

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

- - - - -X
 BUSINESS LEADERS IN CHRIST, :
 an unincorporated association, :
 :
 Plaintiff, :
 :
 vs. : Case No. 3:17-cv-00080
 :
 THE UNIVERSITY OF IOWA; :
 LYN REDINGTON, in her official :
 capacity as Dean of Students :
 and in her individual capacity; :
 THOMAS R. BAKER, in his official :
 capacity as Assistant Dean of :
 Students and in his individual :
 capacity; and WILLIAM R. NELSON, :
 in his official capacity as :
 Executive Director, Iowa :
 Memorial Union, and in his :
 individual capacity, : HEARING TRANSCRIPT
 :
 Defendants. :
 - - - - -X

Judge's Chambers, First Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Friday, February 1, 2019
3:00 p.m.

BEFORE: THE HONORABLE STEPHANIE M. ROSE, Judge.

KELLI M. MULCAHY, CSR, RDR, CRR
United States Courthouse
123 East Walnut Street, Room 115
Des Moines, Iowa 50309

APPEARANCES:

For the Plaintiff:
(Via telephone)

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(Via telephone)

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P R O C E E D I N G S

(In chambers, with counsel present via telephone.)

THE COURT: Okay. I think that is everybody we should be expecting. So on the line I have Mr. Blomberg and Mr. Baxter and Jacob Estell on behalf of BLinC, and I have Mr. Carroll on behalf of the University of Iowa.

Is anybody else on the line?

Okay. We are here today for purposes of oral argument on the parties' cross-motions for summary judgment. Both parties are seeking summary judgment in this particular case.

Prior to the hearing, we sent to the parties a list of questions I would like the parties to address and advised the parties that I would give each side 30 minutes to make their arguments, which can be apportioned however the parties choose to apportion that time. For each motion, the movant's going to go first, and they can reserve any portion of their 30 minutes to respond to the other side.

So in this particular case, Mr. Blomberg or Mr. Baxter on behalf of BLinC, would you like to make your argument?

MR. BAXTER: Thank you, Your Honor. This is Eric Baxter on behalf of Business Leaders In Christ, and I would like to reserve about three minutes for rebuttal.

May it please the Court. Your Honor, the University has admitted everything that this Court needs to find viewpoint discrimination in violation of the free speech clause and

1 religious targeting in violation of the free exercise clause.

2 It has admitted that religious organizations are not
3 permitted to require or even encourage their leaders to share
4 the group's faith, and they have admitted that other
5 organizations who are formed around beliefs or activities that
6 touch on protected categories under the human rights policy are
7 allowed to restrict leadership and membership, as are
8 nonreligious ideological organizations; feminist groups,
9 pro-life groups, political groups. They're also allowed to
10 restrict leadership and membership based on their organization's
11 beliefs or mission. Such disparate treatment of religious
12 organizations triggers a strict scrutiny which the University
13 cannot satisfy here.

14 I'd like to address these issues in that order; first the
15 free exercise -- or the free speech violation, then the free
16 exercise violation, and, finally, why strict scrutiny is not
17 satisfied.

18 Under the free speech clause, *Martinez* is clear that the
19 minimum requirement in the limited public forum is that the
20 government cannot engage in viewpoint discrimination, and the
21 Eighth Circuit, as recently as in the *Gerlich* case in 2017, has
22 reemphasized this requirement.

23 There are three -- at least three ways that the University
24 is clearly engaging in viewpoint discrimination. The first
25 involves the organization Love Works, which is a religious

1 organization with views on marriage and sexuality exactly
2 opposite those of BLinC. It requires its leaders to sign a
3 statement of core Christian beliefs and that they will affirm
4 LGBTQ individuals in their Christian pursuit.

5 BLinC was deregistered for having leaders affirm beliefs
6 exactly contrary to that, and Love Works has not been
7 derecognized. There is no more direct example of viewpoint
8 discrimination for that.

9 (Interruption from the operator.)

10 MR. BLOMBERG: In addition to Love Works, other groups
11 are allowed to encourage or require their leaders to embrace the
12 group's mission, both based on protected categories. For
13 example, men's and women's a cappella groups, club sports teams,
14 military sports -- support groups are all allowed to select
15 leaders based on categories that are covered by the human rights
16 policy, as are nonreligious ideological groups like the Iowa
17 National Lawyers Guild, which embraces democratic socialist
18 views; the Latino/Latina Graduate Student Association; and other
19 groups are all allowed to select their leaders and members based
20 on their mission.

21 All of these groups have messages that they are trying to
22 convey, and who they select as leaders impacts that message. By
23 exempting from the human rights policy or not putting them
24 subject to it in the first place, the University is enhancing
25 the messages of these groups while suppressing the message of

1 religious organizations.

2 Finally, there is extensive direct evidence that the
3 University is engaging in viewpoint discrimination, starting
4 with the statements by Dr. Nelson and Dean Baker that if BLinC
5 would just delete its beliefs about marriage and sexuality, it
6 would have granted or allowed them to remain on campus, down to
7 the most recent filings by the University in the related case,
8 the IVCF case, where the University -- I'm sorry -- in this case
9 in the motion for summary judgment and as opposition to our
10 motion for summary judgment where the University accused BLinC
11 of desiring a special dispensation which would allow it to
12 perpetuate discriminatory behavior toward gays and lesbians;
13 that it wants, quote, religious groups to get a path to
14 discriminate against their peers; that it openly discriminates;
15 that the people of Iowa disapprove of the way it selects its
16 leaders; and that BLinC has a desire to participate in illegal
17 discrimination.

18 All of this is after BLinC has clearly expressed what the
19 Supreme Court in *Obergefell* and *Masterpiece* recognized as decent
20 and honorable religious beliefs that are protected forms of
21 expression.

22 In *Masterpiece* the court held that even slight suspicion
23 that the government is acting from animosity towards these
24 beliefs is enough to trigger strict scrutiny, and here we have
25 clear and direct statements from the University from the

1 beginning to the end of this case that it is targeting BLinC
2 because of its beliefs on marriage and sexuality. Strict
3 scrutiny is thus triggered under the free speech clause.

4 Excuse me.

5 Strict scrutiny is also triggered under the free exercise
6 clause. *Lukumi versus City of Hialeah* teaches us that unless
7 the law is neutral and generally applicable, it is subject to
8 strict scrutiny. The minimum requirement is that a law not be
9 or action be not discriminatory on its face, but even subtle
10 departures from neutrality and covert suppression of religious
11 beliefs will trigger strict scrutiny.

12 In *Lukumi*, for example, the statute was facially neutral,
13 but the restrictions were so gerrymandered that only religious
14 conduct was subject to restriction, and we have the exact same
15 thing here.

16 For a law to be generally applicable, the government cannot
17 exempt some groups for secular reasons and then deny an
18 exemption to groups who need it for religious reasons. There
19 are several ways that that is happening in this case.

20 The University is not equally enforcing the policy. As
21 previously mentioned, groups like Love Works, a cappella groups,
22 veterans' groups all get a one-off exemption while religious
23 groups are denied it. It's also passed a categorical exemption
24 under Title IX for fraternities and sports groups.

25 And there are many other belief-based groups that aren't

1 covered by the policy at all. In fact, the policy prohibits
2 discrimination on the basis of creed, which Cervantes, who was
3 the 30(b)(6) witness -- one of the two 30(b)(6) witnesses for
4 the University in addressing the policy, agreed that creed
5 covers non -- you know, religious and non-religious deeply held
6 philosophies, and yet the University in its latest statements
7 has said that it has made no effort to consider what creed means
8 or what its impact would be on political and other ideological
9 groups. So the policy is clearly not being enforced or applied
10 in a generally applicable way.

11 Second, neutrality, even worse than *Lukumi*, this policy is
12 not neutral on its face because it explicitly names religion as
13 a restricted category. *Trinity Lutheran*, the Supreme Court's
14 recent decision, makes clear that when the Government opens up a
15 program to the public generally, or a subset of the public, it
16 cannot exclude or restrict people or individuals or groups based
17 on their religious status. And that's how the University is
18 construing its prohibition against religious discrimination, as
19 a restriction against religious organizations.

20 In addition to the -- it's also not neutral on its face
21 because there are specific exemptions; for example, the Title IX
22 exemption. Even though Title IX also includes a religious
23 exemption, the University is applying the Title IX exemptions
24 only to fraternities, sororities, and sports groups and not
25 applying the religious exemptions to religious groups.

1 There is also an overwhelming amount of evidence that the
2 University is targeting religion. From the very commencement of
3 the case, the investigation against Business Leaders In Christ
4 was biased. It started with a meeting. This is at Statement of
5 Fact, all admitted statements, 169, our Statement of Fact 169, a
6 meeting between Cervantes, the investigator, and Dean Baker, who
7 said that he wanted there to be an all-comers policy but not in
8 the pure sense, and then fraternities and sororities, suggesting
9 that he intended to protect them.

10 A meeting the same day with Dr. Nelson, who was the main
11 decision-maker, said it was important to protect groups like
12 glee clubs, Women in Engineering, and Black Student Union, and
13 but no mention of the importance of religious groups.

14 Cervantes' investigation itself was biased. She admitted,
15 and this is at Statement of Fact 283 and '84, that it was okay
16 to have conduct requirements, including the religious groups
17 could exclude members who engaged in sexual activity outside of
18 marriage between a man and a woman.

19 She admitted that Hannah Thompson, the then president of
20 BLinC, said that it was because of the Biblical beliefs that
21 Marcus Miller was denied a leadership position, and she
22 admitted, Cervantes admitted, that her notes backed that up.

23 She admitted in Statement of Fact 296 that she had no
24 reason to think that Hannah was lying, and yet she insisted that
25 Hannah had told her that it was only because Marcus Miller was

1 gay that he was not given a leadership position, all of this
2 while at the same time she was searching the Internet for
3 articles and placing them in her file, articles about the Bible
4 being sexist and racist.

5 Next, BLinC was asked to meet with University officials,
6 told them about their religious beliefs -- or were told that
7 would be okay, asked if they would just add in a statement of
8 their beliefs into their constitution so that people would know
9 and be aware of them. And yet once they did that, Dr. Nelson
10 and Dean Baker turned around and told them that they had to
11 delete their statement of faith because it was discriminatory on
12 its face; that if they would have deleted those three statements
13 that they had added, among others, the statements about marriage
14 and sexuality, that they would be allowed to remain on campus.

15 They ignored the 20-plus years of history. There was a
16 1999 memo, a 2004 memo, a 2009 memo that at the time of the
17 investigation Dean Baker testified were all still current that
18 explicitly state in exact same circumstances that religious
19 organizations have the right to express their beliefs, including
20 beliefs about marriage and sexuality, and to require their
21 leaders and members to sign a statement of faith affirming that
22 they agree with and will strive to live by those beliefs. They
23 ignored all of those to target BLinC because of its religious
24 beliefs.

25 After this Court entered its preliminary -- its first

1 preliminary injunction, the University ordered investigation and
2 started by reviewing all of the religious student groups,
3 pulling from their constitutions beliefs about marriage and
4 sexuality, which would have been totally irrelevant if that had
5 not been what they were targeting and looking for.

6 All this time, the University admits in his -- in the
7 statement of facts Dean -- or Dr. Nelson admitted that up to the
8 time of his deposition, the policy was that all groups,
9 including religious groups, could have standards for their
10 leaders, including standards that touched on marriage and
11 sexuality.

12 It was only at the deposition that he first learned what
13 the University had told IVGCF, the InterVarsity Christian
14 Fellowship, that it couldn't even encourage its leaders to be
15 Christian. He initially testified that that was inconsistent
16 with the University's policy, but then, on re-reading the
17 e-mail, he said, "Oh, my subordinate's communicating with the
18 in-house counsel. That must be the new policy."

19 So after all this clean-up effort, we have a policy that's
20 not neutral on its face; that's explicitly added a Title IX
21 exemption that categorically exempts fraternities, sororities,
22 and sports groups; that has a number of individualized
23 exemptions for other groups. And then we're left with what the
24 University filed today, showing that 32 religious groups have
25 been put on probation and essentially no others.

1 This is worse than *Lukumi*, and there's not even a neutral
2 policy on its face, and it's being applied in a discriminatory
3 manner. To top it off, I already mentioned the statements the
4 University made in its motion for summary judgment, but in
5 depositions our clients were asked questions like, "Do you agree
6 that gay people are human beings? Do you agree that they have
7 equal status with you? Do you believe that same-sex couples
8 believe in the same God you do?" all after BLinC has repeatedly
9 testified that it specifically has religious beliefs about
10 sexual conduct.

11 The University cannot meet strict scrutiny under any of
12 these circumstances. Strict scrutiny requires a compelling
13 government interest. *Gerlich* states it's the most demanding
14 test known to constitutional law.

15 The *Rosenberger* Supreme Court case says that when there's
16 viewpoint discrimination, it's extremely rare that there could
17 be any justification that could satisfy strict scrutiny.

18 *Lukumi* says that when you're directly attacking religious
19 beliefs, as in saying people have to delete them to stay on
20 campus, that that's never justified and you don't even have to
21 get to strict scrutiny.

22 As we go with regard to the deferential treatment between
23 other organizations, the University claims it wants a safe
24 environment for diverse voices, but there is no evidence of
25 allowing -- it has provided no evidence of allowing groups to

1 select leaders would negatively impact the diversity of the
2 campus, and, in fact, all it's done is push religious groups off
3 campus.

4 THE COURT: Mr. Baxter.

5 MR. BAXTER: Yes.

6 THE COURT: Speaking about today's filings, one of the
7 things I wanted to look into was the question of whether or not
8 BLinC continues to have standing as an entity in this lawsuit,
9 and so I was looking at whether or not they actually qualified
10 as a registered student organization, setting aside the human
11 rights issue, setting aside the statement of faith.

12 I asked BLinC to provide me with a list of the students,
13 and I said under seal, who are members of your organization, and
14 you were unable to come up with more than two people. The
15 University of Iowa requires at least five at all times in order
16 for this to be a student organization that can be registered and
17 recognized.

18 So help me understand, even if I accept every argument
19 you're making, help me understand how BLinC still has standing
20 when they don't meet the completely neutral and basic
21 organizations to be a registered student organization.

22 MR. BAXTER: Well, first, Your Honor, the declaration
23 of Brett Eikenberry confirms they have five students who qualify
24 for membership this year.

25 THE COURT: No, that's not what it says. It says he

1 doesn't know; they don't keep a list; it's approximately, he
2 thinks, maybe between five and ten. That doesn't cut it. That
3 doesn't work.

4 MR. BAXTER: Your Honor --

5 THE COURT: And you've refused to provide any names
6 whatsoever to me.

7 MR. BAXTER: -- he does have -- they do keep
8 membership lists of who attends. He hasn't compiled those into
9 a formal list of everybody who's been there twice or more. He
10 can -- he can amend his declaration to make that statement and
11 to verify that.

12 I don't think that he -- you know, one of the issues with
13 producing the names is that University students have been
14 targeted, including by the University itself in its actions. He
15 mentions in his declaration the actions of the University, and
16 some of those students -- some of those members are employees of
17 the University, and so they're hesitant to produce their name to
18 the University.

19 So we would ask that he be allowed to amend the
20 declaration, to count the list. He didn't have time. Because
21 of the snowstorm, we had difficulty reaching everybody. The
22 secretary/treasurer who maintains the list, we hadn't reached
23 before the call today.

24 And so we would ask for the opportunity to clarify the
25 number of students who are actual members, and it's absolutely

1 necessary to produce their names under seal for attorneys' eyes
2 only.

3 THE COURT: I'll agree to that. I want their names, I
4 want to know if they're students, I want to know when they
5 joined BLinC, and I want to know -- well, those are basically
6 the three that bring forth whether or not this group still
7 qualifies as a registered student organization.

8 But those are important issues with regard to standing, and
9 it can't just be brushed aside here. It's important, especially
10 when you're seeking a permanent injunction.

11 MR. BAXTER: I understand, Your Honor, and I
12 apologize. I didn't understand from your e-mail that you were
13 looking for a specific number, and so I appreciate that
14 clarification, and we will provide the additional information.

15 THE COURT: All right. Thank you.

16 You can continue with your argument.

17 MR. BAXTER: In addition to claiming a safe
18 environment, which the University has provided, that they need
19 to restrict religious organizations to protect a safe
20 environment, for which they have produced no evidence, the
21 University also claims it's necessary to comply with federal and
22 state law, yet in their statement of faith -- response to our
23 statement of -- I'm sorry -- our Statement of Fact No. 382, they
24 admit that neither the University policy nor law require the
25 University to control who Christian organizations select as

1 their leaders.

2 As I mentioned previously, the laws they cite, Title IX and
3 the Iowa Civil Rights Act, both have exemptions for religious
4 organizations that acknowledge, as is required by the First
5 Amendment, the right of religious organizations to select their
6 own leaders without government interference.

7 Finally, Baker, Nelson, and Redington all testified that
8 the ability of religious groups -- for example, at 352,
9 Statement of Fact 352, Baker testified that the ability of
10 religious groups to select leaders based on beliefs is, quote,
11 beneficial, positive good, an aspect of democracy, he just
12 preferred it be done by popular vote; and at 355 that religious
13 groups play an important role on campus by promoting persistence
14 towards graduation, giving students a sense of camaraderie and a
15 place where they can feel welcomed.

16 Nelson similarly testified that student groups are an
17 important part of diversity and important parts of the groups is
18 to have -- give students an opportunity to confront ideas they
19 might disagree with.

20 Redington, at 403, made the same or the similar statement.

21 There's no evidence that what they're doing, what the
22 University is doing, is consistent with its policy of allowing
23 students to meet with other like-minded students who have shared
24 beliefs and values for the purposes of increasing diversity on
25 campus.

1 Finally, they also said that there are historic reasons for
2 exempting, for example, sports clubs, and they have no intention
3 to change. That's at Statement of Fact 426 and 427. Yet there
4 are also historic reasons for religious organizations who have
5 been allowed to do this for 20 -- more than 20 years and,
6 presumably, indefinitely back in time.

7 So, Your Honor, in closing, there's clear evidence of
8 viewpoint discrimination, of religious targeting, of unequal
9 enforcement, and other aspects of non-general applicability, and
10 the University has fallen far short of meeting its standard
11 under the -- of showing the compelling government interest and
12 hasn't even addressed whether there are other means where it
13 could meet its interests, for example, by stating its own views,
14 and so forth.

15 So with that, we would ask this Court to grant summary
16 judgment in BLinC's favor.

17 THE COURT: Thank you, Mr. Baxter. And you still have
18 nine minutes left for later.

19 Mr. Carroll.

20 MR. CARROLL: Yes. And if I understand it correctly,
21 I'm just going to respond to his motion right now?

22 THE COURT: You can both respond to his motion and you
23 can make your argument because you'll go first now on --

24 MR. CARROLL: On the qualified immunity?

25 THE COURT: Correct.

1 MR. CARROLL: Okay. So thank you.

2 Just a couple things early on as Mr. Baxter was speaking.
3 I would like the opportunity to respond to the affidavit that
4 was filed today. Obviously, I just saw it this morning.

5 And Mr. Baxter made comments about me deposing witnesses
6 and intruding on religious beliefs, but simply I was asking
7 questions that were related to the case.

8 With that being said, I'll move on to their -- you know,
9 the substance of their arguments.

10 When we look at, obviously, you know, the standards for
11 summary judgment are pretty clear. They're saying, "Hey, we
12 win. There's no fact disputes," yet Mr. Baxter continually
13 raised up fact disputes. You know, "The evidence is clear," and
14 a witness said this and a witness said that, but we had
15 responded, the University of Iowa had responded, with our
16 response essentially saying, "Yeah, that was said," but that
17 doesn't mean at this stage, you know, that -- you know,
18 literally the fact-finder has to wait until there's an actual
19 hearing or trial; a trial, actually, in this case.

20 And so just from a motion for summary judgment standard,
21 there's a lot of matters that have to be determined as a matter
22 of fact and not just, okay, you don't have enough here, and this
23 thing's over.

24 And I think there's enough here to have the Court have to
25 look at it in a trial setting and say, okay, here's the

1 evidence; here's the, you know, opposing witnesses. I mean, we
2 took depositions, but that doesn't end everything, necessarily.
3 And you can take any -- like Mr. Baxter did, you can take any
4 statement out of context you want, but the Court needs to hear
5 all the evidence.

6 And when we go through what Mr. Baxter said, for example,
7 well, this witness said that, but they're not adding in
8 everything that was said. And we've done our best -- I mean,
9 Iowa has done its best to go through all their, you know,
10 statements of uncontroverted facts and admit or deny and then,
11 you know, under the rules, support where you can find it in the
12 record, Your Honor.

13 And now I'll address the specific questions I got on the
14 e-mail. So I'm just going to go down. I don't know if the
15 Court has that e-mail in front, but I'm just going to go, I call
16 them like No. 1, No. 2.

17 So one of them was why do we admit certain groups are an
18 apparent violation of the human rights policy, and that's
19 admissions -- well, the statement of uncontroverted/controverted
20 facts 16 through 35.

21 At the time of the court filings, we admitted because it
22 was accurate in one sense, and that was because the actual
23 complete review of every group wasn't done. And the Court had
24 asked that we file essentially what's the status as of today,
25 and I think I filed it yesterday, actually, or maybe Wednesday.

1 So the status -- the chart you have, and Mr. Baxter has it,
2 that chart is the complete status, and it says student group --
3 because, you know, that the number of groups change so, you
4 know, sometimes there's 510, sometimes there's 495. I mean, the
5 number changes.

6 But all groups have been reviewed as of today. I mean,
7 what the Court has today is accurate. And when Mr. Baxter said,
8 "Well, look, these are religious groups, and they're -- clearly
9 Iowa's targeting them," I was highlighting the fact -- and I was
10 trying to be helpful. I was trying to highlight the fact we
11 have put all religious groups, "we" being Iowa, on hold pending
12 this litigation because we don't -- Iowa does not know what to
13 do right now.

14 So rather than say, "Hey, group, you're not in compliance,"
15 Iowa is simply saying, "You're on hold." And so but all the
16 other groups are either, yes, in compliance or you're not in
17 compliance and you're deregistered.

18 THE COURT: Okay. Mr. Carroll --

19 MR. CARROLL: Yes.

20 THE COURT: -- Love Works is a religious organization,
21 but you've approved them. They're not on hold. What --

22 MR. CARROLL: No. They should be on hold. They're on
23 hold.

24 THE COURT: According to the chart you gave me, and it
25 was filed today, I'm looking at page 8 of 14, you have it listed

1 under "YES," meaning --

2 MR. CARROLL: Oh, I'm sorry. Then that means they're
3 in compliance, but --

4 THE COURT: Okay. So let's talk about Love Works.
5 Love Works is a Christian organization, and they require their
6 leaders to sign a statement of faith that essentially says the
7 exact opposite of what BLinC has their leaders say.

8 BLinC has been penalized. They've been stripped of their
9 status, and now they're on hold, apparently, with every other
10 religious organization that you highlighted, but Love Works is
11 not. Now, if that's not viewpoint discrimination, explain to me
12 what that is.

13 MR. CARROLL: Well, all I can say, Your Honor, is then
14 that chart's going -- my chart's wrong. Their constitution is
15 in compliance. They're on hold on enforcement.

16 THE COURT: What does that mean?

17 MR. CARROLL: It means that, for example, like BLinC
18 and other religious groups, they can have their constitution in
19 compliance, like they included the language of the University of
20 Iowa Human Rights Policy, and regardless of how they're treating
21 the policy, right now, the University of Iowa is saying you're
22 on hold. So, I mean, honestly, Your Honor, that's just an error
23 on my part, then, that chart.

24 They have the language to be compliant, but there's no
25 enforcement against any what we can identify as religious

1 groups. I mean, some of them you can't even -- I mean, it's
2 difficult to tell with some of the groups so we were trying to
3 be careful.

4 THE COURT: It's also in the record at Document 82-2,
5 paragraph 17. That's not your chart. That's the record. Is it
6 also in error there?

7 MR. CARROLL: Well, no, not necessarily. It kind of
8 depends on the timing of documents. And what I mean by that is
9 there was a time when the reviews weren't completed, and so --

10 THE COURT: All right.

11 MR. CARROLL: -- I can't say --

12 THE COURT: In that same document, and here I'm
13 quoting from what you've called my Question No. 3, it's the
14 third bullet point, you told me, in response to Plaintiff's
15 statement of material facts, that the University, quote, has
16 approved the constitutions of dozens of organizations that
17 explicitly restrict or control access to leadership or
18 membership based on race, national origin, sex, sexual
19 orientation, gender identity, status as a U.S. veteran and/or
20 military service, end quote.

21 Now, explain to me why all those groups are allowed to
22 restrict, based on protected classifications, their members but
23 BLinC is not and it's not, again, viewpoint discrimination.
24 Explain that to me.

25 MR. CARROLL: Yes. Well, these different groups, you

1 know, you have -- I mean, if we break them out, they're allowed
2 to have criteria, but at the same time they have to comply with
3 the human rights policy of the University of Iowa.

4 So they can -- so the constitutions -- and, again, I'll --
5 I'll double-check and I'll correct, if necessary, but the
6 constitutions need to be in compliance with the University's
7 policy.

8 Now, where we run into this issue is we're a
9 complaint-driven process, and the constitutions are in
10 compliance, but we wait for a student to say, "Hey, I was denied
11 membership because of my status," and then we would investigate
12 and say, "Is that what happened?"

13 Or, for example, I mean, the veteran, the military groups,
14 "Were you denied because you're not a veteran?" And we'd
15 probably say, "Well, you do have to be a veteran," but I don't
16 know the answer, I mean, because it's complaint-driven.

17 THE COURT: Okay. Then let's compare a couple more.

18 MR. CARROLL: Okay.

19 THE COURT: You have a Chinese student Christian
20 fellowship group that, according to the chart you filed today,
21 because it's religious, you've put it in a pending status. And
22 yet the Chinese Students and Scholars Association, which is not
23 religious but which requires membership only for enrolled
24 Chinese students and scholars, that one you've approved.

25 So the one that is religious, you've stopped; the one that

1 is not religious, you allowed to go forward. Both of them
2 discriminate based upon a protected classification. Explain
3 that to me if it's not clear viewpoint discrimination.

4 MR. CARROLL: We, Iowa, put them on hold because of
5 the current litigation. Mr. Baxter and his group have sued Iowa
6 twice now. We were trying to be proactive to say, okay, if this
7 is a religious discrimination problem, let's figure out BLinC,
8 and then we can move forward. We weren't trying to target
9 religious groups.

10 I mean, they're using it against me right now when Iowa was
11 trying to be proactive to say let's just wait on this religious
12 issue. The other groups, whatever they've identified, I mean,
13 they complied with the constitutional provisions and they were
14 approved. There were no complaints filed by any students at the
15 University of Iowa to say you're discriminating, but --

16 THE COURT: All right. We talked about that, though,
17 a year ago at our last hearing.

18 MR. CARROLL: Yes.

19 THE COURT: Would you say that these decisions you're
20 making are status-based or belief-based? In BLinC's case --

21 MR. CARROLL: They're status.

22 THE COURT: Okay. Tell me what status BLinC is
23 infringing upon with their statement of faith. They have said,
24 and you have not disputed, that they did not strike Mr. Miller
25 from their group or prohibit him from becoming a leader based on

1 the fact that he is a gay man.

2 They have said, and you have not disputed, in fact, you
3 have agreed, that what was said is that he was excluded from
4 leadership because he would not sign and agree to the statement
5 of faith. Is that belief-based or status-based, in your view?

6 MR. CARROLL: Well, I think it's status because I
7 don't see how you can distinguish the two.

8 THE COURT: The law distinguishes the two.

9 MR. CARROLL: And I don't mean you personally. I mean
10 when we get into these conversations or legal arguments about
11 religious beliefs, the fact of the matter is your status may
12 control your beliefs, and BLinC just literally, I mean, they
13 don't want -- they don't want gay members. And they certainly
14 don't want gay leaders, unless they sign something that says,
15 hey, this is what I believe in. But it's the status that starts
16 the equation.

17 THE COURT: Okay. But in your response to the
18 plaintiff's statement of material facts, and this is paragraph
19 135, and I sent it to you by e-mail, I think it's Question No.
20 6, you admitted, quote, a student could publicly acknowledge or
21 identify as being gay and still be a leader with BLinC so long
22 as the student agreed with and agreed to live by BLinC's
23 statement of faith.

24 That was a quote from your response filed at 82-2. Explain
25 to me again how that's a status distinction rather than a belief

1 distinction.

2 MR. CARROLL: I'm sorry. Can you give me the -- and
3 I'm looking at my notebook -- the number? What did you say, I'm
4 sorry, 165?

5 THE COURT: 82-2. And this was Question No. 6 in the
6 questions I sent you a few days ago.

7 MR. CARROLL: Okay.

8 THE COURT: It's paragraph 135.

9 MR. CARROLL: Oh, 135, okay. Thank you.

10 So I'm looking at the response I filed, and so, "Admit,
11 with the qualification that according to" Hannah -- it's Hannah
12 Thompson and Jacob Estell, "the 'openly gay' individual would
13 have to regard his or her innate attraction to members as
14 'sinful.'"

15 I mean, I'm admitting what they're claiming because both
16 BLinC represented -- these are the only two people I deposed.
17 They both said it in their depositions.

18 THE COURT: And you haven't disputed that, correct?

19 MR. CARROLL: I haven't disputed that that's what they
20 said.

21 THE COURT: Do you have any evidence that dispute -- I
22 mean, you haven't objected to that. Those are now stipulated
23 facts upon which I can rely because you've admitted them.

24 MR. CARROLL: Well, yes, but I say that with
25 qualification. This is what they testified to. I mean, I don't

1 understand how more -- I mean, they testified to this, so, I
2 mean, but 135 is citing their depositions, and I'm admitting
3 that's what they said.

4 THE COURT: All right. Let's turn to your qualified
5 immunity issue. I don't want you to run out of time to talk
6 about that. Give me your thoughts on that particular argument.

7 MR. CARROLL: Okay. Well, on qualified immunity, I
8 mean, obviously, the standard seems to be moving within the
9 court systems, but, you know, at the end of the day, qualified
10 immunity protects individuals. It wouldn't change anything
11 having BLinC move forward, you know, against the entity itself.

12 But the fact of the matter is when we look at all this, the
13 law is not that clear, and so while there has to -- you know, it
14 doesn't have to be complete everybody understands the law, but
15 at the same time when we -- when we look at all the briefs that
16 are filed, this First Amendment and the -- honestly, the First
17 Amendment and the Fourteenth Amendment, this is a collision
18 course. What rights are we supposed to be enforcing? How do we
19 enforce them?

20 You have individuals who did certain things under certain
21 policies and honestly tried to do their best. And so, you know,
22 the summary of that argument truly is you don't have to have an
23 actual case on point to, you know, defeat qualified immunity.
24 But when you look at the First Amendment and civil rights cases,
25 it seems like, you know, a reasonable public official would go,

1 "I'm really not sure what I'm supposed to be doing here." And
2 it's an objective test, which is what are we supposed to do.

3 So we have all these interests -- Title VII, the Iowa Civil
4 Rights Act, the Fourteenth Amendment -- and everything's trying
5 to be applied, and then you have the First Amendment, of course,
6 and everybody's trying to apply it, and all the sudden the whole
7 purpose of qualified immunity is, "But I shouldn't be held
8 personally responsible. I was trying to do" -- you know, I
9 mean, I'm sure it's not a legal test, but, "I was trying to do
10 the best I could under the circumstances I was given."

11 And these individuals, there's no evidence in the record
12 that they targeted this group. I mean, when we look at it, in
13 the undisputed record is Iowa has a complaint-driven system. A
14 complaint was filed and properly -- I mean "properly" in the
15 sense of that student had the absolute right to file a
16 complaint -- and they looked into it, and so then they had to
17 start making decisions.

18 And so, really, at the end of the day, would a reasonable
19 public official understand what they're doing is
20 unconstitutional? It's not, "Oh, this is interesting," it's,
21 "Is this unconstitutional?" And I think all the case law
22 suggests, no, we don't know yet. We just don't.

23 So, I mean, and that's really the summary of the qualified
24 immunity argument, that I don't know how public officials can
25 equate First Amendment versus civil rights and walk away when

1 the U.S. Supreme Court still struggles with how this plays out.

2 THE COURT: Of the individuals here that are being
3 sued, Redington, Baker, and Nelson, I know Mr. Baker is an
4 attorney. Are either of the other two?

5 MR. CARROLL: Oh, Ms. Redington might be, but
6 certainly not -- I mean, Mr. Baker has a law degree, but he's
7 not an attorney for the University of Iowa. I don't know -- I
8 know Mr. Nelson is not. I can't say for sure Ms. Redington is
9 not.

10 THE COURT: And would you be --

11 MR. CARROLL: That wasn't her role at Iowa, that's for
12 sure.

13 THE COURT: Would you be the attorney they consulted
14 or would the University of Iowa typically call upon the law
15 school to get legal advice if they needed it? I mean, in your
16 view, this is very difficult legal stuff so who did these
17 administrators get advice from about this complex legal issue
18 that you argue they shouldn't be held individually responsible
19 for?

20 MR. CARROLL: The only thing I can say is they didn't
21 come to me. They didn't ask me. I do not know if they asked
22 others.

23 THE COURT: Okay. Is there something set up at the
24 University of Iowa, some kind of general counsel's office that
25 they use for issues like this?

1 MR. CARROLL: Well, there is a general counsel's
2 office, yes. I just -- to answer the question, I just don't
3 know.

4 THE COURT: Okay.

5 MR. CARROLL: Other than I know they didn't -- nobody
6 talked to me.

7 THE COURT: Okay. Any other thoughts before I toss it
8 back over to the plaintiff?

9 MR. CARROLL: No. Thank you.

10 THE COURT: Okay. You've still got about seven
11 minutes left if you have any response to their arguments here.

12 Mr. Baxter, are you arguing the remainder of the issues as
13 well?

14 MR. BAXTER: Yes, I will be.

15 Your Honor, I have to admit I find this extremely
16 frustrating to hear the University for the first time in this
17 argument contest that Love Works is on probation. It's
18 completely contrary to everything they've said in the case.

19 They never put -- when they first purged the list in last
20 July, Love Works was not on it. It's not on the list today.
21 They have admitted in the statements of facts that Love Works
22 would continue to be on campus.

23 In their reply brief, they wrote that -- I'm just trying to
24 find here -- they specifically defended why BLinC -- why Love
25 Works was distinguishable from BLinC; because it provides a safe

1 space for minorities who have historically been the victims of
2 discrimination, because BLinC excludes people and Love Works
3 doesn't, and so forth.

4 So there's absolutely no evidence in the record, and it's
5 contrary to the record to come in and now say that Love Works is
6 on probation. It's false. The evidence is in, and it's binding
7 on the University, and the Judge should disregard Mr. Carroll's
8 unsupported statements.

9 It's also critical here that there is no written -- there's
10 no policy change and there's no evidence of any policy change.
11 Every single witness who's testified about this -- Cervantes, at
12 283 and '84 of our statement of facts, admitted that it was
13 permissible under the policy for religious groups to have
14 standards of sexual conduct.

15 Nelson, at 376, in the voice of the University, admitted
16 it, and the University has said "Admitted" in response.

17 Baker admitted it as long as -- it was okay to have
18 standards that prohibited, for example, marriage -- sexual
19 contact outside of marriage between a man and a woman, as long
20 as it wasn't based on status alone, that it was based on the
21 religious belief.

22 Redington testified that she never would have -- never
23 would have deregistered BLinC if she had known what was really
24 going on, but she didn't read the underlying evidence, she just
25 relied on what the investigator said. She admitted that it was

1 a First Amendment violation, that red flags went off on her head
2 but she did -- in her head but she did it anyway.

3 Every single witness has admitted what the policy is, and
4 under that interpretation of the policy, BLinC is not in
5 violation of that. There's no change in the policy except that
6 they've added a Title IX exemption and statements from counsel
7 essentially that they have a different policy.

8 It's ridiculous to come now and say that, well, this is --
9 you know, we only have a complaint-driven system when this Court
10 has already criticized that in its initial preliminary
11 injunction ruling.

12 The University conducted a six- or seven-month review of
13 all of the constitutions, sent letters and e-mails to all of the
14 student groups saying if you have any language about leadership
15 selection, you'll have to remove it. They didn't actually
16 follow up on that or do anything about it except with respect to
17 religious groups.

18 You know, it makes a mockery of this whole process that
19 we're here today claiming all of the sudden that Love Works is
20 on probation. He hasn't said anything -- Mr. Carroll hasn't
21 said anything about all the other groups; the military groups,
22 the minority support groups, the a cappella groups, the sports
23 groups. We haven't even touched the fraternities and
24 sororities, though I think that's a huge issue in this case, and
25 that's set forth in our briefs.

1 All of those groups are allowed, as they always have been,
2 to select leaders based on their mission and beliefs, and only
3 religious groups have been targeted. The fact that they have
4 still not even clarified what the policy means is further
5 evidence that this is simply driven by an attempt to shut down
6 groups who have unfavorable beliefs on sexual orientation and
7 gender identity.

8 And you can see this in each of the witnesses because they
9 got so twisted trying to interpret the policy under this
10 supposedly new way. Cervantes, for example, said that it was
11 okay for Catholics to exclude Muslims because that was -- or it
12 wasn't okay for Catholics to exclude Muslims because that would
13 be based on religion, but that it was okay for Muslims to
14 exclude Muslims who didn't endorse the Prophet Muhammad.

15 Baker said that it was okay to have standards that
16 prohibited students from engaging in sex outside of marriage but
17 not if it was -- marriage generally but not if marriage was
18 defined as between a man and a woman, further indicating that
19 this is really about BLinC's religious beliefs.

20 And so at this point, the record is closed, and the Court
21 should not allow counsel to come in and make statements that are
22 inconsistent with the evidence and contrary to everything that's
23 happened in this case to date.

24 Counsel also suggests that there are, you know, unresolved
25 questions of fact. He has not identified what any of those

1 questions are. The University admitted almost everything in
2 BLinC's statement of facts, and those things that it denied, it
3 denied only by saying things such as, "Well, we admit that
4 that's what they said."

5 They basically admit in part or there's hardly any direct
6 denials. I can't think of anything in the statement of facts,
7 except issues that aren't really relevant, that are directly
8 contradicted by the University, and Mr. Carroll has not
9 identified any.

10 Finally, on the issue of counsel, there's no evidence in
11 the record that any of the -- anyone other than -- that anyone
12 went to counsel and looked for advice. Dean Redington did
13 testify that she had red flags but she had the go-ahead from the
14 University so she went ahead and did that. But there's no
15 evidence that anybody else reached out to counsel, and the
16 University has never asserted that as a defense and should not
17 be allowed to do so now after discovery has closed.

18 Your Honor, the evidence in this case is clear. It's
19 undisputed. There is rampant evidence that the University
20 targeted BLinC because of its religious beliefs and for the last
21 two years has continuously been changing its story to try to
22 make its policy fit the facts without harming groups that it
23 favors, like fraternities and sororities, sports clubs, and
24 almost every other group on campus.

25 As I understood the Judge's e-mail, it asked counsel not

1 just to produce a list of the status of the groups, but why, why
2 they were deregistered, why they weren't deregistered, and what
3 the University would do to the religious groups if it were to
4 apply its policy.

5 The fact that it's put them on pause of its own accord,
6 yes, it was forced by the Court to allow them to remain on
7 campus, but there's nothing stopping the University from
8 explaining what it would do with each of those religious groups,
9 which ones of them are in compliance with its policy and which
10 ones are not.

11 It's clear the University is engaging in viewpoint
12 discrimination. It's clear that they're targeting BLinC because
13 of its religious beliefs. It's clear that they're unevenly
14 enforcing the policy, and it's clear that it has no
15 justification that would pass strict scrutiny. For these
16 reasons, we would ask the Court to rule in favor of both
17 motions.

18 I forgot that I wanted to just hit one issue on qualified
19 immunity. The courts hold that you don't have to have a case
20 right on point -- that's *De Boise*, the Eighth Circuit *De Boise*
21 case -- it just has to be sufficiently clear what the contours
22 of the right are.

23 The *CLS v. Martinez* case and *Gerlich* both clearly state you
24 can't do viewpoint discrimination. The *Lukumi* case and other
25 cases clearly demonstrate that you can't target based on

1 religion or you can't grant secular exemptions but not religious
2 exemptions.

3 The case law in the Eighth Circuit goes back into the
4 seventies in the *Gay Lib* case. All these cases make very clear
5 what the standard is, and the University has identified nothing
6 that would confuse that standard. The *Gerlich* case is just from
7 2017.

8 Moreover, Baker and Nelson and Redington all admitted that
9 they had concerns about what they were doing and they did
10 nothing about it. Nelson and Baker were both involved with the
11 CLS issue. They knew that -- Baker testified that he knew
12 viewpoint neutrality was a standard, that the free speech clause
13 protects student rights to express religion on campus. That's
14 at 349.

15 351 statement of fact --

16 THE COURT: I'm sorry. You've got to go back and slow
17 way down for the court reporter, please.

18 MR. BAXTER: Okay. I'm sorry.

19 The Statement of Facts 319, Baker and Nelson, deeply
20 involved in the CLS issue.

21 At Statement of Facts 53 through 60 is Baker's 2004 letter
22 that it was okay to have codes of conduct, even prohibiting
23 homosexual conduct.

24 Statement of Facts 55, Baker emphasized that viewpoint
25 neutrality is the guiding principle. He admitted.

1 He's on the memo at Statement of Facts 70 through 85, memos
2 to students threatening personal liability if they continued to
3 try to cut funding off to Christian Legal Society.

4 Statement of Facts 354, he admitted that the 2009 memo that
5 upheld First Amendment rights of religious groups was still
6 current. He sent that to Cervantes to guide her investigation.

7 Statement of Facts 339, he admitted that he knew the free
8 speech clause protects students' rights to express their
9 religious views on campus.

10 351, he knew that the University telling religious groups
11 who to select as leaders would raise questions under the free
12 speech clause.

13 And in 353, he said the BLinC situation did "raise First
14 Amendment concerns in my mind," but then he says he "chose to
15 defer to Ms. Cervantes" in her investigation.

16 If you look at Statements of Fact 334 through 345, it
17 details how deeply involved he was, including being the
18 individual who recommended to counsel that they discriminate --
19 or that they deregister BLinC.

20 Nelson testified that he was also deeply involved with the
21 CLS institute -- or incident, that's at Statements of Facts 68,
22 74, and 369, including the warnings to students that penalizing
23 CLS because of its religious beliefs would subject them to
24 personal liability.

25 At Statement of Fact 373, he admitted that telling student

1 groups what they had to believe or say, including in their
2 constitution, violated federal and state law.

3 And in 374, he admitted discussing with Redington and Dean
4 Shivers whether they were taking the right action but pursuing
5 going forward anyway.

6 Redington at 387 --

7 THE COURT: Mr. Baxter, you're way out of time. Do
8 you have a couple more citations you'd like to cite?

9 MR. BAXTER: Sure. I would just point you to 387
10 through 389 and 395, Redington, where she also admitted that she
11 had red flags, that she knew it was a violation but she just
12 wasn't paying attention, and she did what -- just deferred to
13 what the investigator told her.

14 THE COURT: Okay. Thank you, Mr. Baxter.

15 Mr. Carroll, any final thoughts?

16 MR. CARROLL: Oh, no. I'll be very brief, I know,
17 because we're running on our hour.

18 Mr. Baxter said the record is closed, but, in fact, he was
19 going to supplement an affidavit so I would seek the same
20 permission to make sure the chart that I forwarded to the Court
21 is accurate.

22 And so with that, we've argued the case. It's been fully
23 briefed, obviously.

24 MR. BAXTER: Your Honor, for all the reasons I
25 previously stated, I object to any effort to amend the record in

1 that regard.

2 THE COURT: I understand.

3 There is a distinction here, in my mind. I raised the
4 issue for the first time when I sent questions to counsel about
5 how many members remain within BLinC. For reasons that escape
6 me, the University of Iowa has never, apparently, asked that
7 question during discovery or during the litigation at hand, so
8 that was a new issue.

9 Plaintiff has raised some, I think, legitimate concerns
10 about publicizing that kind of information given the history of
11 this particular case, and so I granted them permission to
12 supplement that affidavit because I think it will be helpful. I
13 would like to have that information by close of business on
14 Tuesday, February 5th.

15 Love Works is an entirely different issue. That has been a
16 part of the litigation for quite some time. There have been
17 numerous admissions by University of Iowa that Love Works was,
18 in fact, approved and continues to operate as an RSO at the
19 University of Iowa. You've sent a chart to date that is
20 consistent with that.

21 If there's some error in the chart, then there's some error
22 in multiple other filings that have been made by the University
23 of Iowa. That's a matter of evidentiary dispute between the
24 parties. That's different, in my mind, and I am not going to
25 reopen the issue on Love Works. We have the record we're going

1 to have there. And so I do deny University of Iowa's motion to
2 supplement the record as to Love Works.

3 Thank you both for your -- I'm sorry.

4 (Interruption from the operator.)

5 THE COURT: Thank you to the parties. Thank you to
6 the parties for your time. We'll get an order out.

7 Thank you. We're adjourned.

8 (Proceedings concluded at 4:00 p.m.)

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C E R T I F I C A T E

I, Kelli M. Mulcahy, a Certified Shorthand Reporter of the State of Iowa and Federal Official Realtime Court Reporter in and for the United States District Court for the Southern District of Iowa, do hereby certify, pursuant to Title 28, United States Code, Section 753, 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 at Des Moines, Iowa, this 8th day of February, 2019.

/s/ Kelli M. Mulcahy
Kelli M. Mulcahy, CSR, RDR, CRR
Federal Official Court Reporter