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

BUSINESS LEADERS IN CHRIST,)	
)	
Plaintiff,)	ORIGINAL
)	
VS.)	CIVIL NO. 3:16-cv-403
)	
THE UNIVERSITY OF IOWA; LYN)	
REDINGTON, in her official)	
capacity as Dean of Students)	
and in her individual)	
capacity; THOMAS BAKER, in)	
his official capacity as)	
Assistant Dean of Students)	
and in his individual)	
capacity; and WILLIAM NELSON,)	
in his official capacity as)	
Executive Director, Iowa)	
Memorial Union, and in his)	
individual capacity,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STEPHANIE M. ROSE
Thursday, January 18, 2018; 8:29 a.m.
DAVENPORT, IOWA

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THE BECKET FUND FOR RELIGIOUS LIBERTY

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25

1 THE COURT: Thank you. You may be seated. We are
2 here in the matter of Business Leaders in Christ versus The
3 University of Iowa. Business Leaders in Christ are represented
4 by Matt Dummermuth, Daniel Blomberg --

5 MR. BLOMBERG: Blomberg.

6 THE COURT: -- and Eric Baxter. The University of
7 Iowa is represented by George Carroll and Nathan Levin.

8 We are here for purposes of oral argument on
9 Plaintiff's Motion for Preliminary Injunction. Which counsel on
10 behalf of the Plaintiff will be doing the primary argument?

11 MR. BAXTER: I will be arguing, Your Honor.

12 THE COURT: Each party, as you know from the e-mail we
13 sent earlier, will have 30 minutes. You can allot your time
14 however you wish to allot your time. I have read the materials
15 and you are welcome to argue from the desk or from the podium,
16 whichever is most comfortable for you is fine.

17 MR. BAXTER: Thank you, Your Honor. Good morning,
18 Your Honor. Eric Baxter on behalf of the Plaintiff, Business
19 Leaders in Christ.

20 Business Leaders in Christ, as you know, is a small
21 religious student group at the University of Iowa. There are
22 over 500 student groups at the University of Iowa and all of
23 them are allowed to select leaders who embrace their mission.
24 Only BLinC, our client, has been asked to revise its beliefs and
25 change its pattern for selecting leaders if it wants to

1 participate on campus in the same way that every other student
2 group is allowed to do.

3 Under normal circumstances this case would fall
4 clearly under the Healy versus -- the Healy versus James line of
5 cases, Healy, Widmar, and Rosenberger where the Court has said
6 no matter how abhorrent a student group's views are, in Healy it
7 involved, you know, the group refused to say that it wouldn't
8 engage in violence, the Court said no matter how abhorrent we
9 think their views are, you cannot target a group because of its
10 beliefs.

11 Now, that raises the question how does this fit within
12 the CLS v Martinez case that the Supreme Court issued in 2010
13 and notably the University of Iowa didn't even raise this case
14 in its Response Brief and that's because when you look closely
15 at that case, it is clear that it has no application here. That
16 case is a very unique case where the Court said we have a very
17 unusual policy here where the University has required all
18 student groups to allow anybody who comes to participate on a --
19 on a full basis, they call it an all-comers policy, where the
20 Democrats had to let in Republicans, pro-choice had to let in
21 pro-lifers, presumably the sororities would have to let in
22 fraternities under this stipulation that the Court bound the
23 parties to because everybody has to accept anybody who comes
24 along and the Court started by saying well, what is the standard
25 of review that would apply here because this is a speech case

1 where you would normally have strict scrutiny which would
2 require the government to show a compelling government interest
3 that is being applied in the least intrusive way possible, but
4 we also have this, you know, limited forum where a University is
5 a unique context where they opened it up for special purposes
6 which has a slightly lower standard of showing that there's a
7 reasonable connection between the restriction being placed and
8 the purposes of the University's forum and then you have to show
9 there's a viewpoint neutrality and the Court said well, in this
10 unique circumstance where you are at a University and we are not
11 really trying to force them to shut down, we are just not going
12 to, quote, subsidize them anymore, said the Court, we are going
13 to apply the lower standard. That whole discussion is just
14 about the standard.

15 We agree for purposes of this Motion that there's a
16 limited public forum, that the Court can apply the standard that
17 applies to limited public forums, that is that you have to show
18 a reasonableness between the restriction and the University's
19 purposes and you have to show that there's no viewpoint
20 discrimination; but with all of that, you know, the Affidavit
21 that the University filed last night suggesting that they
22 somehow can do whatever they want because they're not -- they've
23 allowed these other opportunities, there are still other
24 opportunities for BLinC to communicate its message really
25 reveals a deep misunderstanding of the CLS versus Martinez case.

1 In the first place, the Declaration is misleading
2 because -- and we just submitted, I'm sorry, Your Honor, we
3 didn't have time to print copies from the hotel, but they're
4 basically saying that these other opportunities, the BLinC can
5 pay 150 to \$500 an event to rent a room, it can't use the
6 electronic digital boards, can't even chalk on campus, all of
7 these things are reserved strictly for student organizations so
8 -- for registered student organizations so on that level alone
9 the Declaration fails; but on a deeper level it shows a deep
10 misunderstanding of the CLS v Martinez case because in that case
11 the Court applied that analysis of saying well, there are still
12 other opportunities and the University is just denying the
13 subsidy, it is not really trying to shut them down, that was all
14 just part of the analysis for the Court to say well, what is the
15 standard of review that we apply and once we decide what the
16 standard of review is, reasonableness and no viewpoint
17 discrimination, that standard still applies here. It is not an
18 invitation for the University to do whatever it wants to the
19 student group and that's basically the tenet of the entire CLS v
20 Martinez case which, of course, we have very unique
21 circumstances here with this all-comers policy where because
22 every group is required to receive everybody who comes, there's
23 no need to discuss viewpoint discrimination. The Court says we
24 need not dwell on that here because there can be no distinction
25 between the groups based on their message or perspective under

1 an all-comers policy; but if you don't have that, then you still
2 have to show viewpoint discrimination so almost all of the
3 analysis in that Court's opinion is really just about well, is
4 there a reasonable connection between what the University is
5 trying to accomplish and the restriction it's imposing and the
6 Court basically applies a rational basis side of analysis and
7 says it is reasonable and we don't have to get into viewpoint
8 discrimination so there are I think two or three major points in
9 *CLS v Martinez* that distinguish it.

10 First, the Court said in any other case, even if there
11 are alternative challenges, and this is at page 690 of the
12 opinion, that would not cure the Constitutional shortcoming if
13 there's viewpoint discrimination. The Court then goes on to say
14 that and we're not even sure that this would apply when it comes
15 to leadership. The majority says, you know, if there were an
16 attempt to be a hostile takeover, we don't think that's very
17 likely in the first place, but if it were to happen, we are sure
18 the University would, quote, revisit its policy to make sure
19 that students can control the message that their group is trying
20 to convey and Justice Kennedy, whose opinion controls, says that
21 there would be a substantial case if the all-comers policy were
22 used to challenge group leadership and reiterated the Court's
23 statement that who speaks on behalf of the group colors the
24 message that is conveyed so again, the Court, in *CLS v Martinez*,
25 was emphasizing over and over this is a very unusual case. When

1 you have an all-comers policy, there's no need to discuss
2 viewpoint discrimination. Even then we're nervous when you try
3 to apply an all-comers policy to leadership issues and then the
4 Court goes on to say and we agree, this may not even be
5 advisable, but it doesn't mean it is not permissible, so talking
6 about this is not necessarily a policy that reflects well on the
7 University so this -- the facts of BLinC's case completely flip
8 Martinez on its head. It does not have an all-comers policy.
9 In fact, the policy it has is the exact opposite of an
10 all-comers policy.

11 When you look at the registered student organization
12 policy, which is attached to Exhibit A of the Baxter
13 Declaration, at page two of the printoff, it says that the
14 purposes are to allow like-minded students to join together, it
15 allows you to limit membership, not just leadership, but
16 membership to people who share the goals and beliefs of the
17 organization.

18 In the -- in the related policy on religious diversity
19 which is attached as Exhibit B to my Declaration on page one of
20 that printoff, it says that the purpose is to advance religious
21 diversity and that the University will not engage in
22 discrimination on the -- on the basis of religious viewpoint so
23 this is the exact opposite policy of what was in CLS.

24 In CLS the University's main priority was promoting
25 tolerance, inclusion, forcing students into the same groups to

1 debate within them, whereas the University of Iowa's policy is
2 the traditional policy that has prevailed on University campuses
3 for centuries, you know, in the Tocquevillesque style of
4 allowing students to form associations to -- with like-minded
5 people who share their beliefs and goals and allow those
6 associations to then express their views, compete against each
7 other in the marketplace of idea, and expose students to a wide
8 variety of ideas and to challenge their thinking and help them
9 prepare to live in the real world so a very different policy, so
10 under the standard then, turning to the forum standard, the
11 limited public forum, we have to ask well, is what the
12 University is doing, you know, imposing a restriction with the
13 nondiscrimination policy, is that restriction reasonable in
14 light of the purposes of -- the purposes of the University in
15 opening the forum.

16 Now, if -- if the University applies the policy as it
17 says it does in writing, that is distinguishing between status
18 and belief, then they're probably, you know, we're not
19 questioning the reasonableness of -- of asking groups not to
20 discriminate in most circumstances on the basis of status and if
21 you look at -- the policy itself is very clear that it makes
22 that status belief distinction.

23 The restriction says that organizations must be open
24 to all students without regard to race, creed, color, and then
25 goes on to list all the categories, or any other category that

1 deprives the person of consideration as an individual, that is
2 who they are. Not what they believe, but who they are, and that
3 sets up a very clear contrast between belief and status and that
4 is exactly how the University has applied the policy now for
5 decades.

6 We have the letter of Dean Baker from 2004 where CLS
7 faced the exact same issue as here where they were -- they had
8 concerns about being able to restrict membership based on --
9 that was membership, not just leadership as here, but restrict
10 membership based on their religious beliefs and in his letter,
11 Dean Baker said the Human Rights Policy does not prohibit
12 student groups from establishing membership criteria. They're
13 entitled to require a Statement of Faith as a precondition for
14 joining the group. Asking prospective members to sign a
15 Statement of Faith would not violate the Human Rights Policy.
16 He says the distinction between class characteristics such as
17 race and gender on the one hand and personal conduct of those --
18 implicit in the Human Rights Policy is the distinction between
19 class characteristics and conduct. He says CLS would not be
20 required to condone the behavior of students after they join the
21 group if they engage in conduct that was contrary to the purpose
22 of the organization and the Statement of Faith. They may be
23 dismissed as members; and then again, he emphasizes this belief
24 conduct -- or belief status distinction saying your group may
25 not, however, refuse to accept as a member a homosexual law

1 student who professes to be a Christian and is prepared to sign
2 your organization's Statement of Faith and observe the CLS group
3 rules of behavior and he goes on for the whole page, that's the
4 Kim Colby Declaration, the exhibit attached there to that
5 letter; and the second page of that is -- goes on at length
6 talking about the policy makes this status belief distinction
7 and that's how the University -- there are lots of groups, Imam
8 Mahdi, a Muslim group, has a requirement that its members live
9 by the Islamic principles concerning major and minor sin,
10 Feminist Majority requires students to accept belief in the
11 importance of access to abortion and contraception, and the list
12 could go on and on. The Amicus Brief that was filed on behalf
13 of a number of religious organizations indicated they require
14 their leaders to file -- to affirm that they abide by the
15 group's beliefs.

16 In the meeting with our clients on September 1st, Dr.
17 -- or Dean Baker and Dr. Nelson started the meeting by saying we
18 understand we can't force a group to select leaders who don't
19 share its beliefs. We would never force an environmental group
20 to accept climate deniers as their leaders and your organization
21 can require its leaders to abide by your tenets as well and the
22 clients went on at length with the University officials talking
23 about making sure we want to screen for people who share our
24 beliefs and are willing to live by them, belief and conduct, but
25 we don't care about their status. Anybody can join because

1 irregardless of their status.

2 In his letter to Dean Redington, BLinC's president
3 Jake Estell said, you know, under our policy, students who
4 identify as homosexual can be members and leaders of BLinC if
5 they affirm its beliefs and agree to live by them. Again, at
6 page nine of that letter, moreover, BLinC has repeatedly made
7 clear that students who identify as gay or lesbian are eligible
8 to serve as leaders so long as they affirm and live by BLinC's
9 Christian and religious beliefs; and then after that meeting,
10 Dr. Nelson sent a letter to the clients saying submit a new
11 constitution, told them at the meeting that's fine, we agree
12 that that's acceptable under our policy, we just want you to
13 make clear so the students know coming in what they are getting
14 into, that they may not be able to serve as leaders and he sent
15 a follow-up letter that said make sure your letter says that
16 they are not categorically eliminated or ask questions that are
17 not -- you have to ask questions that are not presumptive, for
18 example, of sexual orientation and that's what already was in
19 the Statement of Faith. The Statement of Faith just required
20 students in general terms to turn away from sin and to accept
21 Christ as a savior and to receive His grace; but to follow the
22 direction given by the University, our clients added a statement
23 saying here are some other standards of conduct ranging from,
24 you know, not -- not participating in pornography, being honest,
25 not being racist, you know, a whole standard of ideals for

1 Christian living, including the statement that marriage -- God's
2 intention for sex is between married -- for marriage between a
3 man and a woman which is not presumptive about anyone's sexual
4 orientation. It applies to single and married, it applies to
5 heterosexual and homosexual, and it does not categorically
6 assume anything about the leader so they followed precisely the
7 instructions that were given to them and then the next thing
8 they knew, they have been denied registration and in doing this
9 in complete, you know, in complete contrast to what happened in
10 CLS v Martinez where there was an all-comers policy, the
11 University specifically engaged in viewpoint discrimination.

12 It said you must revise your Statement of Belief
13 because it is discriminatory on its face so presumably if BLinC
14 would have resubmitted a constitution with a statement that we
15 affirm that God's intention for sex is between any two
16 consenting adults, apparently the University would have accepted
17 that and, in fact, that's exactly what Marcus Miller, the
18 student who filed the original complaint against BLinC did, he
19 started his own organization that said the purpose of this
20 organization is to affirm -- is to be gay affirming in contrast
21 with the religious organizations that have taken a different
22 approach against our members so you have a clear example here of
23 one viewpoint being allowed, another viewpoint being penalized,
24 and the client being told if you want to remain on campus, you
25 have to revise that belief so this takes us completely out of

1 the CLS v Martinez realm and puts it completely back into the
2 Healy versus James, the Widmar, and the Rosenberger where the
3 University is targeting a single organization because of its
4 beliefs.

5 Now, that, of course, leads directly into -- I think
6 that that answers the first three questions that the Court had
7 about CLS v Martinez and the forum analysis and then the -- Your
8 Honor asked if -- if there was a student group based on atheism,
9 if that sought registration and required its leaders to refrain
10 from praying, reading the Bible or other religious texts,
11 attending religious worship services, would the University be
12 required to deny its application. Absolutely, just like any
13 other group under the limited forum doctrine.

14 It would make -- I don't even understand how it
15 violates the policy because the policy as written says that it
16 only prohibits status based discrimination and the University
17 hasn't denied any of that. They haven't denied any of the
18 facts, they haven't retracted anything that was said at any of
19 the meetings, they haven't denied what was said in the CLS
20 letter, they have completely let all of that go and never
21 address then under what policy are you penalizing BLinC and it
22 underscores that what is going on here is hostility towards the
23 religious belief and Hosanna-Tabor, the 2012 Supreme Court
24 decision that was decided unanimously holding that the
25 government cannot interfere in the selection of religious

1 leaders further underscores that as do the decisions for secular
2 organizations like an atheist group, the Hurley decision and the
3 Boy Scouts versus Dale where the Court -- or Dale versus Boy
4 Scouts of America where the Court said even in a secular
5 context, you cannot force a group to accept members or leaders
6 to the extent it would -- it would interfere with their ability
7 to express a message and under Hosanna-Tabor that's an absolute
8 protection for religious organizations where the Court said that
9 they have -- the First Amendment gives special solicitude to
10 religious organizations.

11 THE COURT: Hosanna has never been applied in this
12 manner though. It has always been used as an affirmative
13 defense where there is a Plaintiff who is an employee who was in
14 a ministerial position within a religious institution who is
15 suing a Defendant employer who is a religious institution. We
16 don't have those facts.

17 MR. BAXTER: I disagree, Your Honor. Hosanna-Tabor in
18 that case was not -- it was an ADA case, there are -- the
19 ministerial exception -- Hosanna-Tabor itself did not rely on
20 employment-like decisions at all, it relied on the church
21 autonomy doctrine, citing Watson v Jones, Kedroff, Milivojevich,
22 all those cases were property dispute cases where the Court said
23 you -- the government cannot interfere in the internal affairs
24 and decision making of a religious organization and Courts have
25 applied that in cases -- a wide range of cases involving

1 employment disputes, defamation claims, overtime claims,
2 contract disputes, and I have a list of citations. If it would
3 help, Your Honor, I would be happy to submit a supplemental
4 briefing showing the wide range of areas which this applies and
5 we are applying this defensively. We applied this in response
6 to the University's action against us, brought an investigation
7 against us, we defensively raised the ministerial exception.

8 THE COURT: Do any of those cases extend to student
9 organizations?

10 MR. BAXTER: I'm not -- well, the Conlon -- the Conlon
11 case out of the Seventh Circuit, Your Honor, was applied to
12 IVCF, InterVarsity Christian Fellowship, where the Court said
13 this is a categorical exception. You can -- it can be waived.
14 The Court can simply never get involved in a religious
15 organization's affairs.

16 Hosanna-Tabor itself, if you look at the concurrence
17 by Justice -- Justice Alito and Justice Kagan, they said
18 ministerial -- ministerial exception is misleading. It is not
19 about ministers, it is about anyone who leads, has
20 responsibility for leading the affairs of a religious
21 organization. It doesn't have to be a church, is doesn't have
22 to be a synagogue or a mosque, there are cases applying it to
23 nursing homes, I had a list here, I am trying to find the --
24 nursing home, communications director for both, you know,
25 interns, employees, volunteers, anything that goes to the heart

1 of how a religious organization conducts its religious affairs.

2 The IVCF versus Conlon case, let me see if I can find
3 the citation here, 777 F.3d 829, I'm sorry, it's Sixth Circuit,
4 2015.

5 THE COURT: Do any of those cases involve state-funded
6 organizations?

7 MR. BAXTER: I, you know, that's never come up in a
8 case, there's no -- and the Trinity Lutheran decision I think,
9 you know, removes that consideration that you aren't -- you
10 cannot be penalized from participating in generally available
11 funding or other government programs simply because of your
12 religious status so again, you know, a nursing home presumably
13 is receiving HHS funding so there's no basis for -- the Court
14 has just simply said categorically the First Amendment puts
15 religious organizations aside on a pedestal and that's aside
16 from the limited forum doctrine. The Court can resolve this
17 under the fact that the University is open to limited public
18 forum and it is engaging in viewpoint discrimination but the
19 Hosanna-Tabor ministerial exception doctrine also clearly
20 applies in this situation; and with that, Your Honor, I will
21 reserve the remainder of my time for rebuttal.

22 THE COURT: Okay. Mr. Carroll, are you arguing on
23 behalf of the State?

24 MR. CARROLL: Yes, I am.

25 THE COURT: Okay.

1 MR. CARROLL: I want to begin with arguing what the
2 proper standard is at this stage for a temporary injunction.
3 Obviously the Eighth Circuit standard is *Dataphase*, but there
4 has been a modification to *Dataphase*.

5 If the challenge is to a policy of regulation or
6 statute that is the result of a reasoned Democratic process, and
7 I have laid out in our brief that the University of Iowa was
8 created by the Iowa Constitution as a separate entity, it is
9 then governed by the Board of Regents, the Board of Regents is a
10 nine-member body that are appointed by the Governor of Iowa
11 subject to approval by the Iowa Senate, therefore then the Board
12 of Regents becomes the administrative agency similar to numerous
13 agencies within state and federal government.

14 The Board of Regents has authorized the University of
15 Iowa to create an operations manual consistent with state law,
16 federal law, and University and Board of Regents' policies. In
17 addition, the Board of Regents has the absolute authority to
18 rescind any policy implemented by the University of Iowa that is
19 contrary to its policy, state law, or federal law.

20 In this case the University of Iowa created the
21 operations manual clause that is at dispute which is the
22 nondiscrimination clause on behalf of the University of Iowa
23 impacting faculty, students, staff, even third-party members
24 that are on campus so therefore the University of Iowa contends
25 that this case fits under the modified *Dataphase* which is the

1 Planned Parenthood decision where the Court presumes the policy
2 itself is constitutional and requires the movant at this stage,
3 so BLinC, to demonstrate more than a fair chance of success, a
4 likelihood chance of success on the merits as we go down the
5 road, and I believe that distinction is important for the
6 Court's standard of review.

7 BLinC's response was this is just an informal policy,
8 it doesn't fit under Planned Parenthood, and I submit it is more
9 than that because the Board of Regents governs the University of
10 Iowa, they have the absolute right to step in and revoke that
11 policy, they have not and therefore it is part of a reasoned
12 Democratic process.

13 THE COURT: Do you have any case law that supports
14 that analysis?

15 MR. CARROLL: I do not. I am relying on the Iowa
16 Constitution to create Iowa and then the statute that creates
17 the Board of Regents; but I fully recognize that this is a
18 different area, it is not like an administrative agency action
19 that had public input, but I do believe it is a fair argument in
20 light of how the University operates.

21 Factually the Court had asked me to address in part
22 what place does the argument, Plaintiff's argument, that the
23 University is inconsistent when it applies the Human Rights
24 Policy; but there is nothing in the record to suggest we apply
25 it inconsistently.

1 What we have in this case in the record is a complaint
2 by a student who has clearly -- and a formal complaint by a
3 student who is clearly protected by University policies and the
4 nondiscrimination policy. Once he filed that formal complaint,
5 the University of Iowa had an absolute obligation to investigate
6 it and resolve it one way or the other.

7 In this case factually it was resolved against BLinC,
8 they were informed of the resolution, they were informed of a
9 possible solution, ultimately the University said we do not
10 accept your solution, our sanctions will stay in place. BLinC
11 chose not to pursue this to the Board of Regents, which they
12 have the absolute right to do, and they had -- and they were
13 notified of that absolute right so there is nothing in this
14 record to suggest Iowa has applied the policy inconsistently.
15 There's no example by BLinC that another group, a sorority, a
16 fraternity, another religious group had a formal complaint and
17 it was resolved differently.

18 THE COURT: Is it your belief that a formal complaint
19 has to be filed before the University looks at and observes its
20 own Human Rights Policy?

21 MR. CARROLL: It is not my belief or my argument. It
22 is to the extent that they've argued we're applying it
23 inconsistently. Now, the fact of the matter is we are not
24 auditing all these groups. We do rely on, for example, even
25 like in an employment setting, we rely on employees to bring the

1 problem to our attention to react appropriately so there's been
2 no example of you forced this leader on us or look at this other
3 group, they're discriminatory, why aren't you going after them;
4 but we don't have, generally speaking, an audit procedure, but
5 what we do have is a procedure where they submit their bylaws,
6 they meet the Guidelines, and then they're recognized -- they're
7 not recognized, they're a registered student organization.

8 THE COURT: What about -- what about one of the ones
9 that the Plaintiff did flag for you that certainly would appear
10 to have a policy that would violate this same Human Rights
11 Policy that the University of Iowa has and that's the Islamic
12 organization that requires all of its -- well, requires people
13 for full membership to be Muslim.

14 MR. CARROLL: Yes, but what we don't have -- we're not
15 applying it inconsistently because a non-Muslim hasn't attempted
16 to join the group.

17 THE COURT: But you are aware that by their own
18 constitution that violates the Human Rights Policy of the
19 University of Iowa, correct?

20 MR. CARROLL: Arguably it does because of the fact
21 that you have to have a specific religious belief. What the
22 University is saying is -- and really along with somewhat of the
23 Martinez case is there's no evidence here that there's been a
24 student trying to take a leadership position and/or even a
25 member that has said well, I want to be part of this group and

1 they are denying it to me.

2 THE COURT: And to be clear, I -- the formal name of
3 that group is the Imam Mahdi organization; but has the
4 University of Iowa ever denied an organization the right to
5 become a registered student organization based upon the
6 constitution that was submitted?

7 MR. CARROLL: Based upon the students' constitution?

8 THE COURT: Yes.

9 MR. CARROLL: Not that I know, but there's multiple
10 applications so I can't answer that yes or no.

11 THE COURT: Has the University of Iowa ever revoked an
12 organization -- student organization's registration after a
13 complaint other than the one in this case?

14 MR. CARROLL: The University has worked with other
15 organizations to make them compliant with the general
16 nondiscrimination statute, excuse me, the internal policy.

17 THE COURT: How often has that happened?

18 MR. CARROLL: Well, not very often. I am going to say
19 a handful, by one hand.

20 THE COURT: Over what period of time?

21 MR. CARROLL: The period of time would probably be --
22 I'm going to go off my background so I am going to say in the
23 last 25 years.

24 THE COURT: Okay. So then I am going to assume that
25 it is rare that you have student complaints?

1 MR. CARROLL: It is rare.

2 THE COURT: So you have had I assume less than five or
3 five or less complaints in the last 25 years from students about
4 student organizations?

5 MR. CARROLL: Well, related to this argument. We have
6 had -- we have had complaints that are, for example, hazing,
7 things like that.

8 THE COURT: Okay. So related to an allegation that
9 somebody's Constitutional rights are being violated because of a
10 membership policy of a particular student organization?

11 MR. CARROLL: And I am not even asserting that it is a
12 Constitutional complaint. It is a complaint about essentially
13 -- the same way the student brought it to our attention through
14 some kind of complaint procedure so they're not necessarily like
15 BLinC, you're basically violating my First Amendment rights.
16 There have been complaints that are saying this group has been
17 discriminatory under the University policy, but never this
18 specific to the First Amendment.

19 THE COURT: Right, but certainly things like this
20 organization won't allow members of this particular race or --

21 MR. CARROLL: Right.

22 THE COURT: -- this organization won't allow
23 membership of this particular whatever, age or whatever the rule
24 might be, and there are, according to Mr. Baxter, at least
25 around 500 student organizations at the University of Iowa, are

1 those -- all of those are registered student organizations?

2 MR. CARROLL: I will have to -- excuse me. I will
3 have to check.

4 Yes, that is an accurate factual statement.

5 THE COURT: Okay. So having had, for instance, this
6 other group's constitution brought to your attention, has the
7 University of Iowa taken any steps to ensure that that
8 organization has modified its constitution in order to meet the
9 Human Rights Policy?

10 MR. CARROLL: My understanding is we have not, but in
11 one sense that now that this issue is brought to this light, the
12 University is looking at groups, for example, I think they point
13 out, you know, we have -- the University of Iowa has a
14 registered student organization that's all-male choir so we are
15 -- we are going through these as we speak, but at the same time,
16 you know, I understand the significance of this issue, it is a
17 large University with a lot of student organizations, and it is
18 somewhat complaint driven. If we had a female that applied to
19 be in the male choir, then we would -- then we would focus in on
20 the issues.

21 THE COURT: And I understand the practical reasons for
22 being complaint driven; but do you have any case law that would
23 support the idea that it is not an arbitrary enforcement when
24 your only action to enforce it comes when somebody complains?

25 MR. CARROLL: I do not have specific case law other

1 than, you know, that the standard arbitrary and capricious is --
2 was it arbitrary for the University of Iowa to respond to a
3 specific complaint? Absolutely not. So then the argument is is
4 it arbitrary not to go now and read all these constitutional
5 organizations -- or the bylaws of these organizations and I
6 don't believe that's arbitrary in the context of what arbitrary
7 means.

8 The University of Iowa is looking at things, but to
9 exactly answer your question, we don't -- I don't have case law
10 to say we don't have to go out and look at all this.

11 THE COURT: I'm sorry. Give me just a moment here to
12 find a page. And here I'm looking at what is in the record as
13 Docket 7-4 and at page 36 of 48, it is a letter to Dean -- to
14 the Dean from Becket which lists this Islamic organization
15 specifically and lists the concern that it requires members who
16 are Shia Muslims so the University of Iowa has had that
17 information for at least at this point two and a half months.
18 In the context of a Motion for Preliminary Injunction, you
19 haven't taken any action at all to ensure that that particular
20 group is running a constitutional organization?

21 MR. CARROLL: We haven't taken any action to --
22 against the organization.

23 THE COURT: To unregister them or anything else?

24 MR. CARROLL: Right. That's correct.

25 THE COURT: Okay. Then how do you respond to the

1 Plaintiff's concerns that you have singled them out?

2 MR. CARROLL: Well, I think that the initial response
3 is we had a student complaint so we had to respond to that
4 complaint and we're not targeting their religious belief, we're
5 attempting to apply the nondiscrimination policies of the
6 University of Iowa.

7 Now, if the response here is the University of Iowa
8 needs to go back today and look at all these constitutions, then
9 maybe that's it; but right now we're looking at what the
10 University of Iowa did to BLinC and I submit that it wasn't
11 arbitrary to look at this complaint and try to work through it
12 and initially work through it with BLinC.

13 THE COURT: And this isn't necessarily an attack
14 against the University for how it handled administratively the
15 issue as it arose a year ago, but -- well, or six months ago;
16 but having had this kind of information brought to the
17 University's attention, I think there's an expectation there
18 when you're looking at enforcement in the context of a
19 Preliminary Injunction that the University would at least act on
20 and consider this to be a complaint. It is clearly articulated.

21 The Plaintiffs haven't asked you to go through all
22 500, I am not asking you to go through all 500, but it doesn't
23 seem unreasonable that you would at least pull up the one that
24 pretty clearly is in violation of your policy that they
25 highlighted for you two and a half months ago.

1 MR. CARROLL: I mean, my response is, you know, we
2 received the letter from a lawyer, should the University of Iowa
3 follow it up? Perhaps.

4 THE COURT: Okay. The parties have not talked here
5 much about the other aspect of the Statement of Faith at issue
6 here as it relates to transgendered students. Do you have any
7 arguments that you would like to highlight on that issue? I
8 think most of the parties' analysis and discussion at this point
9 has related to issues involving gay or lesbian students. Would
10 you like to raise any issues with respect to the transgender
11 issue?

12 MR. CARROLL: Well, I think what I -- yes, in the
13 sense of we have the nondiscrimination policy that would apply
14 equally across campus. To the extent the transgender issue
15 would arise, it may arise in sororities, it may arise in
16 fraternities, it may arise in the music group I mentioned, and,
17 you know, to be honest, the response is that we do -- we would
18 look into these things and the fact of the matter is it is
19 somewhat of a complaint-driven process. I mean, that's the way
20 it is.

21 I would like to next address -- even if this Court
22 applies the strict scrutiny analysis, what I view is the
23 conflict here, it boils down to two things. One, are we really
24 telling BLinC who can be their leaders because that's really
25 what they're doing, they're saying an openly gay member can

1 join, but now our leadership is a different component, so they,
2 you know, invoke the ministerial exemption; but what -- we're
3 not entangling ourselves in their leadership decisions. What we
4 are saying is you can't use a protected status to deny a member
5 on one hand, but then on the other hand you have the First
6 Amendment, so you're sitting with a potential compelling state
7 interest which is clearly adopted by the 14th Amendment and the
8 cases I cited having to do with same-sex marriage are to point
9 out now under the U.S. and the Iowa Constitution, same-sex
10 marriage is a fundamental right, a Constitutionally fundamental
11 right protected by the United States 14th Amendment and then the
12 Iowa Constitution Equal Protection Clause so when we look at the
13 final analysis, the Court has to decide do we have a compelling
14 state interest to do what we have done even though we're
15 infringing in part or arguably on the First Amendment right of
16 freedom of religion and association and in this case I submit
17 that the compelling state interest to end discrimination on
18 registered student organizations is sufficient to withstand
19 where we are right now which is a temporary injunction hearing
20 to say that there isn't the necessary and likely chance of
21 success in this case or even a fair chance of success because
22 the Court has to balance the interest of the University of Iowa
23 to enforce essentially state and federal law in a way, you know,
24 if you do the strict scrutiny analysis, of course, you know, it
25 is compelling state interest, I believe we have demonstrated

1 that, and then you really look to the least -- is it the least
2 restrictive alternative.

3 Well, it is in the sense of there's no way to enforce
4 nondiscrimination policies internally and in this case we're not
5 -- we're not necessarily enforcing a policy as in Hosanna where
6 it was an affirmative defense to an ADA claim, we are simply
7 saying if you are going to be a registered student organization,
8 then -- and there are rights that come with that, then you need
9 to abide by what we believe to be a compelling state interest
10 and so therefore, you know, we merge into the cases that talk
11 about can you condition, you know, it is essentially called the
12 unconstitutional conditional privilege which is can you
13 condition state funds that may infringe on a group's
14 Constitutional rights.

15 In the Trinity Lutheran case, the Missouri state law
16 specifically said this generally available funding is not
17 available for any religious group and that case factually
18 involved a playground -- applying for playground grants.

19 In this case the -- BLinC has voluntarily chosen to
20 participate in a registered student organization and seek
21 funding from the University of Iowa and that kind of condition
22 has been upheld by the Courts that say we're not infringing on
23 your right to do what you want, we are conditioning the use of
24 state funds for things that clearly violate. Now it is clear it
25 violates the Iowa Constitution and the U.S. Constitution, not

1 just, you know, the University of Iowa operations manual. The
2 fact of the matter is they want state -- they want the State of
3 Iowa to fund what is fundamentally discriminatory and so when we
4 look at it from that point of view, the Court has to decide
5 which -- honestly which element is going to prevail here. I
6 mean, is it the First Amendment, does the First Amendment
7 absolutely trump the 14th Amendment and that is really the
8 quandary that the University of Iowa finds itself in in this
9 case.

10 When we try to apply what we believe is the proper
11 legal standard under state, federal law, and the Constitutions,
12 then maybe we're running afoul of the First Amendment and the
13 cases suggest that, in fact, if we're not directly infringing on
14 their rights, but we're simply talking about state funding, you
15 know, the Trinity Lutheran essentially was targeting religious
16 groups. This policy does not target religious groups. It
17 essentially applies to every group on campus, let alone faculty,
18 students, and staff.

19 THE COURT: And I don't disagree. I think it is a
20 neutral policy, I think it is a good policy, I think the State
21 has compelling interests in ensuring that there's not
22 discrimination taking place on the basis of gender identity and
23 sexual orientation, I think all of that is absolutely true. I
24 think the First Amendment has to give way and the case law
25 clearly says it has to give way under the Free Exercise Clause

1 for neutral and generally applicable laws.

2 The problem here is what we spent the bulk of our
3 early argument talking about is that it can't be a neutral and
4 generally applicable law if it is being selectively enforced and
5 so to me the turning question for this matter is is the
6 University evenly enforcing this policy against all student
7 groups or just this one.

8 Now, the University's response to that has been we
9 only take this up when we get a complaint and we rarely, if
10 ever, get a complaint. We got a complaint here, we went through
11 a process, and this was the answer. Again, I don't think there
12 was anything necessarily wrong with that process.

13 What I do think the problem becomes is then when
14 you're handed information that clearly shows there are other
15 organizations in violation of the same policy, when you don't
16 bother to do anything about that information.

17 Now, of course, we are not deciding this case, you
18 know, looking at every single organization, we're at a very
19 preliminary stage. This is a request for Preliminary
20 Injunction. Standards are different than it will be at trial or
21 that it may be later down the road as we litigate these matters.

22 The question before me now is whether the Plaintiffs
23 have a fair chance of prevailing on the merits of their Free
24 Exercise Clause claim based upon this idea of being singled out
25 and that's the main focus of what I am hoping to hear from both

1 parties.

2 MR. CARROLL: And I understand, Your Honor. I mean,
3 the answer is that if Iowa should have viewed that letter from
4 an attorney as a complaint about -- against this Muslim group,
5 we did not, you know, as one can imagine, there was a lot going
6 on with this case at the time, a lot of letter writing, a lot of
7 -- this is not an easy decision. Everybody understood that and
8 we did try to work with BLinC.

9 Now, if this turns on we're being arbitrary, that's
10 one thing; but to say we singled out BLinC is just not factually
11 accurate because the facts are a student complained, cited the
12 right policy, and BLinC essentially takes the position that our
13 decision was incorrect factually; but that's not for the Court,
14 of course, and nor did they appeal it to the Board of Regents,
15 the administrative agency, so if this turns on the University of
16 Iowa should do more with other groups, then perhaps that's where
17 the Court is going to go; but Iowa is trying to do its best
18 responding to student complaints and certainly the BLinC issue
19 and moving forward.

20 I mean, for example, if we revoked -- I mean, if we
21 look to the Muslim constitution and said this violates the
22 policy, I mean, are we back here? I mean, if this whole case
23 turns on well, you didn't enforce this against this group and,
24 you know, in their brief they cited athletics at Iowa,
25 fraternities, sororities, other groups.

1 THE COURT: None of those concern me. To me those are
2 all clearly distinguishable. Those are not protected
3 classifications. Whether you practice, you know, whether you
4 support women practicing dentistry is not at all the same as a
5 protected classification such as religion, sexual identity, and
6 sexual orientation, those to me are nonstarters; but because
7 here the argument has been particularly that you're targeting
8 religion, that's the argument, right, it is the religious
9 clauses that have been cited here, at the very least I would
10 hope the University would take a look at the religious
11 organizations that are registered with it and just be able to
12 give me some sense of whether this is the only organization who
13 has something that is violative of the Human Rights Policy and
14 so all I know right now is the one that's cited in this letter
15 that the Plaintiffs have provided to me. I don't know if that
16 means that these two are uniquely the two among the 500
17 organizations that have this issue or if they're two of 100 that
18 have this or they're two of two and so that's what I was just
19 trying to get a sense of and part of that is again, I have to
20 look at the likelihood of success on the merits down the road.

21 MR. CARROLL: And I appreciate that, Your Honor. If,
22 you know, Iowa, I will stand here and tell you, to my
23 understanding Iowa has not looked into that organization. Also
24 to my understanding BLinC wasn't targeted because of its
25 religious beliefs. Now, what they are arguing now is go target

1 every group, go target every religious group; but you have to
2 start with a -- reach the conclusion did we target BLinC because
3 of its religious beliefs.

4 Now, should we be looking into the Muslim bylaws or
5 another group's bylaws? Perhaps, perhaps the answer is
6 absolutely; but the fact of the matter is that arbitrary and
7 capricious standard, we didn't target BLinC, we didn't -- we
8 just didn't go out and go oh, well, you're a Christian group and
9 so we're targeting you because you are a Christian group, but we
10 are leaving a Muslim group alone, that is not how this factually
11 occurred; but I fully appreciate the Court's position and the
12 questioning which is shouldn't you be enforcing that against all
13 religious groups the same way you did against BLinC; and if so,
14 then do we really shift more into the other analysis?

15 THE COURT: Agreed, and to me again at this stage and
16 with this question which is just whether a Preliminary
17 Injunction should be granted, that is where we are leaving open
18 I think the much more complex and bigger questions for after we
19 have had full discovery and after the parties have had an
20 opportunity to do the briefing and all of those kinds of things
21 and I agree here that there are a number of religious tenets of
22 BLinC's organization that were not complained about by the
23 University of Iowa, their stance on abortion, their stance on
24 euthanasia, their stance on death penalty, their stance on a
25 number of other -- chastity, a number of other things aren't

1 challenged here. We are talking about only those two areas of
2 protected classifications that are the issue and they're not
3 necessarily religiously linked other than by this organization
4 in their own Statement of Faith.

5 MR. LEVIN: Your Honor, could I consult with the AG
6 for less than a minute on some factual issues?

7 THE COURT: Absolutely. Go ahead.

8 MR. LEVIN: Okay.

9 (An off-the-record discussion was held.)

10 MR. CARROLL: Thank you, Your Honor. I guess in
11 followup to the Court's concerns about us enforcing it against
12 other groups, I think the University's position is that, you
13 know, this came up rapidly as we tried to work through it and so
14 it is not that the University wouldn't look into other groups,
15 but I still present the argument that we are not targeting
16 BLinC.

17 Now, again, if it boils down to you're not enforcing
18 it against another group, why BLinC, the answer honestly,
19 factually is because we had a complaint. Now, whether we should
20 have read the attorney's letter as a complaint, that's, you
21 know, another day I guess. Generally we get a lot of lawyer
22 letters every day at the University of Iowa and, you know, we
23 just have to kind of sort through things.

24 I would like, with the balance of my time, one of the
25 specific questions to me, if it is still of significance to the

1 Court, was what was the -- what is the legal significance of the
2 fact pattern I put in our Resistance which has to do with the --
3 I was just trying to truly lay out what funding is available and
4 then with respect to why they haven't used the funds, I mean, we
5 are at a temporary injunction stage.

6 The record that I have submitted, that they haven't
7 refuted, other than saying they missed a deadline, is this thing
8 is coming up because there's a recruitment fair in mid -- end of
9 January. Counsel has admitted that to me. That's what is
10 making this of urgency to that group. The fact of the matter is
11 I've pointed out you haven't consistently gone to the
12 recruitment fair so when you talk about the standard under
13 Dataphase, irreparable harm, you are complaining about something
14 that you haven't used consistently and you did not use in the
15 fall of 2017 before this complaint was filed so when they argue
16 if we can't go to the recruitment fair, we won't get members, it
17 may be the demise of our group, I am simply pointing out to the
18 Court well, wait a minute. If you're going to complain about
19 being denied a benefit, you better have used the benefit before
20 the dispute started and they -- and they simply did not
21 consistently.

22 The other thing I just filed yesterday, kind of the
23 Affidavit, was just to point out the fact that there are other
24 forums they can use.

25 THE COURT: Now, the Plaintiffs this morning or, no,

1 I'm sorry, it was last evening, indicated that all of those
2 other forums the Plaintiffs could use are for registered
3 organizations according to the University website.

4 MR. CARROLL: To be honest with you, Your Honor, I
5 drove over from Des Moines this morning, I have not seen their
6 Affidavit. My secretary briefly told me about it on the phone
7 this morning when I arrived to Davenport; but the Affidavit I
8 submitted of Mr. Nelson provides that nonregistered
9 organizations can use the Union, for certain rooms there are
10 rental fees, that's -- we're not disputing that; but they can
11 also use the bulletin boards for free on University of Iowa
12 campus, they can use the residence hall bulletin boards, there's
13 avenues because Martinez kind of talked about well, there's
14 other avenues for the groups and the purpose of Mr. Nelson's
15 Affidavit would say there are other avenues and one of the
16 cases, I believe it was Martinez, pointed out, and this is years
17 ago, so it is more true today was hey, social media has taken
18 over everything. Why do we talk about bulletin boards? College
19 kids don't look at bulletin boards anymore. I mean, I think the
20 Court can take judicial notice of that, so they have plenty of
21 avenues. What we are trying to point out is although you are
22 not a registered student organization, your access to the
23 student body really isn't that limited.

24 THE COURT: Thank you, Mr. Carroll.

25 MR. CARROLL: Thank you.

1 THE COURT: Mr. Baxter? And I know Mr. Carroll ran
2 over some. You are welcome to take additional time as well.

3 MR. BAXTER: Thank you, Your Honor. I just want to
4 respond mostly to the points that were made.

5 First on just the final points that were made about
6 urgency, there is a student fair, the student fair is really the
7 only opportunity that the BLinC organization has to meet with
8 all of, you know, has access to all of the student
9 organizations. There's also the OrgSync which they use which is
10 the only, you know, way that -- that's where everyone goes to
11 look at what organizations are available, when they meet, what
12 activities they have.

13 There's -- it's -- to say that they can use social
14 media, that doesn't give them access to the student body, that
15 gives them access to their friends, so there's really -- there's
16 no argument here about -- that they are being deprived and our
17 Declaration filed this morning showed that they are being
18 deprived of the same access that everyone else has to the
19 student body and the Courts have held that also, you know,
20 irreparable harm is satisfied merely by the Constitutional harm.

21 On the standard of review, let me just cite a couple
22 of cases for the Court. I would cite the Barrett versus
23 Claycomb case which is at 936 F. Supp. 2d 1099 where the Court
24 specifically rejected that having members of the Board of
25 Regents who have the authority to tell someone what to do is not

1 a Democratic process, it is not a process that involves what the
2 legislature does or what an agency does in common rule making.

3 If you want to look at what a Democratic process is,
4 you can look at the Iowa Civil Rights Act which was -- actually
5 became a statute and includes a religious exemption on these
6 very issues saying that religious organizations are not liable
7 under the Act for discrimination or for screening on the basis
8 of their religious beliefs, that includes sex, sexual
9 orientation, gender identity, and so forth, so I think there's
10 just no argument. All BLinC has to show here is a fair chance
11 of success on the merits.

12 Now to the main -- this main issue about enforcement.
13 The Imam Mahdi constitution was approved in February 2015. All
14 of these organizations have constitutions that have to be
15 reviewed and all of them -- and the problem -- to say that you
16 can rely on basically a heckler's veto because someone
17 complains, and again I would just like to cite a couple of cases
18 that are -- that are on point with that, Board of Regents of the
19 University of Wisconsin versus Southworth, 529 U.S. 2017 -- I'm
20 sorry, 529 U.S. at page 217, where the University there allowed
21 a majority vote of the student body to the claim funding and the
22 Court said that you cannot use majority determinations to
23 undermine the Constitutional protection of -- of unlike
24 viewpoints.

25 The Eighth Circuit said the same thing in Gay and

1 Lesbian Students versus Gohn, 850 F.2d 361, where they allowed
2 -- the University allowed a student senate to vote to reject
3 funding and again the Court said you can't do that. You cannot
4 use majority vote or, you know, a complaining process. I'd also
5 cite the Court to the Tenafly Eruv case, which is 309 F.3d 144,
6 where the Court says you can't rely on unequal enforcement to
7 suppress someone's Constitutional rights.

8 The problem here, of course, goes way beyond just Imam
9 Mahdi. There's a huge problem, you know, the -- all kinds of
10 organizations, fraternities and sororities, the University's own
11 programs, sports programs discriminate on the basis of sex, it
12 has scholarship programs, support programs for students that
13 discriminate on sex, race, national origin, gender identity, all
14 those are -- there's nothing wrong with the University doing
15 that; but those are all prohibited technically that that's
16 status-based discrimination that is prohibited by the Human
17 Rights Policy.

18 BLinC has not engaged in status-based discrimination
19 and again, the University has never responded why is it now
20 applying the Human Rights Policy to suppress beliefs as opposed
21 to status. It has never -- it's never disputed that our clients
22 would allow someone, regardless of their sexual orientation, to
23 serve, it has never disputed that it would allow an organization
24 who affirms -- that affirms sex between any consenting adults,
25 this is plain and simply viewpoint discrimination and there are

1 dozens of organizations that require either ideological
2 affirmation or that signal that they are based on sex, you know,
3 Women Dentist Association; race, Hispanic Dental Association; we
4 also cited Black Engineers, Asian Fitness Club, all of these
5 organizations signal there's national origin, there's Chinese,
6 Indian, Korean, Japanese, Persian, Saudi, Sri Lankan, all of
7 these organizations signal in their constitutions we are looking
8 for people of a certain category that is, you know, now they may
9 be able to say we don't discriminate on the basis of your
10 beliefs, but they do -- or that we let people join if they share
11 our -- we're not discriminating because of your race, we are
12 going to let you come in or whatever, but they are technically
13 violating the constitution -- the Human Rights Policy.

14 THE COURT: But they're not because they may be an
15 organization that promotes women or promotes a particular
16 religion or promotes a particular race, but you can join no
17 matter what your religion or race.

18 MR. BAXTER: And that's exactly what BLinC says, you
19 can join no matter what your status is, you just have to support
20 the mission of the organization and that's what the University
21 said is okay. He -- counsel has never refuted that the
22 University all along has said it is okay to have a mission based
23 even for religious organizations and I would have to say it has
24 to be especially for religious organizations because of the
25 First Amendment.

1 And there's nothing in the record that shows that
2 they're going forward and we have counsel here who is saying
3 well, we are going forward, but they have had weeks now and
4 really months, this has been an issue since last February, to
5 submit an Affidavit or a Declaration or a statement from someone
6 saying what they are doing to change the situation.

7 Counsel is concerned about violating the Fourth
8 Amendment. That -- the University itself disavows any
9 endorsement of what a student organization says. It says they
10 are separate legal entities, registration is not an endorsement,
11 it is a charter to exist, that's what the registered student
12 organization policy reads, it says we do not support or endorse
13 the organizations.

14 In *Cuffley v Mickes*, the Court -- Eighth Circuit said
15 fear of violating the equal protection clause is not enough,
16 because a private organization speaks does not -- that even if
17 you are sponsoring them or supporting them, that was a case
18 where the KKK wanted to join a highway cleanup program and there
19 was a nondiscrimination policy just like here and the Court said
20 you cannot deny -- the Court said you cannot deny them access to
21 that program just even if you find their views abhorrent. They
22 discriminate on the basis of race, gender, national origin. Not
23 enough. The Court said we are not even going to consider
24 whether participating in the highway program is speech within
25 the meaning of the First Amendment or whether this creates a

1 forum, a limited public forum, because you simply cannot in any
2 case discriminate on the basis of their viewpoint so that case I
3 think is absolutely dispositive and then the Gerlich case I
4 would add also where the -- the Iowa State University said we
5 don't want you to use our trademarks in connection with your
6 views that marijuana should be legalized and the Court said once
7 you've made that available, not just funding, but your
8 trademark, once you've made that available to everybody, you
9 cannot discriminate just because you don't like the views of
10 that single organization and there's a large number of private
11 speakers, this is clearly not the University's speech.

12 THE COURT: How -- I agree that stepping into the
13 morass of conduct versus beliefs here can get difficult with
14 these particular issues especially; but how does a transgendered
15 student join BLinC? How does that happen?

16 MR. BAXTER: The same standards would apply. Anybody
17 can join BLinC. Anybody is welcome to be a member, the student
18 that filed the complaint was invited and welcome to be a member.
19 Those who lead the organization have to be able to show that
20 they support and will strive to live by.

21 If you read Hannah Thompson's Declaration, she said
22 we're not even concerned about people, you know, sometimes not
23 totally complying. If they're showing that they accept the
24 belief, which is a traditional Christian belief that people
25 should subject their will to God and suppress their temptations

1 or desires or whatever their natural inclinations are in certain
2 circumstances, and as long as they profess a belief and are
3 willing to show an effort to try to turn to Christ and accept
4 His grace, that that's all that's required and so it is the same
5 standard applies as to anybody else.

6 I would also emphasize that both Obergefell and Varnum
7 in the cases, both state and federal cases recognizing same-sex
8 marriage, in both cases the Court emphasized that these
9 traditional beliefs are -- come from -- are sincerely held,
10 they're reasonable, they're -- and that they deserve the full
11 protection of the First Amendment, that people who hold to those
12 beliefs have the right to continue to teach and live by those
13 beliefs and so the idea that they would -- that the University
14 would somehow be violating the 14th Amendment by respecting
15 those beliefs on the same terms as it respects every other
16 viewpoint is simply -- is simply misguided.

17 To just touch back on the status-based discrimination,
18 again, I point the Court to the Hurley case which we cite in our
19 briefs where the Court -- there was a nondiscrimination policy
20 like here, a group wanted to join it to express gay pride, and
21 the Court said you cannot force -- even though that's a
22 protected status, this wasn't even a religious organization, it
23 was a private parade organization, the Court said you cannot
24 force in that situation someone to accept a message, you have --
25 and said specifically you have to distinguish here between

1 beliefs and status. The individuals were not precluded from
2 being in the parade, just like nobody is precluded from being in
3 BLinC, they just are not -- cannot express their message which
4 conflicts with the message the group wants to convey.

5 THE COURT: Let's circle back though. How does
6 somebody who is transgender, they are transgender, that is their
7 status, how do they fit in to this organization?

8 MR. BAXTER: So BLinC's Statement of Faith says --
9 encourages students to embrace their -- their birth gender so
10 someone who has feelings of being someone of the opposite sex
11 under that religious teaching is encouraged to embrace their
12 birth gender. If someone is willing to do that, despite
13 whatever their feelings or their sense of who they are, then
14 they are welcome to participate in the organization.

15 That view may not be popular, but it is a legitimate
16 viewpoint that cannot be discriminated against just because
17 everyone -- a lot of people find that abhorrent. Many people --
18 that's true of every -- that's true of someone who wants to
19 engage in sex outside of marriage, who wants to view
20 pornography, those may be things that -- everyone is asked to
21 comply by the same standard regardless of their status.

22 THE COURT: So they're, in the minds of the
23 organization here, there is -- there is no status of being gay
24 or of being transgender, it is only actions that make you gay or
25 transgender?

1 MR. BAXTER: Well, I don't think the organization
2 takes -- it really doesn't matter. They can take whatever view,
3 you know, their religion is. I haven't asked them specifically,
4 but I -- I don't think they take any -- I am not aware that they
5 would say, for example, that someone's feelings or sense of who
6 they are is not real and they said someone who identifies --
7 Jake Estell's letter to Dean Redington said someone who
8 identifies as gay can be a member as long as they express --
9 share the belief that they should not act on that and are
10 willing to teach the beliefs, the religious beliefs, of the
11 organization and that's -- the Supreme Court has recognized that
12 distinction in the Hurley case.

13 THE COURT: Okay.

14 MR. BAXTER: I mean, I guess another example I might
15 give of that is the feminist organization says, you know, we
16 require our members to accept abortion and access to
17 contraception. You know, if there's a young woman who is a
18 feminist who wants to join the organization, but because of her
19 religious beliefs does not accept that, part of who she is, her
20 religion, how she perceives the world, she cannot accept that as
21 appropriate. If the feminist organization denies her access,
22 they are not discriminating against her because of her religion,
23 they are just saying we want you to share our beliefs. It is a
24 belief-based screening process and --

25 THE COURT: But that again to me is a very different

1 thing. I mean, somebody is gay, somebody is transgender, this
2 is somebody believing something, and here your organization is
3 not being attacked for your position on a number of religious
4 issues as I talked with Mr. Carroll about.

5 They're not saying you have to believe in abortion,
6 they are not attacking your position on euthanasia, they are not
7 attacking your position on the death penalty, they are not
8 attacking those things that are not linked to a protected class
9 of persons.

10 They're only attacking the two parts, the two
11 sentences of the Statement of Faith that relate to protected
12 classes of people, so what I am trying to understand is if your
13 organization's view is there is no such thing as a gay person or
14 a transgender person, it is all whether somebody acts
15 transgendered or acts gay --

16 MR. BAXTER: Well, I think that's a false dichotomy.
17 The policy treats sexual orientation, gender identity, and
18 religion as the same and a religious person can just as equally
19 say this is not just something that I am choosing to believe, it
20 is how I am, it is how I perceive the world. I am naturally
21 inclined to this sense of belief and my place in the world.
22 Those are -- that is who that person is and that's all the
23 University itself says, all of these categories are about who
24 the person is, not what they believe. Their national origin,
25 that's who they are. Their race, that's who they are. Their

1 sex, that's who they are. Their sexual orientation, that's how
2 they are. Their religion, that's how they are.

3 I don't see -- if you're targeting religion -- and for
4 the University to go and just check all of the religious
5 organizations to make sure they're complying, that itself is its
6 own forum of religious targeting. I mean, and as far as whether
7 you are attacking all of the religious beliefs or some of the
8 religious beliefs is irrelevant and if you look at the Holt v
9 Hobbs case, the Supreme Court just decided in 2016, the Court
10 said it doesn't matter if you are, you know, you don't get a
11 pass just because you are only targeting a small piece of their
12 religious beliefs. That piece of their religion is equal to the
13 full scope of protection under the law.

14 Here the astounding thing is that the University has
15 never backtracked. The only facts in the record are that
16 belief-based screening is permissible, that you can ask your
17 members and your leaders and your members to sign a Statement of
18 Faith, and that there's nothing wrong with expecting your
19 leaders to abide by certain standards of conduct. The
20 University has not disavowed or -- so the only evidence in the
21 record is that that is permissible which leads to the only
22 conclusion the University is targeting BLinC because it doesn't
23 like it.

24 If it didn't want to -- and they've never responded to
25 the issue of like well, if we just changed on our viewpoint to

1 say, okay, we think that any kind of sex is okay, I mean, are
2 they --

3 THE COURT: I don't think they are talking at all
4 about sex.

5 MR. BAXTER: Well, they --

6 THE COURT: They are talking about sexual identity and
7 sexual orientation. Those are very different things than
8 talking about sex.

9 MR. BAXTER: Well, all -- all the policy says is -- if
10 that's true, all our policy says is we believe that sex is
11 appropriate between a man and a woman.

12 THE COURT: A married --

13 MR. BAXTER: A married man and a woman.

14 THE COURT: Marriage between a man and a woman.

15 MR. BAXTER: Right, so if you are -- if you are
16 heterosexual man and you want to have sex outside of marriage,
17 that would violate the policy. If you are single, heterosexual
18 or homosexual, you are asked not to engage in sexual activity.
19 It has no -- absolutely no bearing on your sexual orientation.

20 THE COURT: Show me where in the record this student
21 said he intended to have sex outside of a male-female marriage.

22 MR. BAXTER: It's in the Hannah Thompson Declaration.

23 THE COURT: He intended to pursue relationships.

24 Would you agree with me relationships aren't sex?

25 MR. BAXTER: Well, he said -- either way it would be a

1 violation of BLinC's religious beliefs. He said that -- and I
2 think it is a very good example of her Declaration at Paragraphs
3 I think it is 16 through 25 or 26 where she sits down with him.
4 Why does she meet with him? She said she wanted to find out
5 what his walk with Christ was, whether he accepted their
6 religious beliefs, and was willing to talk and in the course of
7 that conversation he expressed that he had attraction, in his
8 words, to persons of the same sex.

9 Now, if she were engaging in sexual orientation
10 discrimination, that would have ended the conversation; but she
11 said well, let's talk about this. She spent two hours saying
12 well, how do you understand that in view of these Biblical
13 teachings, he said he was struggling with it, he didn't know how
14 he fit in, that he wanted to pursue a homosexual relationship.
15 She talked to the board about it, she went back and had another
16 conversation with him and said look, we are just concerned, we
17 want to help with this, if it is something you share our beliefs
18 and you want to work in this -- with these -- within these
19 beliefs, we're happy to have you be a part of this, and he said
20 no, I want to live as an openly gay man and -- and he says in
21 his complaint I want you to force BLinC to accept openly gay
22 leaders. That is the language of his complaint.

23 Now, she said, you know, we'd love to have you
24 continue to participate, but that is inconsistent with our
25 beliefs, and so you wouldn't be able to serve as a leader; but

1 we certainly welcome you, so there's a clear case here, and then
2 to have Jake Estell say they can identify. Marcus Miller can
3 identify as a gay man, but we're just asking him to live by and
4 accept our religious beliefs.

5 Now, he didn't, and that's fine, he started a group
6 that proposes the exact opposite viewpoint. Now, you can't say
7 that that's the basis on -- you would never say that's
8 discrimination on the basis of sexual orientation, that he is
9 opening a group for people who reject that view of Christianity.
10 It is a belief, it is not based on the status. People of either
11 sex, either sexual orientation can accept those views and live
12 on them so this is a clear case of viewpoint discrimination, it
13 is completely outside the realm of *CLS v Martinez*, it falls
14 within the Healy line of cases, and we ask this Court to grant
15 our clients relief.

16 THE COURT: Thank you, Mr. Baxter. I will take it
17 under advisement. We will get a ruling out before the deadline
18 that the parties are concerned about. Thank you all for being
19 here. We're adjourned.

20 (Proceedings concluded at 9:46 a.m., January 18,
21 2018.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Linda Faurote-Egbers, Federal Official Realtime Court Reporter, in and for the United States District Court for the Southern District of Iowa, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 22nd day of January, 2018.

/s/ Linda Faurote-Egbers
Linda Faurote-Egbers, CSR NO. 622(IA)
FCRR, RMR, RPR, CSR (IA and IL)
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