

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

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INTERVARSITY CHRISTIAN FELLOWSHIP/USA, :
INTERVARSITY GRADUATE CHRISTIAN :
FELLOWSHIP, :

Plaintiffs, :

vs. :

Case No. 3:18-cv-00080

THE UNIVERSITY OF IOWA; BRUCE HARRELD, :
in his official capacity as President :
of the University of Iowa and in his :
individual capacity; MELISSA S. SHIVERS, :
in her official capacity as Vice :
President for Student Life and in her :
individual capacity; WILLIAM R. NELSON, :
in his official capacity as Associate :
Dean of Student Organizations and in :
his individual capacity; ANDREW KUTCHER, :
in his official capacity as Coordinator :
for Student Organization Development :
and in his individual capacity; and :
THOMAS R. BAKER, in his official :
capacity as Student Misconduct and :
Title IX Investigator and in his :
individual capacity, :

HEARING TRANSCRIPT

Defendants. :

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Judge's Chambers, First Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Wednesday, September 25, 2019
2:58 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)

DANIEL H. BLOMBERG, ESQ.
ERIC S. BAXTER, ESQ.
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue NW
Suite 700
Washington, D.C. 20036

For the Defendant:
(Via telephone)

GEORGE A. CARROLL, ESQ.
Assistant Attorney General
Hoover State Office Building
1305 East Walnut, Second Floor
Des Moines, Iowa 50319

Also Present:
(Via telephone)

NATHAN LEVIN

P R O C E E D I N G S

(In chambers, with counsel appearing via telephone.)

THE COURT: Okay. Then we are here for purposes of hearing oral argument regarding the parties' cross-motions for summary judgment filed at Dockets 21 and 51 in the matter of InterVarsity Christian Fellowship vs. The University of Iowa. It's Case No. 3:18-cv-80.

We are joined on behalf of InterVarsity by Mr. Baxter, Eric Baxter, and by Mr. Blomberg.

Did I get that right?

MR. BAXTER: Yes, Your Honor.

MR. BLOMBERG: Yes, Your Honor.

THE COURT: Okay. And we're joined on behalf of the University of Iowa by George Carroll.

Is anybody else on the line?

(No response.)

THE COURT: Okay. As the parties know, yesterday afternoon I sent some questions to the parties that I was hoping the parties would address today during the oral arguments. As the questions indicated -- or the e-mail indicated, I've given each party 30 minutes to argue your respective motions. You can use as much of that for rebuttal as you would like.

At this point, I will ask the plaintiffs to argue your motion first. And who will be arguing that on behalf of InterVarsity?

1 MR. BAXTER: Mr. Blomberg will be arguing, Your Honor.

2 THE COURT: Okay. Mr. Blomberg, go ahead.

3 MR. BLOMBERG: Thank you, Your Honor. May it please
4 the Court. I represent the plaintiffs, InterVarsity Christian
5 Fellowship/U.S.A. and InterVarsity's chapter at the university.

6 The University makes no attempt to distinguish this Court's
7 ruling in BLinC and instead ignores the ruling and repeats the
8 same arguments this Court already rejected and on a record that
9 is even now less favorable to them.

10 But not only was the ruling in BLinC correct, but recent
11 case law, notably the *Telescope Media* and *Wayne State* cases,
12 support the BLinC ruling's holding. So we believe this Court
13 should, at a minimum, reaffirm its BLinC ruling on the merits of
14 the free speech, association, and exercise claims, and enter
15 declaratory judgment and grant nominal damages.

16 Your Honor, I think that leaves three primary issues; the
17 qualified immunity issue, appropriate relief, and the religion
18 clauses claims. And we believe the Court -- I'd like to start
19 by answering the questions that the Court sent over yesterday
20 and then segue back into those three issues with the remaining
21 time. And I'll shoot to save about five minutes for rebuttal.

22 THE COURT: Okay. Go ahead.

23 MR. BLOMBERG: Thank you, Your Honor.

24 So the first question that Your Honor raised was the issue
25 of liability for Dr. Baker and President Harreld. Plaintiffs'

1 position is that the record for Dr. Baker does not currently
2 reflect sufficient evidence of his involvement in InterVarsity's
3 deregistration for him to be found liable for purposes of the
4 plaintiffs' motion for a partial summary judgment.

5 For purposes of President Harreld, we believe the record is
6 sufficient to show that he is liable for his actions as a
7 supervisor because he was aware of the unconstitutional actions
8 of his subordinates and that he failed to correct them.

9 We think the case on that point, Your Honor, would be
10 *Wagner vs. Jones*, 664 F.3d at 275. It's a 2011 Eighth Circuit
11 case that establishes a supervisor is liable under Section 1983
12 where the supervisor is aware of substantial risk of serious
13 constitutional harm and fails to exercise his authority to
14 prevent it and instead turns a blind eye.

15 We think the record here reflects, at IVCF app pages 2397
16 through 2407, that President Harreld was aware that his
17 subordinates were deregistering BLinC, that this Court had
18 enjoined that deregistration in January 2018, and he discussed
19 that decision with Defendant Shivers.

20 He was aware that his subordinates then planned to
21 deregister InterVarsity and other student groups, and he was
22 aware that his subordinates did, in fact, do so, and he never
23 countermanded any of these decisions when he had the opportunity
24 to do that. We think that provides sufficient basis for his
25 liability under Section 1983.

1 As regards the InterVarsity U.S.A. standing, the Court's
2 second question to the plaintiffs, we think that because
3 InterVarsity Graduate clearly has standing in the same way that
4 BLinC did, no further inquiry is necessary under *Jones vs. Gale*.
5 That's 470 F.3d at 1265.

6 However, we also think that InterVarsity USA has standing
7 for injuries that it has directly suffered and for which it
8 still seeks relief and has incurred over \$4,000 in damages and
9 diverted staff time to get its chapter re-registered.

10 The University's actions harmed its mission of providing
11 on-campus ministry at the University, which it had been doing
12 for over 25 years. The national chapter has a direct and
13 inextricable link with InterVarsity Graduate so that the
14 deregistration of a chapter and the attendant harms that came
15 from that were also harms directly to InterVarsity USA.

16 And this link between the two organizations is reflected
17 both in the chapter's constitution and in the University's own
18 policies. So just to look at the InterVarsity constitution at
19 app pages 1995 through 1998, it reflects that the chapter
20 identifies itself as a chapter of InterVarsity USA, it sets a
21 paid InterVarsity USA staff member as the official advisor of
22 the group with duties to provide leadership and spiritual care
23 as well as input into the leadership and membership of the
24 organization.

25 It requires all student leaders to agree with InterVarsity

1 USA's statement of faith. It forbids changing certain elements
2 of the constitution that relate to InterVarsity's religious
3 beliefs at any time for any reason.

4 It requires that any constitutional amendments of any kind
5 have to be filed with an InterVarsity USA staff member in order
6 to be valid, and it requires that any funds that aren't
7 University funds that are in the chapter's possession at the
8 time of dissolution be distributed to InterVarsity USA.

9 Also, University policy requires that RSOs, registered
10 student organizations, like the chapter must observe national
11 organization policies as a condition of keeping their registered
12 status so the University policy requires that relationship
13 between the two organizations because of their -- the national
14 organization's relationship there.

15 It also requires -- the policy only permits an advisor of
16 the kind that InterVarsity Graduate has if they are a liaison to
17 a national organization with which the registered student
18 organization has an official affiliation. And that language is
19 at InterVarsity app 0371, and the policies that I was referring
20 to are the discipline of registered student organizations
21 policy, section 1, sub 5, and the registration of student
22 organizations policy at section 6, sub 1.

23 We think InterVarsity also has associational standing to
24 assert the rights of InterVarsity Graduate and other
25 InterVarsity chapters. We don't think this Court needs to reach

1 that because InterVarsity is asserting its own injuries as well.

2 Your Honor, the third question that this Court asked was
3 whether it needed to reach -- make more than one clearly
4 established determination for purposes of qualified immunity.
5 We think the answer to that is no.

6 We think that if this Court finds that there were multiple
7 constitutional violations by specific defendants and determines
8 that at least one of those violations was of clearly established
9 law, then the plaintiffs do not think that, for purposes of this
10 motion, the Court must take the next step to reach whether the
11 other violations were also of clearly established law.

12 The damages and the claims here all spring from the same
13 operative nexus of facts, and so purposes -- for purposes of
14 damages, finding liability under, say, the free speech claim
15 will also provide relief for the free exercise claim.

16 Your Honor, I think those are the questions that the Court
17 asked the plaintiffs to address. If the Court doesn't have any
18 other questions, I will turn to the qualified immunity analysis.

19 THE COURT: I do not. Thank you. Go ahead.

20 MR. BLOMBERG: Your Honor, I think the primary
21 question in light of this Court's ruling in BLinC is not whether
22 there was a constitutional violation but, rather, whether the
23 law was sufficiently clear that the University -- from
24 University officials to know their actions violated
25 constitutional rights. I believe the answer is yes.

1 In BLinC, this Court found the case -- the issue of
2 qualified immunity was a close call, but this case isn't a close
3 call for two primary reasons.

4 First, before the start of this lawsuit, this Court twice
5 enjoined the University's uneven enforcement of its
6 nondiscrimination policy for violating the free speech clause.
7 And while those rulings were preliminary because the facts were
8 undeveloped, the law was clear selective unenforcement -- or
9 selective enforcement was forbidden as established by a long
10 line of Supreme Court and Eighth Circuit cases going back
11 decades.

12 And especially under the Eighth Circuit's broad view of the
13 clearly established standard, that was more than enough guidance
14 for a reasonable official to know that they should stop
15 selective enforcement.

16 Here, the University officials testified that they
17 understood that this Court's rulings meant exactly that, that
18 they could not selectively enforce their policy against a
19 religious organization, and yet those same officials admitted
20 that that's exactly what they did.

21 They enforced their nondiscrimination policy against
22 InterVarsity and deliberately exempted other groups from the
23 policy; not one group, not two groups, but many exceptions to
24 its policy for multiple groups, including Hawkapellas, Women in
25 Science and Engineering, Love Works, and Iowa Edge, as well as

1 House of Lorde. And that's reflected at Statement of Facts 280
2 through 283, paragraphs 280 to 283, and also 315 to 316, among
3 other places.

4 And the University can't just claim that it was trying to
5 comply with the order in BLinC because that order enjoined
6 discriminatory enforcement against a religious group. And so
7 the University admitted that it actually continued
8 discriminatory enforcement against a religious group, and this
9 time, instead of being BLinC, it was against InterVarsity.

10 Now, the University suggests the nature of the forum, being
11 a university, and being the issue of leadership selection, makes
12 the law unclear, but the Eighth Circuit has repeatedly said the
13 nature of the forum is irrelevant when it comes to issues of
14 viewpoint discrimination. The Court said that in *Gerlich*, it
15 said that in *CEF vs. Minneapolis School District*, it said it in
16 *Burnham*. And that's because viewpoint discrimination is
17 forbidden in all forums.

18 And that's why *Gerlich's* controlling framing of the issue
19 of how to determine whether viewpoint discrimination on a
20 university is fairly straightforward. The court said the
21 question here is whether the plaintiff's right not to be subject
22 to viewpoint discrimination when speaking in a university's
23 limited public forum was clearly established.

24 That's also why Judge Kelly's concurrence in *Gerlich* went
25 through controlling Eighth Circuit case law, explained why the

1 First Amendment's application was just as clear and just as
2 established in the university setting as it was anywhere else.

3 And it's also probably why the University, on appeal in the
4 Eighth Circuit case with BLinC, is trying to push back on
5 *Gerlich* and says that it actually comes, quote, precariously
6 close, end quote, to being wrong. And that's their brief at
7 pages 43 through 44.

8 So, Your Honor, we think that this Court's ruling made it
9 particularly clear that the University couldn't do to
10 InterVarsity what it had just done to BLinC. In fact, you know,
11 if they tried to do the same thing to BLinC, it ran the risk of
12 being held in contempt. You can't turn around and go after
13 another religious group while exempting other secular groups.

14 We think the nature of the violation is the second reason
15 why we think qualified immunity makes it not as close in this
16 case as it was found to be in BLinC. We think the nature of the
17 violation was clear here.

18 The University admits that it deregistered InterVarsity
19 solely for the religious content of its leadership policies,
20 despite having permitted it to have those policies for 25 years.

21 It admitted that InterVarsity's belief requirement, if they
22 had been -- I'm sorry -- admitted that if InterVarsity's belief
23 requirement had been grounded in secular views, then this would
24 have been permissible, but because they were religious, they
25 were banned.

1 So a group's views about poverty alleviation that were
2 secular in nature were permissible; a religious group's views
3 about poverty alleviation that were religious, such as perhaps
4 the parable of the Good Samaritan, were not permissible.

5 By the same token, a group such as many of the groups that
6 are found in the record that require students to hold a view of
7 human dignity as a requirement for being a part of the group or
8 a leader within the group, a religious group couldn't make that
9 same requirement and ground it in the religious concept of the
10 imago dei, the image of God in every human person.

11 Your Honor, that's textbook viewpoint discrimination.
12 *Rosenberger, Good News Club, Lamb's Chapel*, all of them said
13 that when the Government tries to exclude religious views on
14 otherwise permissible subjects, it commits viewpoint
15 discrimination. Frankly, it couldn't be any clearer on that
16 point.

17 And what makes it particularly clear here is that this
18 particular type of viewpoint violation is a poison pill for
19 religious groups. At Statement of Facts 318 through 321, the
20 University basically admitted that when it admitted that a
21 ban -- that its ban on religious groups having religious leaders
22 fundamentally undermined the religious group's mission and
23 message, which is part of the reason why it didn't apply to
24 other groups. And we'll get to that in just a second.

25 But it's also part of the reason why major

1 anti-discrimination laws, like Title VII and the Iowa Civil
2 Rights Act, specifically exempts religious groups from the
3 religious nondiscrimination requirement, because if you apply
4 that requirement to a religious group, then you're cutting to
5 the very heart of their organization.

6 Your Honor, the final reason why the nature of the
7 violation was so clear here is that it was unnecessary. The
8 record shows the University admitted it had no reason why it
9 could accommodate Love Works but not InterVarsity. That's at
10 Statement of Facts 322.

11 It also admitted that it had no evidence demonstrating that
12 an accommodation for InterVarsity would harm its interest in any
13 significant way. That's at Statement of Facts 311.

14 It didn't attempt to even study the question before it
15 forced InterVarsity off campus, even though it allowed
16 InterVarsity to be registered for 25 years and even though it
17 knew that Iowa State had another policy that allowed groups like
18 InterVarsity to select their leaders.

19 So it made no attempt to make that kind of determination
20 before it waded into this very sensitive First Amendment issue,
21 and that's particularly egregious here because, once again, the
22 University did decide to favor other religious groups and
23 secular groups because applying the policy to them would harm
24 their missions.

25 So this is what you see at App 384, where University

1 officials were weighing the imposition of, say, an all-comers
2 policy with the harm it would have to a men's glee club or the
3 Women in Engineering; and at paragraphs 315 and '17 of the
4 Statement of Facts, which showed the exemptions for Love Works
5 and House of Lorde were provided in part because otherwise
6 applying the policy to them would have undermined their
7 missions.

8 So the University admitted that it was just willing to
9 accept harm that came from, for instance, a political/
10 ideological group but not from a religious group. That's at
11 Statement of Facts 303.

12 So, Your Honor, we think that qualified immunity is clearly
13 not applicable here for purposes -- for both of the reasons;
14 because of this Court's order that applied the longstanding case
15 law and because the nature of the violation was significantly
16 different.

17 Your Honor, I'd like to -- if there are no other
18 questions -- no questions on that, I'd like to turn to the issue
19 of relief.

20 The University argues that SF 274 moots the request for
21 injunctive relief. Your Honor, we think that cannot be correct
22 here because since the passage -- after the passage of SF 274,
23 the University has continued to vigorously defend the
24 constitutionality of its policy and to argue that federal law
25 compels its policy. And a controlling case law says in those

1 kind of circumstances, that still leaves the plaintiffs with a
2 need for federal relief.

3 So if you look at the defendants' supplemental brief,
4 Docket 50, where it repeatedly says -- the whole brief is an
5 argument that their policy is constitutional and that
6 InterVarsity's policy is discriminatory and impermissible on
7 campus.

8 And then their summary judgment brief at page 9 and their
9 supplemental brief at pages 6 and 16, they say that they have a
10 duty to ensure and enforce federal civil rights law, and they
11 say that, quote, InterVarsity's sincere religious beliefs, end
12 quote, regarding religious leadership selection are, quote, in
13 direct conflict with federal civil rights law.

14 Your Honor, they've also made this argument before the
15 Eighth Circuit in the BLinC appeal, where their response brief
16 at page 45, and this is filed in early July, says that they
17 were -- their position was grounded in federal nondiscrimination
18 laws as well as the Fourteenth Amendment to the Constitution of
19 the United States.

20 So given their arguments that federal law compels their
21 position, and those are consistent arguments they've taken for
22 years now and continue to take after the passage of SF 274, that
23 leaves them the ability to revert back to the original policy of
24 excluding religious organizations, and that's what the *Trinity*
25 *Lutheran* case said was impermissible and why it required the

1 court to still issue injunctive relief.

2 So we think that that's appropriate here as well, that the
3 Court should issue injunctive relief because of the University's
4 position on what the controlling law is. Obviously, federal
5 law -- if federal law conflicts with state law, federal law is
6 going to trump.

7 Your Honor, that brings me to the last issue, the religion
8 clauses claims.

9 Just one moment.

10 Thank you, Your Honor. Just taking a sip of water there.

11 Your Honor, the religion clauses stand for the proposition,
12 as the *InterVarsity* case in the Sixth Circuit states, that
13 government cannot dictate to a religious organization who its
14 spiritual leaders would be. And here, all three elements of a
15 religion clause claim are undisputed.

16 First, undisputed that *InterVarsity* is a religious
17 ministry; second, it's undisputed that the positions at issue
18 are religious leadership positions that perform significant
19 duties and sensitive duties that relate to religious teaching,
20 religious worship, religious prayer; and, third, it's undisputed
21 that the government -- the University's position here goes right
22 to the heart of the religious organization by requiring them to
23 stop asking that the people who lead them in worship and prayer
24 and religious teaching actually believe the things that they're
25 saying.

1 In fact, the *Walker* case says that there's no clearer
2 example of an intrusion on the internal affairs of religious
3 organizations, something like this, because the group would
4 cease to exist if it had to comply with it.

5 The University's counterargument here, Your Honor, boils
6 down to the assertion that the Government can condition access
7 to a traditional -- limit the public forum based on a private
8 religious group's agreement to give up the religion clauses
9 rights, including structural limits on non-entanglement.

10 And most obviously, Your Honor, the problem with this
11 argument is that would apply in a variety of other contexts,
12 including to limit the public forums that routinely rent space
13 to churches, such as schools, community centers, and
14 fairgrounds, allowing them to condition access to those limited
15 public forums on the churches giving up their ability to assert
16 religion clause claims, including their ability to decline to
17 accept those schools' or community centers' or fairgrounds'
18 nondiscrimination policies that would prevent them from hiring,
19 say, an atheist pastor.

20 Your Honor, we point the Court to the *InterVarsity vs.*
21 *Wayne State* decision that came down late last week, 2019 Westlaw
22 4573800, we filed it earlier today as supplemental authority,
23 that refused to reject as a matter of law the religious clauses
24 claims.

25 Your Honor, the final point on this issue, I'd just like to

1 note that this is not a particularly challenging application of
2 the doctrine in the sense that churches clearly fit within this
3 forum. The defendants here have admitted that there is an
4 actual church that operates within this forum, that student
5 groups are permitted to operate as a functional equivalent of a
6 church. And, in fact, the Newman Center holds weekly Masses.
7 That's at Statement of Facts paragraphs 32, 132, and 137.

8 And the leadership activities here are actually much more
9 religious and much more wholly religious than you would
10 typically find in a ministerial exception-type case where an
11 employee might have duties of a variety of different natures.
12 Here the record shows that these students have an almost
13 complete commitment of their time on behalf of InterVarsity to
14 religious activities.

15 And finally, Your Honor, I think just worth pointing out
16 that the resolution on religion clauses grounds is actually a
17 good bit narrower than other potential grounds, including, in
18 part, because the University doesn't dispute any of the major
19 criteria for -- any of the three criteria for finding religion
20 clause claims.

21 Ruling in favor of InterVarsity in this instance
22 doesn't -- wouldn't require ruling that the same would be true
23 for every group; it would just apply to a religious group. It
24 doesn't apply to every position; it just applies to ministerial
25 positions. It doesn't apply to every form of governmental

1 interference, though it certainly would here. The interference
2 is at its height.

3 And so, Your Honor, with that, I'd like to reserve the
4 balance of my time for rebuttal.

5 THE COURT: Thank you. And you still have 8 minutes
6 left.

7 Mr. Carroll.

8 MR. CARROLL: Oh, yes, Your Honor.

9 I'll start with -- I will start with two things. I'm at
10 home today. I cut my foot last night doing yardwork. So you
11 may hear dogs bark, so I apologize for that.

12 I'm going to respond to the questions I was posed. So did
13 we file a response to the first supplemental statement of
14 material facts? We didn't because they were quoting deposition
15 testimony, and I understand under the local rules that they're
16 deemed admitted because -- their quotes were accurate so there
17 was no reason to, like, deny them.

18 The second question, are the individual defendants
19 asserting qualified immunity, the qualified immunity doesn't
20 apply to declaratory and injunctive relief, but it clearly
21 applies to individual relief and no money damages. At some
22 point, if the Court decided, the Court could enjoin the entity,
23 the University of Iowa.

24 And the third question is kind of the -- well, the basis of
25 the qualified immunity argument, and I will get to that in a

1 moment.

2 So when we look at what InterVarsity filed, you know, I
3 mean -- and I know, Your Honor, you have both cases. So BLinC's
4 on appeal to the Eighth Circuit, but the fact of the matter is
5 they're different cases.

6 And after the BLinC ruling, the University of Iowa said,
7 okay, we're going to look at all these groups and we're going to
8 determine whether they're in compliance with the University's
9 human rights policy, and if not, we're going to say, hey, please
10 try to -- you know, please get in compliance. And at some
11 point, InterVarsity said, well, we're just not going to. And
12 that's fine from that point of view.

13 But it wasn't -- you know, part of the BLinC thing was that
14 it was a student-complaint-driven process. This was a thorough
15 review to ask these groups, if you want public forum access, if
16 you want any kind of, essentially, public funding, then we need
17 you to be in compliance with the Iowa human rights policy. And
18 InterVarsity initially kind of agreed, and then they said, no.
19 And that's fine. I mean, I'm not going to dispute that.

20 But all groups, the record is clear all groups were
21 reviewed under the same standard after the BLinC ruling: Do you
22 have this or not? And if not, why not?

23 And then if you look at -- and it hasn't been completely
24 codified yet -- Senate File 274, I mean, because we don't have
25 an official cite yet, you know, the Iowa legislature passed a

1 law saying you can't -- universities can't exclude leadership
2 based on certain grounds. So that's where the mootness argument
3 comes in. The argument that part of this case isn't moot is
4 incorrect because it is moot.

5 Right now all religious groups are on hold, and somehow
6 InterVarsity has turned this to, oh, you're targeting them
7 again. It's exact opposite, Your Honor. We're saying, you
8 know, we got to resolve BLinC and we got to figure, well,
9 obviously, InterVarsity, so we're just going to essentially
10 leave you alone, and but we've done with the other groups -- the
11 same with other groups.

12 I mean, they keep bringing up athletics and music clubs. I
13 mean, that's not the issue here. And, you know, we put them on
14 hold, honestly, to be helpful, to say, okay, let's just weigh
15 this out, and we'll figure something out, and at the end of the
16 day, whatever day that is, then here's what is gonna happen.

17 And so when they say we punished InterVarsity, it wasn't
18 that way at all. It was the opposite. I mean, the University
19 went through all the constitutions and said please, you know, be
20 in compliance, and they -- and they didn't.

21 And other groups, I mean, the record shows that other
22 groups weren't in compliance. I mean, some didn't even submit a
23 constitution, so that was simple, but other groups, I mean, just
24 flat-out refused.

25 And so to say we targeted InterVarsity after the BLinC

1 ruling is just absolutely incorrect. I mean, it was an absolute
2 act of good faith to say we'll just put InterVarsity on hold
3 with the other religious groups. Well, now what I just heard
4 this afternoon, it's like we targeted -- Iowa targeted
5 InterVarsity, and that's not true, and the record doesn't
6 demonstrate that.

7 Now, moving on to kind of the more of my -- my cross-motion
8 for summary judgment.

9 THE COURT: Okay.

10 MR. CARROLL: I don't know if you call it
11 cross-motion. But on qualified immunity, I mean, the law isn't
12 clearly established. We have cited multiple cases to say if you
13 hold -- and actually, Mr. Blomberg was incorrect, it's not
14 Dr. Baker -- if you hold university officials to understand the
15 First Amendment and the establishment clause and then the equal
16 protection clause, I mean, that's a tremendously difficult
17 standard.

18 And, you know, as these cases kind of merge, the Court --
19 and Mr. Blomberg was correct, you said this was a close call on
20 qualified immunity, but at the same time, it's how are these
21 individuals to know. I mean, I don't understand how lawyers
22 today and the U.S. Supreme Court and the Eighth Circuit can
23 still issue decisions and talk about law and we expect what I'll
24 call lay people to understand what the law is.

25 I mean, there are some things that are so clearly

1 established, yes. You can't bust in somebody's home and arrest
2 somebody without an arrest warrant or an emergency. I mean,
3 there are certain things that are so clear.

4 But to understand the First Amendment, for people that it's
5 not what they do every day -- and it doesn't matter if they
6 talked to lawyers about it because every case is different. I
7 mean, Mr. Blomberg, you know, cited the *Gerlich* case from Iowa
8 State. But that case, that was a very close case. In fact,
9 en banc was denied six-six, okay? So, I mean, it wasn't like
10 this is so clear.

11 Now, the decision itself stands, I understand it
12 completely, but it wasn't like -- if it's not clear to six
13 judges on the Eighth Circuit, then I don't understand how it
14 would be clear to people that don't do this for a living. And
15 I'm not criticizing any federal judge in no manner, it's just
16 that that isn't what they do every day. They run universities.

17 And, I mean, in this case, everybody -- I mean, all of
18 the -- InterVarsity came after BLinC. Everybody was thinking
19 this is the best way to approach it; not going after the
20 religious claims, not going after whoever their ministers are,
21 just minimally saying, you know, we think you need to be in
22 compliance.

23 And, you know, if you lose qualified immunity on that, then
24 you don't have it. I mean, you'll never have -- you know, I
25 mean, I think qualified immunity is going to go out the door

1 because it's like I'm supposed to not only understand the law,
2 I'm supposed to understand how a judge at some level -- district
3 court, appellate court, U.S. Supreme Court -- is going to rule.
4 And I don't understand how people that that isn't what they do
5 for a living should understand that. You know, I mean, that is
6 the essence of our argument.

7 And then on the -- I'm going to move to the other parts. I
8 think, hopefully, I've answered your questions.

9 THE COURT: Before we move on, Mr. Carroll, with
10 respect to your argument that people who don't deal with the
11 First Amendment every day, that this is not their job, cannot be
12 expected to understand and avoid violating somebody's First
13 Amendment rights, isn't that why something as clear as my order
14 in BLinC is important?

15 This is the same university, the exact same policy, the
16 exact same lawyers involved in it, including you, the same
17 University of Iowa people who are responsible for enforcing or
18 not enforcing it. And what I said to you very clearly, what I
19 said to the University of Iowa, and what in their depositions
20 all these responsible people said they understood, was that that
21 human rights policy could not be selectively enforced.

22 Let's call that X. I told you not to do X.

23 MR. CARROLL: Okay.

24 THE COURT: The next thing you did was double X. You
25 not only went after the BLinC-type people, but you went after

1 all religious people, which is worse than what you did in BLinC,
2 in my opinion.

3 So how do you say we didn't know what to do when I told you
4 exactly what to do and you did the opposite of that? Give me
5 your best take on why that isn't a huge problem for you in this
6 case.

7 MR. CARROLL: Okay. You -- I am not the defendant,
8 so -- when you say said "you." But when you said it looked like
9 selective enforcement -- and actually, Your Honor, you disagreed
10 with the complaint-driven process. When I explained -- and, I
11 mean, I understand your ruling. When you said you don't think
12 this letter from BLinC was a complaint, and I said, well, no,
13 but you didn't accept that argument.

14 In this case, after the BLinC ruling, we didn't just go
15 after one group. It was all groups that were reviewed.

16 THE COURT: But you have just said that you put on
17 hold in good faith, quote, for their own good, quote, all of the
18 religious groups. And I know from reading the depositions that
19 that's where you started this review process was with the
20 religious groups.

21 I don't think you understand free expression and viewpoint
22 discrimination when you draw a line between religion and other
23 groups that articulate other things. I don't think, perhaps,
24 you yourself understand the problem there. And that is very
25 concerning to me because that is exactly what we're talking

1 about.

2 The University of Iowa may not selectively go after student
3 groups based on what they think, based on what they advocate,
4 whether it's religious or otherwise, unless you're going to do
5 it evenly, equally. That means you cannot carve out a
6 particular type of group and put them on hold for their own
7 good. That's ludicrous to those of us who understand this law
8 well.

9 And it's incredibly baffling, in light of the ruling I
10 made, that the University would make that choice, and so I'm
11 trying to understand why you would make that choice when it is
12 so clearly a problem, in my view. Can you help me with that?

13 MR. CARROLL: Well, the choice was made just to try
14 to -- groups designate if they're religious or not, okay? And
15 some groups, you honestly -- you wouldn't know if they're
16 holding religious beliefs. The carve-out was they clearly have
17 asserted a statement of faith. Those groups were put on hold
18 after the BLinC ruling. We weren't suppressing anything they
19 were doing.

20 And the other groups were reviewed. They were reviewed
21 equally. It was just to try to carve out and point out to the
22 Court that we've put these on hold because of BLinC. They're
23 not being targeted here. It's just a matter -- honestly, it's a
24 matter of formatting. I mean, we could have done it
25 alphabetical.

1 THE COURT: Explain to me what you mean by put them
2 "on hold." What did that, in practical terms, mean for these
3 organizations?

4 MR. CARROLL: It meant that, because of the BLinC
5 ruling, every group was reviewed on an equal basis, and then the
6 ones that weren't in compliance -- and there's non-religious
7 groups in that noncompliance. The non-religious groups were
8 also told, no, you have to be in compliance with the Iowa human
9 rights policy.

10 We put the religious groups on hold only because of the
11 BLinC ruling, so maybe we favored them over the other groups.

12 THE COURT: What do you mean you put them on hold? So
13 you deregistered them?

14 MR. CARROLL: No. No. I mean, InterVarsity was
15 deregistered and then put on hold so -- I mean, they were at the
16 recruitment fair this fall, so we just put it on hold to review
17 the human rights policy. I mean, we reviewed the human rights
18 policy. We said let's let this play out, and we're going to see
19 how -- you know, what happens. But they weren't --

20 MR. LEVIN: Your Honor, I don't mean --

21 MR. CARROLL: -- disfavored.

22 THE COURT: I'm sorry. Hold on just a minute. Who
23 just interjected?

24 MR. LEVIN: Your Honor, this is -- my name Nathan
25 Levin. I'm in-house counsel for the University of Iowa. I

1 think I may be able to provide some quick clarification on what
2 George is referring to as put "on hold."

3 Put "on hold" was a term that he has used to indicate that
4 we have kept all of our religious forums in good standing and
5 have not taken away any benefits or privileges of those groups
6 due to the pending litigation and appeal of BLinC and of
7 InterVarsity.

8 So "on hold," as could -- I totally understand could sound
9 to appear as if they're on hold, they've been deregistered or
10 they've taken benefits away, but that's entirely not the case;
11 put "on hold" meaning we are not going to apply the civil
12 rights/human rights policy and review that and deregister them
13 if they don't have the right requisite language in it. And so
14 they have been all put in good standing until final resolution
15 of the BLinC case and/or the InterVarsity case.

16 THE COURT: I thought --

17 MR. LEVIN: And with that I'll back out.

18 THE COURT: -- InterVarsity was threatened with
19 deregistration and was ultimately deregistered. Am I wrong
20 about that?

21 MR. CARROLL: Your Honor, this is George. Initially
22 they were, but they were put back in good standing, and they
23 stand in good standing as we speak. I mean, they're on campus.
24 They have a -- I mean, they actually don't have a university
25 sponsor, but --

1 THE COURT: Okay. So how long were they deregistered?

2 MR. CARROLL: Oh, Eric or Dan, you might know.

3 Maybe 30 days.

4 MR. BLOMBERG: Yeah. This is Daniel. I think they
5 were deregistered for about a month and a half.

6 MR. CARROLL: Yeah.

7 THE COURT: And only reinstated after lawsuit was
8 filed?

9 MR. BLOMBERG: That's correct, Your Honor.

10 THE COURT: Yeah. Do you understand where the problem
11 comes in, Mr. Carroll?

12 MR. CARROLL: Well, I do understand the problem. It
13 had to do -- well, it goes -- I guess I go back to the same
14 argument, which is all groups were reviewed the same fair way
15 and requested to file compliance, and InterVarsity at some point
16 essentially refused.

17 THE COURT: Okay. But so did other organizations that
18 were non-religious, and you let them be registered, including
19 after your second round of reviews. Correct?

20 MR. CARROLL: No. Well, okay. I mean, if you're
21 going to talk about the musical groups and athletic sports
22 clubs, perhaps.

23 THE COURT: Well, what about things like the Iowa
24 National Lawyers Guild or the University's College of
25 Dentistry's programs or the Tau Sigma Military Dental Club? I

1 mean, these aren't athletic groups or singing groups, although,
2 frankly, that doesn't excuse things. What about sororities and
3 fraternities? There's a whole lot, a whole lot -- Women in
4 Science and Engineering, Iowa Edge student organizations.

5 There's a whole lot of organizations that the University
6 allowed to continue being registered student organizations that
7 have equally noncompliant portions of --

8 MR. CARROLL: No. They --

9 THE COURT: -- their constitutions.

10 MR. CARROLL: I'm sorry. They are in compliance. So
11 I'll just use the example Iowa Women in Science, which is from
12 the engineering college. To be a member, you don't have to be a
13 woman. You have to support the mission of supporting women in
14 science.

15 THE COURT: How is that different than the statement
16 of faith?

17 MR. CARROLL: Well, it's not quite different. What
18 the difference is, we're -- InterVarsity was basically saying if
19 you don't believe in our faith, you can't be a member. You
20 don't have to be a female to be in the -- I'll just shorten it
21 to engineering women, okay?

22 You don't have to be a female to be in that organization as
23 long as you support the mission, and in the statement of faith
24 for InterVarsity, you have to believe in the absolute mission.
25 And the only mission in, like, engineering is I hope you're a

1 good engineer. I mean --

2 THE COURT: What about Love Works?

3 MR. CARROLL: Well, I'll admit that's a challenge.
4 But Love Works, you know, it became kind of a -- I'm not even
5 sure it exists anymore, to be honest with you, because I don't
6 think they --

7 MR. LEVIN: Your Honor, could I interject? With Love
8 Works --

9 MR. CARROLL: You don't need -- no. You're not an
10 attorney of record.

11 THE COURT: I need to know who was speaking for the
12 transcript. Can you tell me who was just speaking that
13 Mr. Carroll --

14 MR. LEVIN: Sorry, Your Honor. That was --

15 THE COURT: Go ahead.

16 MR. LEVIN: -- Nathan Levin.

17 THE COURT: Hi, Nathan Levin. Was that you speaking?

18 MR. LEVIN: Counsel here at University of Iowa. Yes.

19 THE COURT: And Mr. Carroll does not want you to speak
20 because you're not an attorney of record?

21 MR. LEVIN: That's my understanding.

22 THE COURT: Okay.

23 MR. CARROLL: Well, I thought those were the rules,
24 Your Honor.

25 THE COURT: Okay. You were explaining why Love Works

1 was given a pass and InterVarsity was not.

2 MR. CARROLL: Well, they -- okay. So InterVarsity --
3 or Love Works wasn't given a pass.

4 THE COURT: It was deregistered during its review?

5 MR. CARROLL: It -- it essentially became defunct.

6 THE COURT: Where in the record is that information?

7 MR. CARROLL: Oh, that, I'm sorry, I'd have to -- I'd
8 have to look it up.

9 THE COURT: Okay. You can submit that to me tomorrow.
10 But go on with your argument.

11 MR. CARROLL: Yeah. Yeah.

12 So, I mean, my argument is that -- well, I'll just go back
13 to what I said. I don't want to be just repetitive, but the
14 argument is we weren't targeting anybody.

15 THE COURT: Okay.

16 MR. CARROLL: We're trying to pull -- you know, pull
17 groups together. The chart, we're just trying to sort those
18 charts out and just say, okay, these -- this group's on hold. I
19 mean, and I understand what you're asking, Your Honor, about
20 fraternities and musical groups, but we're just trying to sort
21 them out to go we're just gonna put these groups that Iowa --
22 the University of Iowa recognizes as a religious group, I mean
23 in the sense of they say it in their constitution or their
24 application to be an RSO --

25 THE COURT: Okay. Love Works identifies as a

1 Christian group.

2 MR. CARROLL: Yes.

3 THE COURT: Okay. Just noting that for the record.

4 You still have a few minutes left. Any final arguments
5 you'd like to make or do you want to reserve that for rebuttal?

6 MR. CARROLL: The only thing -- no. And I don't need
7 rebuttal. The only thing I would say is this claim under the
8 Iowa Constitution, you know, these claims are tort claims, and
9 you have to exhaust administrative remedies to file a tort claim
10 against the State of Iowa.

11 THE COURT: Okay.

12 MR. CARROLL: It's in our brief, so...

13 THE COURT: Okay. Thank you.

14 MR. CARROLL: Thank you.

15 THE COURT: Mr. Blomberg, you still have eight minutes
16 left. Go ahead.

17 MR. BLOMBERG: Thank you, Your Honor. Just a few
18 factual matters to clean up.

19 On Love Works, their status isn't unclear at all. In fact,
20 I went to the University's website yesterday and saw that
21 they're still listed as a student organization and was able to
22 download a copy of their constitution.

23 The testimony in the record in the case, which is at
24 Statement of Facts 322 through 329, reflects that Love Works --
25 that the University repeatedly reviewed and approved Love Works'

1 constitution under its policy; that Love Works is now and has
2 always been approved; that the University expressly exempted
3 Love Works because it, in its view, provided a safe space for
4 minorities, even though it had a statement of faith that it
5 required its leaders to hold as a condition of being leaders.

6 They also admitted in those same paragraphs that Love Works
7 never received from the University a two-week ultimatum to
8 change its leadership rules, it was never deregistered, it never
9 had a notice put on the University Web page stating that the
10 group was defunct for lack of interest, all of which happened to
11 InterVarsity.

12 Another student group that was specifically listed in the
13 testimony is House of Lorde, which also the University admitted
14 that it exempted that group even though that group requires its
15 members to identify as black or queer and that the University
16 was aware of those constitutional requirements and they exempted
17 it as under its safe space exemption.

18 For purposes of Women in Science and Engineering, they both
19 required their members to agree with the mission of the
20 organization -- which, as the record reflects, numerous, dozens
21 of organizations require that, and that's okay for secular
22 groups, it's not okay for religious groups -- and the Women in
23 Science and Engineering also was allowed to encourage its
24 leaders and members to be women. So it didn't -- it wasn't an
25 express requirement, but it was an encouragement, and that was

1 one of the accommodations that InterVarsity asked the University
2 to consider and which the university rejected before it
3 deregistered InterVarsity.

4 Your Honor, the argument that the University treated --
5 even evaluated the religious groups on the same basis is
6 incorrect as the record reflects at paragraphs 257 through 258
7 that Dr. Shivers requested that Dr. Nelson and Mr. Kutcher
8 compile a list of religious organizations and only religious
9 organizations as a part of starting the review of student
10 organizations.

11 And Mr. Kutcher admitted that only religious organizations
12 were put into a specific list by the University as part of the
13 review. So even not only did the actual outcome of the policy
14 discriminate against religious groups, but even the evaluation
15 aspect of it did.

16 The University, when it did make the decision to
17 deregister, it deregistered about 30 groups. The only groups,
18 though, that were deregistered because of their leadership
19 requirements are reflected in the record as being religious
20 groups. The groups in addition to InterVarsity that were
21 deregistered included the Christian Pharmacy Fellowship, the
22 Chinese Student Christian Fellowship, the Geneva Campus
23 Ministry, the Imam Mahdi Organization, the J. Ruben Clark Law
24 Society, the Latter Day Saints Student Association, and the Sikh
25 Awareness Club. That's at paragraphs 14 and 202.

1 In none of those circumstances did you have a comparable
2 deregistration for other groups, secular groups, because of
3 their leadership standards, and that's reflected in the
4 discussion at paragraph 12 of the statement of facts.

5 Just a couple other matters, Your Honor. Let's see.

6 Just to emphasize too, while the deregistration of
7 InterVarsity lasted for only a month, it was severe in its
8 impact. It caused the group to miss meetings, it caused members
9 of the group to become terrified because the University is not
10 only their educator but also their employer. They refused to
11 allow their names to be associated with InterVarsity's work in
12 this lawsuit because they're afraid of the impact in their
13 future career.

14 The current president of the organization, Katrina Schrock,
15 who is in the physics program and pursuing a doctorate, an
16 exceedingly bright woman, says she's not sure that she ever
17 would have signed up to be the president if she'd realized that
18 this is what she was getting into, and it's been very hard for
19 her to recruit a new president to take her place because of the
20 stress and strain of having to go through all of this as a part
21 of reasserting its rights.

22 And not only were they deregistered, but they also spent
23 the past year being accused by the University of engaging in
24 violations of federal civil rights law. And the University
25 itself has -- sorry, not the University, but InterVarsity itself

1 has suffered the most significant drop in membership in the 22
2 years that the paid InterVarsity staffer, Kevin Kummer, has been
3 there.

4 So this has been a very significant and very painful
5 process for InterVarsity and also the other religious groups
6 that were deregistered as a part of InterVarsity. I think
7 that's what you see as well -- or are related to InterVarsity,
8 not part of InterVarsity. You see that reflected in the amicus
9 briefs that were filed on behalf of other religious student
10 groups that are concerned about the impacts to them and to other
11 groups on campus.

12 So, Your Honor, unless you have any other questions, I
13 think those are the issues that I wanted to try to clear up.

14 THE COURT: I appreciate that.

15 Mr. Carroll, if you have any information in the record
16 about Love Works' status that is different than the information
17 provided and cited to us by Mr. Blomberg, please get that on
18 file tomorrow.

19 MR. CARROLL: Yes.

20 THE COURT: Otherwise, we'll consider this fully
21 submitted at close of business tomorrow and we'll get an order
22 out as soon as possible.

23 Anything else for the good of the order right now on behalf
24 of InterVarsity, Mr. Blomberg?

25 MR. BLOMBERG: No, Your Honor. Thank you.

1 THE COURT: Mr. Carroll, on behalf of the University
2 of Iowa?

3 MR. CARROLL: No, Your Honor.

4 THE COURT: Okay. We are adjourned. Thank you.

5 (Proceedings concluded at 3:55 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 29th day of September, 2019.

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