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June 21, 2021

VIA CM/ECF

Michael E. Gans, Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, MO 63102

**Re: *InterVarsity Christian Fellowship v. Univ. of Iowa,* No. 19-3389**
**Rule 28(j) Notice of Supplemental Authority:**
*Fulton v. City of Philadelphia*, No. 19-123, 2021 WL 2459253 (June 17, 2021)

Dear Mr. Gans,

*Fulton* unanimously applied longstanding precedent to confirm that the Free Exercise Clause requires strict scrutiny of burdens on religious exercise that are not generally applicable.

*Fulton* identified at least two ways to flunk general applicability. First, applying its decisions in *Sherbert v. Verner* (1963) and *Employment Division v. Smith* (1990), the Court said "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." 2021 WL 2459253 at *5 (cleaned up). This is true "regardless whether any exceptions have been given," because the existence of such a mechanism alone "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at *7.

Second, relying on its 1993 decision in *Church of Lukumi Babalu Aye v. Hialeah*, the Court stated that a law "also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at *5.

Either way, lack of general applicability triggers "strictest scrutiny." *Id.* at *8. Relying on *Lukumi* and its 2006 decision in *Gonzales v. O Centro*, the Court explained that, to survive strict scrutiny, the government cannot rely on a generalized interest in non-discrimination but must show a "compelling reason why it has a particular interest in denying an exception" to religious claimants. *Id.* at *9. Further, the

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presence of a "system of exceptions … undermines [the government's] contention that its non-discrimination policies can brook no departures." *Id.*

Here, University of Iowa's RSO policy fails both general applicability tests *and* strict scrutiny. The University has a mechanism for discretionary exemptions to create "safe spaces" for certain groups, letting officials decide which leadership criteria to permit (*e.g.*, Love Works and House of Lorde) and which to prohibit (*e.g.*, InterVarsity). IVCF Br.19. And it categorically exempts numerous secular student groups and secular programs. IVCF Br.15-17. Under clearly established law—as the Court's unanimity emphasizes—these two types of exemptions both trigger strict scrutiny and fatally undermine the University's purported interests.

Word Count: 347

Sincerely,

/s/ *Eric S. Baxter*

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