STUDENT ORGANIZATIONS COMMONLY ORGANIZE AROUND SHARED RELIGIOUS VIEWS AND SEEK LEADERS WHO SHARE THEIR RELIGIOUS COMMITMENTS.

College campuses are supposed to be a “marketplace of ideas.” *Healy v. James*, 408 U.S. 169, 180 (1972). Especially on college campuses that may number tens of thousands of students, like the University of Iowa, a critical component of that marketplace is the formation of organizations of students who join together to advocate for a common cause. Students supportive of an ideological, cultural, political or religious cause seek out others with that common interest and join together to amplify their voice, and the First Amendment protects their right to do so. *Id.* See also *Boy Scouts of America v. Dale*, 530 U.S. 640, 646 (2000) (holding that the First Amendment protects the leadership decisions of the Boy Scouts of America’s because leaders’ beliefs and actions change the message of the expressive association); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995) (holding that the First Amendment prohibits the state from forcing an expressive association to include speakers that alter the association’s message).

Decisions regarding who leads and speaks for an association are fundamental to the association’s ability to exist as a distinctive entity. This is because groups express their views through their leaders. “A religious body’s control over such [who leads it] is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 201 (2012) (Alito, J., joined by Kagan, J., concurring). Forcing a group to offer leadership roles to those who do not share its core beliefs distorts or destroys that voice. *Dale*, 530 U.S. at 654. And

for religious groups, “[d]etermining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself.” *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

Whether the association is for secular or sacred purposes, however, the government has no right to insist that the Iowa University Democrats, College Republicans, Chinese Students and Scholars Association¹, University of Iowa Association of Nursing Students², BLinC, *Amici*, or other groups allow students who are critical of the group’s views or who do not agree with the purpose of the association, to lead its discussion groups, speak publicly in its name, or vote on its speakers and policies. If the right of association means anything, it “presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.” *Democratic Party of U. S. v. Wisconsin*, 450 U.S. 107, 122 (1981). After all, “[i]f the government were free to restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006).

This freedom is essential for students whose views are in the minority on public campuses, like *Amici*. Although the freedom of expressive association is a right of all Americans and valuable to everyone, it is “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Dale*, 530 U.S. at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Large and broadly accepted groups can

¹ Chinese Students and Scholars Association at University of Iowa’s membership is limited to “Chinese students.” See Constitution of the Chinese Students and Scholars Association, available at <https://orgsync.com/17434/chapter> (last visited Jan. 11, 2018).

² Unsurprisingly, University of Iowa Association of Nursing Students’ Board is exclusive to University of Iowa Nursing students. See Student Organizations - University of Iowa Association of Nursing Students (UIANS), available at <https://nursing.uiowa.edu/current-students/uiowa-association-of-nursing-students> (last visited Jan. 11, 2018).

generally defend their identity through sheer force of numbers and informal means of control. But smaller groups or less popular groups are far more vulnerable to takeover or harassment by students empowered to obstruct and even change the group's unpopular stance. Which groups find themselves in that unenviable position varies with time and place. In an earlier era, public universities frequently attempted to bar gay rights groups from recognized student organization status on account of their supposed encouragement of what was then illegal behavior. The courts made short shrift of those policies. *See, e.g., Gay & Lesbian Student Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988). The question here is whether groups such as BLinC, *Amici*, and others will receive comparable First Amendment protection.

Amici engage with the entire campus community and open their meetings and events to everyone. But if persons who do not share *Amici's* religious views and refuse to conform to its standards of conduct could simply walk in and insist on taking a turn leading one of *Amici's* weekly studies of the Bible or the Torah—books whose interpretation is not free from controversy—and even claim the mantle of a “leader” of these groups to speak for them, those meetings would cease to be an expression of *Amici's* beliefs, and each “group as it currently identifies itself [would] cease to exist.” *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). As the Second Circuit has observed, a religious group’s faith requirements are a “legitimate self-definitional goal.” *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 860–61, n.20 (2d Cir. 1996). “[J]ust as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause,” BLinC and *Amici* “may protect their ability to hold [distinctive mission-based] meetings by including the leadership provision in [their] constitution.” *Id.* at 861.

When it comes to selecting leaders for religious groups, “depriving the [ministry] of control

over the selection of those who will personify its beliefs” is forbidden by the First Amendment. *Hosanna-Tabor*, 565 U.S. at 188 (holding that the First Amendment protects the right of religious groups to select their religious leaders without interference or restriction by the government). “By imposing an unwanted [leader], the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.” *Id.* The organization of a student group around shared beliefs is not unique to those that are religious. Any student group organized to advocate for particular beliefs or views will seek to ensure that its leaders actually share those beliefs. If it does not do so, the group’s expression will likely be fundamentally changed. A Democratic club with a Donald Trump supporter as its President, a vegan club led by a hunter, or a CrossFit club led by a couch potato will all have their expression altered by this new leadership – both internally in their messaging and externally in the perception of those the group seeks to influence. Similarly, a Jewish student group that fails to keep Kosher ceases to be a Jewish student group in the religious sense of the word, and a Christian student organization that cannot maintain its own doctrine loses its voice.

Amici welcome everyone to their meetings and events. *Amici* do not permit or engage in invidious discrimination, the exclusion of individuals based on irrelevant characteristics, in their leadership decisions. However, just as political considerations are relevant to the decision to elect a person to leadership in a political student group, the faith commitments of a student are highly relevant to his or her ability to lead Bible studies (the position sought by the complainant here with *amicus* 24:7) or to assume any other leadership position. The law commonly grasps this distinction. *See Amos*, 483 U.S. at 338 (religious organizations’ Title VII exemption from religious nondiscrimination law permissibly lifts a regulation that “burdens the exercise of religion”). The right of religious association includes the “right to organize voluntary religious associations”

(*Watson v. Jones*, 80 U.S. 679, 728 (1871)), to choose the leaders of those associations (*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)), and to require “conformity of the members of the [association] to the standard of morals required of them” (*Watson*, 80 U.S. at 733); *see also Hosanna-Tabor*, 565 U.S. 171, 201 (Alito, J. and Kagan, J. concurring) (“A religion cannot depend on someone to be an effective advocate for its religious vision if that person’s conduct fails to live up to the religious precepts that he or she espouses.”). The University of Iowa’s new interpretation of its Human Rights Policy infringes on precisely these constitutional rights.

II. THE UNIVERSITY’S SUDDEN RE-INTERPRETATION OF ITS HUMAN RIGHTS POLICY TO PREVENT RELIGIOUS STUDENT GROUPS FROM SEEKING LIKE-MINDED LEADERS THREATENS MANY RELIGIOUS STUDENT GROUPS AT THE UNIVERSITY.

The *Amici* in this case have long maintained chapters on the University of Iowa campus, some for decades. The University has not previously applied its Human Rights Policy in the manner it has to BLinC. Nor has the University communicated to religious student groups that it so radically reinterpreted its policy to prevent religious student groups from choosing leaders who share the organization’s religious convictions. After the University’s derecognition of BLinC, the only conclusion for other religious organizations is that the University is undergoing a dramatic reinterpretation of the Human Rights policy, as applied to religious student groups.

Over the past two decades, the University has at least three times been asked to apply the same Human Rights Policy to derecognize, defund, or otherwise punish a religious student group because of their faith standards for leaders. The University has expressly declined to do so each time. 24:7 described this history in correspondence with the University when it was faced with a complaint from the same complainant, who initially sought and then withdrew from a Bible study leader position with 24:7. A copy of this letter is attached as Exhibit 1.

Indeed, in one such occurrence, the University of Iowa, in a letter to the Christian Legal Society addressing this same issue, stated that religious organizations have always been permitted to require leaders to affirm the organization's religious beliefs and agreed that the University's policy cannot legally be interpreted to mandate otherwise. *See Letter from Thomas R. Baker to L. Craig Nierman*, (Feb. 20, 2004), Exhibit 1 to the Declaration of Kimberlee W. Colby, docket no. 7-3. The Associate Dean of Students (and Defendant in this case) Thomas R. Baker, reassured CLS as follows:

Implicit in the Human Rights Policy is the distinction between class characteristics such as race and gender, on one hand, and on the other hand the personal conduct of those seek to join student organizations. *The [student group] would not be required, and will not be required, to condone the behavior of student members...that is contrary to the purpose of [its] organization and its statement of faith.*

Id. (emphasis added). Indeed, the University at the time assured student groups that “[a] student religious group is entitled to require a statement of faith as a pre-condition for joining the group.”

Id. Such a condition “would not violate the UI Human Rights Policy.” *Id.* When CLS requested a formal exemption from the Human Rights Policy, concerned that it might be treated the same as BLinC, the University responded that CLS did not need an exemption because CLS was already protected under the policy. The University stated that, “[s]ince the Human Rights Policy protects groups such as [CLS] from discrimination on the basis of creed, it is not necessary to formally exempt religious groups from the Human Rights Policy in order to ensure that the rights of CLS members are protected.” *Id.* Unfortunately, the University's treatment of BLinC suggests that this has become a hollow promise.

Without altering the language or notifying religious student groups of any change in the interpretation of the language, the University has applied this same policy in exactly the opposite way, derecognizing BLinC. The University has not informed religious student organizations of

this new interpretation of the Human Rights Policy even after its application to BLinC. *Amici* are deeply concerned by this unannounced departure from longstanding practice at the University of Iowa, leaving them uncertain whether the University of Iowa will begin to take action against their religious organizations that, like BLinC, seek to ensure their own leaders enthusiastically support, and do not undermine, the organizations' religious mission.

III. RELIGIOUS STUDENT GROUPS CONTRIBUTE TO THE UNIVERSITY COMMUNITY

Religious student organizations serve all students at the University of Iowa campus in numerous ways. They provide spiritual guidance, emotional support, and a sense of belonging to students whose religious convictions may make them feel isolated on the University of Iowa campus. 24:7, as its name implies, seeks to provide constant support for students by connecting them with each other and with a larger spiritual community, and by mentoring students and helping them learn how to thrive while facing the changing demands of college life. Rabbi Blesofsky, through Chabad on Campus, provides religious leadership to Jewish students on campus, promoting the Jewish virtue of kindness and affirming the value of each individual.

Religious student groups also serve the broader University community and provide a means for students to serve both locally and throughout the world. For instance, Chi Alpha's feedONE initiative provides nutrition, clean drinking water, and educational resources to more than 146,000 children in 11 countries around the world. *See* Chi Alpha, feedONE, <https://chialpha.com/get-involved/feedone/> (last visited Jan. 12, 2018). The Christian Medical & Dental Association (CMDA) hosts an annual community health fair, hosts blood drives and provides free blood pressure checks. Its members visit the local children's hospital at Christmas to encourage and support patients and families. CMDA also takes students on international medical mission trips, giving them practical experience in putting their faith commitments into practice. Combined, these

organizations offer countless hours of service, enhance the spiritual and emotional wellbeing of students, and add to the rich cultural diversity of the campus community. Religious organizations are vibrant threads in the tapestry of campus life at the University of Iowa. To stifle these organizations and the students they represent would be a great loss to the campus community.

CONCLUSION

Diversity, and the value it provides, only exists when differences can co-exist. True diversity requires allowing a broad array of organizations to form around shared beliefs and engage with one another in the marketplace of ideas. The University's sudden reinterpretation of its Human Rights Policy to prohibit BLinC – and presumably other student groups – from maintaining faith standards for their leaders threatens their existence on the University's campus. For the reasons explained herein and more fully in the Plaintiff's briefs, *Amici* ask the court to enter a preliminary injunction and continue the decades-long protection of the First Amendment rights of religious student groups at the University of Iowa.

Respectfully Submitted, the 12th day of January, 2018.

J. Caleb Dalton*
District of Columbia Bar No. 1033291
ALLIANCE DEFENDING FREEDOM,
CENTER FOR ACADEMIC FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
Phone: (202) 393-8690
Fax: (202) 347-3622
CDalton@ADFlegal.org

**Pro Hac Vice* Application Pending

/s/ Robert R. Anderson
Robert R. Anderson
Iowa Bar No. AT 9021
P.O. Box 275
Huxley, IA 50124
Phone: (515) 597-4000
Fax: (888) 688-4132
bobanderson7@msn.com

Attorneys for Proposed Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2018, I electronically filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Respectfully submitted on this the 12th day of January, 2018.

/s/ Robert R. Anderson

Robert R. Anderson

Attorney for Proposed Amici Curiae

EXHIBIT 1

Coral Ridge Park, Suite 307
2461 Tenth Street
Coralville, IA 52241-1218
319-351-4900 Telephone
866-425-4901 Facsimile
lcn@niermanlaw.com
www.niermanlaw.com



L. CRAIG NIERMAN
NIERMAN LAW, P.L.C.

March 23, 2017

VIA FACSIMILE AND ELECTRONIC MAIL ONLY

Ms. Constance A. Schriver Cervantes, J.D.
Equal Opportunity and Diversity
University of Iowa
202 Jessup Hall
Iowa City, IA 52242

RE: [REDACTED] – 24/7

Dear Ms. Cervantes:

As you know I represent 24/7 in the above captioned matter. The following clarifies the history, relevant policies, and applicable law.

I. 24/7 Encouraged [REDACTED] To Become A 24/7 Leader *After* He Disclosed His Sexual Orientation, But He Did Not Finish The Application Process After He Signaled Disagreement With 24/7's Core Beliefs.

[REDACTED] became involved in 24/7 early in his freshman year, i.e., the fall semester of 2015. Starting in January 2016, he disclosed to 24/7 that he had realized that he was sexually attracted to men. After his declaration, leaders and members continued to warmly welcome him to the 24/7 fellowship. In fact, he continued to play in the 24/7 band ([REDACTED] is a gifted violinist).

After revealing his sexual orientation, [REDACTED] repeatedly affirmed his orthodox Christian faith. In summary, this means that he recognized Jesus as being God's Son, accepted Jesus' sacrificial death as the only means to eternal life, and recognized the Bible as authoritative (including its teaching on marriage, sexual conduct, etc.); his convictions mirrored the core beliefs of 24/7.

Page 2
March 23, 2017

In light of ██████ theology and the way he lived that out, 24/7 saw him as a potential leader. In other words, *despite knowledge of ██████ pronouncement of where he was at sexually, 24/7 encouraged him to apply for a leadership position.*

However, toward the end of the in-person interview, ██████ *contradicted his prior statements by declaring that he was reconsidering his theology.* Specifically, he said he was considering a “revisionist” view of the Bible; this means that he was trending away from viewing the Bible’s explicit pronouncements as authoritative, which put him at odds with 24/7’s core beliefs and group identity.

For the sole reason that ██████ indicated that his doctrine might be changing, 24/7 asked him to clarify in his own mind what his beliefs were and then notify 24/7 before the application process continued; he never responded. Accordingly, his application was never formally denied since he did not finish the process.

Nevertheless, despite ██████ new view of the Bible, he was still welcome at 24/7 events and, indeed, he attended some of them during the 2016 fall semester.

II. 24/7’s Actions Are Protected By The University of Iowa’s Human Rights Policy

I enclose a copy of the University of Iowa’s February 20, 2004 letter which was sent in the context of a remarkably similar issue involving the Christian Legal Society (CLS), a recognized student group. Like 24/7, CLS was organized around its spiritual or religious beliefs. CLS meetings and events were open to all students, but it limited leadership positions and official voting membership to those who shared its religious convictions. In summary, the University of Iowa initially resisted recognizing CLS because CLS retained the right to limit its membership to those that adhered to its statement of faith.

In interpreting the University of Iowa’s Human Rights Policy, Associate Dean of Students Thomas R. Baker stated:

Implicit in the Human Rights Policy is the distinction between class characteristics such as race and gender, on one hand, and on the other hand the personal conduct of those seek [sic] to join student organizations. *The [student group] would not be required, and will not be required, to condone the behavior of student members . . . that is contrary to the purpose of [its] organization and its statement of faith.*

(emphasis added).

Thus, the University of Iowa’s Human Rights Policy gives 24/7 the right to limit the participation of students whose beliefs are so contrary to its identity and core beliefs that they would undermine its purpose and distinctiveness. In fact, he determined that applying such a policy to prevent CLS from choosing leaders and voting members that share its religious beliefs would be religious discrimination against CLS in violation of the Iowa Human Rights Act.

Page 3
March 23, 2017

III. Religious Student Organizations Have A Constitutional Right To Select Members And Leaders Who Share Their Religious Beliefs.

The First Amendment's Free Speech Clause protects the right of expressive associations, like student organizations at public universities, to select their members and leaders based upon their adherence to each individual organization's beliefs.¹ As the Supreme Court recently reiterated, "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."²

This freedom of association protects religious clubs' ability to set their own membership and leadership requirements. As the Supreme Court recently reminded the nation, the "[f]reedom of association . . . plainly presupposes a freedom not to associate."³ Obviously, "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."⁴ Hence, the First Amendment protects "expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."⁵

Over and above the free association protections, the Supreme Court recently reaffirmed that the Free Exercise Clause prevents government from "interfering with the freedom of religious groups to select their own" leaders.⁶ It recognized that the Free Exercise Clause protects the right of religious groups to select those responsible for "conveying [their] message and carrying out [their] mission" and deemed it unlawful for the government to interfere with such decisions.⁷

When religious student groups select individuals who share their religious beliefs to be voting members and leaders, they are exercising this religious freedom. Public colleges and universities consequently violate the rights of religious students by requiring them to abandon their right to associate with persons who share their beliefs as a condition to access an otherwise open speech forum.⁸

¹ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

² *Knox v. Serv. Emps. Int'l Union, Local 100*, 132 S. Ct. 2277, 2282 (2012).

³ *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

⁴ *Democratic Party v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981).

⁵ *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703 (2012); see also *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (noting Free Exercise and Establishment Clauses work together to "protect[] religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits").

⁷ *Hosanna-Tabor*, 132 S. Ct. at 708-09.

⁸ See *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (concluding a university violated the First Amendment when it conditioned access to a free speech forum on a Christian student organization's willingness to abandon its faith-based membership and leadership restrictions); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996) (school district violated Equal Access Act, an analog to the First Amendment, when it conditioned a Christian student organization's access to a free speech forum on its willingness to abandon a requirement that its leaders share its Christian beliefs).

Page 4
March 23, 2017

Indeed, the University of Iowa—like most colleges and universities—only prohibits discrimination based on a narrow list of characteristics, thus *permitting* discrimination on a vast array of social and ideological grounds. Thus, groups organized around their political affiliations, beliefs on social issues, etc., may appropriately limit access to leadership to those who do not share their beliefs; yet, they often prohibit religious groups from doing the exact same thing. Formulating a nondiscrimination policy in this manner blatantly discriminates against these student groups.

The Free Exercise Clause also prohibits public universities from adopting policies that target religious groups for special disabilities.⁹ Thus, a university that allows discrimination on a host of grounds, but specifically precludes religious student groups from making membership and leadership decisions designed to preserve key articles of their faith violates the students' Constitutional protections because it uniquely burdens religious belief and practice.

Similarly, the Free Speech Clause prohibits public colleges and universities from excluding groups from speech forums based on the content or viewpoint of their expression.¹⁰ Singling out religious expression, such as faith-based membership and leadership restrictions, in a religious group's founding principles discriminates on the content and viewpoint of its speech. Secular groups may express reasonable philosophical requirements for leaders and members in their constitutions, yet religious student groups are denied this right simply because their speech regarding philosophical requirements is religious in nature. However, the First Amendment prevents government from prohibiting speech on "otherwise permissible subjects" simply because "the subject is discussed from a religious viewpoint."¹¹

IV. *Christian Legal Society v. Martinez* Does Not Undermine the First Amendment Rights of Students in This Context.

It is important to note that *Christian Legal Society v. Martinez*¹² does not apply here. *Martinez* is expressly limited to situations in which "access to a student-organization forum" is conditioned "on compliance with an all-comers policy."¹³ Indeed, the *Martinez* Court explicitly noted that it was not addressing a policy allowing "[a] political . . . group [to] insist that its leaders support its purposes and beliefs," while a "religious group cannot."¹⁴ The "all-comers" policy in *Martinez* required *all* student groups to open membership to *all* students, with no exceptions.

⁹ See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (explaining that "the Free Exercise Clause" prohibits government from "discriminat[ing] against some or all religious beliefs or regulat[ing] or prohibit[ing] conduct because it is undertaken for religious reasons").

¹⁰ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

¹¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

¹² *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

¹³ *Id.* at 2984.

¹⁴ *Id.* Notably, the four dissenters in *Martinez* viewed such a policy as clearly engaging in viewpoint discrimination. See *id.* at 3010 (Alito, J., dissenting); accord *id.* at 2999 (Kennedy, J., concurring) (noting *Martinez* would "likely [have] ha[d] a different outcome" if CLS could have shown that Hastings' policy was "content based either in its formulation or evident purpose").

Page 5
March 23, 2017

Thus, for example, to the extent that the University of Iowa exempts fraternities and sororities from prohibitions on gender-based discrimination, it cannot single out groups like 24/7 for making distinctions on the basis of religion. Thus, the University of Iowa does not require that organizations accept all students; accordingly, *Martinez's* holding does not apply.

V. Conclusion.

As you know, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”¹⁵ Indeed, our universities are places where “free speech is of critical importance because it is the lifeblood of academic freedom.”¹⁶

While 24/7 stands ready to cooperatively participate in the University of Iowa community, it takes its First Amendment rights seriously and will appropriately protect them.

Please contact me if you have any questions.

Very truly yours,

L. Craig Nierman

Copy to: Mr. Kyle R. Hulshizer, President, 24/7

¹⁵ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁶ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).