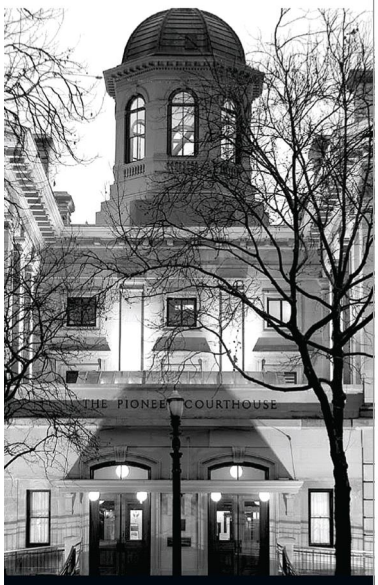

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BUSINESS LEADERS IN CHRIST,

Plaintiff-Appellant,

vs. Case No. 19-1696

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; WILLIAM R. NELSON, in his official capacity as Executive Director, Iowa Memorial Union, and in his individual capacity,

Defendants-Appellees.

ORAL ARGUMENT VIA VIDEOCONFERENCE

HELD ON
TUESDAY, SEPTEMBER 22, 2020

BEFORE
HONORABLE LAVENSKI R. SMITH, CHIEF JUDGE
HONORABLE DUANE BENTON
HONORABLE JONATHAN A. KOBES

NAEGELI DEPOSITION AND TRIAL
111 SOUTHWEST FIFTH AVENUE, SUITE 2020
PORTLAND, OREGON 97204

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MR. BAXTER: -- go after BLinC because of its leadership requirements because it did not have a membership requirement. BLinC invited everyone, including the complainant in this case to participate fully in their activities. And when the university met with BLinC in September of 2017, the university told BLinC that it actually didn't require, you know, have any policy against leaders signing a statement of faith or some other statement of mission alignment. That that was perfectly permissible that the university had always required it. The university told BLinC in that meeting that it couldn't force them to select leaders who didn't share their faith any more than it could require an environmental group to select a climate denier to be their leader.

And BLinC and the university both left

that meeting with the understanding that BLinC would be allowed to continue requiring leaders to sign a statement of faith. The university --

THE COURT: Mr. Baxter, (inaudible) case that addresses the issue basically that applies viewpoint discrimination in the context of a university, a student group, and leadership?

MR. BAXTER: I'm sorry, Your Honor, the first part of your question cut out for me. Can I address the cases that address viewpoint discrimination?

THE COURT: Well, and I'm wondering, do we need him to address the specific facts of this case which relates to student organization leadership positions?

MR. BAXTER: Well, Your Honor, I would note that Martinez, a Supreme Court student organization case, strongly suggested that leadership could not be subject to restriction by the university. There, only four justices signed -- even insinuated that an all-comers policy, which is not at issue here, could apply to leaders. The Court said that if anyone used an all-comers policy to try as a subterfuge to take over leadership, then (inaudible) presumably would change its policy. And

Justice Kennedy, who is the fifth vote, explicitly stated that if that happened, that if an all-comers policy was used to challenge leadership or to challenge the group's views, that that would create a substantial case of viewpoint discrimination.

And so -- and then Hosanna-Tabor came out two years later and clarified that especially for religious organizations, the religion clauses prohibit interference in leadership selection.

THE COURT: Well, they call them ministerial in those cases, don't they counsel?

MR. BAXTER: I'm sorry, Your Honor, could you repeat that question?

THE COURT: Sure. Happy to.

Those cases all call it ministerial; right? Hosanna-Tabor and Guadalupe?

MR. BAXTER: That's not correct, Your Honor. The cases often refer to the ministerial exception, but Judge Alito in Our Lady of Guadalupe and also Justice Kagan and Justice Alito in Hosanna-Tabor warned against the use of the term "ministerial." That it was a term of art that broadly encompassed religious leadership selection.

And if you look at the Sixth Circuit decision in Conlon v. InterVarsity, that court held

that Hosanna-Tabor had identified that the establishment clause creates a structural barrier against the government interfering in a religious organization internal affairs and that employment in Our Lady of Guadalupe, the Court said that employment disputes were just one part of that. And so it doesn't matter whether someone is actually called a minister or not. If they perform a religious function, as BLinC's officers do here -- they pray, they lead Bible study, they minister directly to their student members. There's no question that they perform a ministerial function and that their religious leadership selection is protected under the religion clauses.

Of course, that goes even beyond the basic cases, a long line of Supreme Court cases and cases in this circuit holding that viewpoint neutrality is a sine qua non for universities managing student groups in a limited public form.

This case's decision in Gerlich in 2017 cited Martinez for the principle that courts cannot engage in viewpoint -- or that universities cannot engage in viewpoint discrimination in handling student groups on campus. And that case was arguably a much more difficult case because there

the benefit involved the use of the university's trademark, so it was much more easy to attribute the student group's speech to the university. But the Court rejected that argument and said that viewpoint neutrality was still the straightforward (inaudible) of the university (inaudible).

Defendant complained that Gerlich didn't involve a nondiscrimination policy but there is a robust consensus of cases, in fact, a unanimous consensus of cases applying -- address the application of nondiscrimination policies in a limited public forum on university campuses.

I point this Court to the Seventh Circuit's decision in CLS v. Walker where the Court, without equivocation, held that you could not restrict -- you could not stop a religious group from having leadership requirements, requirements very similar to those at issue here because of a nondiscrimination policy. That viewpoint neutrality was still the governing principle. Even -- I point the Court to Ward v. Polite, (inaudible) also (inaudible) again, a (inaudible) holding (inaudible) the First Amendment's protections.

THE COURT: Mr. Baxter, the Ward -- let me interrupt you. The Ward case, of course, did not

involve an organization; right?

MR. BAXTER: That's correct.

THE COURT: It was a graduate program.

MR. BAXTER: That's correct.

THE COURT: So isn't it of limited help?

MR. BAXTER: I think it still applies because the principle was that they could not engage in viewpoint discrimination or violate the individual's religious freedom.

Now, the Reed case did involve a student organization. That's the case that defendant seemed to rely on most. And there the Court held exactly the opposite of what defendant (inaudible). The Court did recognize that policy as written in that case was viewpoint neutral, but it remanded the case because it was concerned that there was evidence of discrimination in how the policy was applied. And the Court was clear that that would be unconstitutional. The Court remanded to give the university an opportunity to clean up its enforcement. Said maybe some of these incidences where there's, you know, selection based on protected categories or if this was an oversight, the university just didn't know it, and now it can go back and clean it up. Well, and we don't know if

the case settled after that point, but the same thing has already happened in this case. The District Court's first injunction was limited to 60 days, specifically to give the university an opportunity to go down and clean up its enforcement.

The university already rejected that opportunity. Instead, deregistered additional student groups while amending its policy to protect fraternities, left numerous dozens of other groups untouched that already discriminated based on protected categories, and then when it showed up at the preliminary -- at the summary judgment hearing, the university presented a spreadsheet of all of its student groups, highlighting all the groups that it believed were in violation of its policy. And so they were on hold pending the litigation. All of those groups were -- it was just religious groups on that list. Thirty-two religious groups. All of the religious groups with leadership requirements except Love Works, the group with beliefs exactly opposing BLinC's. And no other groups, even though there are numerous groups -- House of Lord that, you know, that requires its leaders and members to be -- to identify as Black individuals. The Socialist Democrats is one that the Court identified which

requires its leaders and members to affirm the beliefs of that organization. Numerous other examples that are set forth in the joint appendix.

If the Court looks there at Joint Appendix 2449, paragraphs, beginning 14 through roughly 30, identifying lists of organizations that discriminate on protected categories and were never, ever addressed by the university despite the many warnings from the District Court over two preliminary injunctions. And these cases are consistent with a long line of cases from the Supreme Court, this Court in Gerlich, Gay Lib, and Doan (phonetic), all cases involving viewpoint neutrality on the student, you know, with student organizations in a limited public forum.

Now, even without the viewpoint neutrality issue, I would remind the Court that this case initially involved straight religious targeting in violation of both the free association, freely established law of free association, and free exercise. The Supreme Court's decisions in Hurley (phonetic) and Dale (phonetic), which are cited in our brief, clearly held that a nondiscrimination of policy cannot be used to override a private organization's right to organize around shared

beliefs and goals.

And that was another important point that the District Court missed on the reasonableness issue where she was asking if the policy, the university's enforcement of its policy was reasonable in light of the purposes of the forum. The Court pretty much summarily held that it was reasonable even after the university amended its policy she didn't reconsider the issue, but it doesn't make sense. The policy, if you look at again JA 2449, paragraphs four and five, the admitted purpose of the forum was to allow likeminded students to gather around shared goals and beliefs. It can't be reasonable if that's the purpose of the forum, which is very different than the purpose of the forum in Martinez. If the purpose is shared beliefs and goals allowing likeminded students together, it's not reasonable then to restrict, to refuse to allow some groups to select their members based on those goals and values.

So we would say that even without the viewpoint discrimination, defendants are not entitled to qualified immunity because they violate the clearly established law of free association.

And the same is true with the free exercise of religion.

Remember, when this case started, as I mentioned earlier, the university told BLinC that its leadership selection was okay. It's admitted that it has always allowed leadership selection, including other religious groups with the same beliefs as BLinC to maintain statements of faith, to require leaders and members to sign those. Defendants Baker and Nelson signed a memo reaffirming that that was permissible and that student government leaders would be personally liable if they didn't -- if they tried to cut off funding to groups because of their statements of faith.

It was only at that meeting the conclusion was that the university invited BLinC to add a statement of faith so that students would know what the group was about before they joined it. BLinC agreed to do that and provided a one-page statement of faith and it was three sentences in that statement that then triggered the deregistration, statements about BLinC's views on marriage and sexuality. And defendants admitted that if BLinC would have just deleted those three statements from

its statement of faith, that they would have allowed it to remain on campus even with its religious standards -- other religious standards for leaders.

Defendant Baker admitted that he thought it was fine to have standards about sexual conduct for leaders and members, but he said it depended on what those standards were. If they acknowledged same sex marriage it was okay; if they didn't, it wasn't okay. That's a clear example --

THE COURT: Mr. Baxter?

MR. BAXTER: -- of religious targeting, which this -- yes, Your Honor?

THE COURT: Let me ask you. As I understand your argument, what you're saying is there may not be a case factually identical with this in prior precedent, but I understand you to be saying there's a substantial body of case law that would create notice to reasonable university personnel that what they were contemplating and what they were doing was violative of First Amendment principles. Is that your argument?

MR. BAXTER: Maybe I gave a misimpression, Your Honor. I think there are cases directly on point --

THE COURT: Okay. Then what's your case

and cases that are directly on point showing these defendants that they were violating clearly established constitutional law?

MR. BAXTER: All right. The Seventh Circuit decision in Christian Legal Society v. Martinez is exactly on point. I would argue that Martinez and the Ninth Circuit decision in Reed are also exactly on point with respect to enforcement of a policy. Enforcement of a policy that is not an all-comers policy. Both of those courts held applying a nondiscrimination policy to student orgs on campus that you cannot engage in viewpoint discrimination. All three of those cases are directly on point.

I would also point this Court to its own decision in Cuffley v. Mickes which is at 208 F.3rd 702, where this Court held that application of a nondiscrimination policy could not be used to exclude the KKK from participating in what could have been considered a limited public forum. The Court said it actually didn't matter if it was a limited public forum or not because the viewpoint discrimination was impermissible in any context. But here we're not even talking about something that extreme. We're talking about a religious group on

campus trying to live out its beliefs, beliefs that the Supreme Court in Obergefell has recognized as decent and honorable beliefs shared by a large number of Americans.

I would also point this Court to its decision in Wagner v. Jones at 664 F.3rd 259, where the University of Iowa, again, was denied qualified immunity for rejecting a law school faculty applicant because of her socially conservative views. And this Court held that it should have been obvious to the dean of the law school that that was an impermissible basis for terminating someone.

I think that's analogous to this situation where groups like Love Works were allowed to remain on campus, engage fully in the benefits that the university offered, even though they required their leaders to sign a gay affirming statement of faith. And BLinC, on the other hand, was deregistered for requiring its officers to sign a statement of faith that they only put it into their constitution because the university asked them to. That's textbook viewpoint discrimination.

THE COURT: Mr. Baxter, you're well within your rebuttal time. You can continue if you like or you can reserve. It looks like you have a little

under three minutes remaining.

MR. BAXTER: Thank you, Your Honor. I'll reserve my time. The clock disappeared off my screen and so I wasn't aware. Thank you.

THE COURT: All right.

MR. THOMPSON: May I proceed, Your Honor?

THE COURT: I'm sorry; I was muted. Yes, you may please proceed.

MR. THOMPSON: Thank you, Your Honor. And may it please the Court.

Let me begin by thanking the Court and court staff for making this possible. This isn't easy and I think the litigants all appreciate the effort the Court and staff is putting in to make this happen.

Simply put, this is a qualified immunity case, and more simply put, this is a prong two case. And so I'm not going to belabor what the Court is aware of, that the U.S. Supreme Court in White v. Pauly and Wesley and other cases has been very, very specific about the need to look at particularized facts and with a high degree of specificity. In this matter, we concede. We will agree that a government entity should generally refrain from engaging in viewpoint discrimination is well settled

law. And I think --

THE COURT: Counsel, let me interrupt you. It's more than that. It's a presumption, right, that it's unconstitutional? The Supreme Court uses the term "presumption" and "presumed"?

MR. THOMPSON: Correct.

THE COURT: Well, that's --

MR. THOMPSON: -- viewpoint discrimination.

THE COURT: -- I think that's stronger than you stated it; right?

MR. THOMPSON: Yes.

THE COURT: Okay. Proceed.

MR. THOMPSON: Presumptively unconstitutional.

THE COURT: Right.

MR. THOMPSON: If you can prove viewpoint discrimination, Your Honor. Thank you for the clarification.

But that a public university should decline to enforce the terms of a nondiscrimination policy against a publicly-funded student organization when faced with resolving a specific civil rights complaint by a student alleging that he has been excluded from participation as a leader in

that organization is not well settled.

Again, BLinC urges the Court to look through the lens of simple viewpoint discrimination cases, which is the Gerlich case, but it is not similar in any way on the facts other than the fact that it occurs in the context of a university.

THE COURT: Counsel, question. I'm wondering what the significance, if any, is of the District Court's statement here that the individual defendant should have been aware that their actions implicated BLinC's First Amendment rights and indeed, the record shows that they were. Generally, I don't think qualified immunity protects those who knowingly and intentionally violate constitutional rights. So I'm wondering what your views are on the District Court's finding on that issue.

MR. THOMPSON: Well, I mean, I also think -- I think First Amendment rights is such a broad brush to sweep with here. That in other words, I think there's no doubt from the record that the university officials were aware that First Amendment rights were implicated by the limited public forum created by their registration of student organizations. And again, that's well settled as well.

The more specific question here though is whether the specific conduct alleged in the complaint in fact violated the First Amendment. And I think that, for example, Mr. Baxter and the Court referred in part to records that dealt with memos that go back into the '90s and the early 2000s. One of the things that's missing in that recitation of the facts is that, again, this is why facts matter, is that this is a nondiscrimination policy in the state of Iowa that deals resolving a gay student's complaint about sexual orientation discrimination. The law in Iowa, the civil rights law in Iowa was amended in 2007. The Varnum decision about marriage came down in 2009. And so the relationship between the human rights policy issue and the First Amendment issues was evolving, was changing. And that's why it's important here not just to look at limited public forum jurisdiction, but to look at it in the context of human rights policies, and specifically in the context of university officials trying to decide and make a decision about how to respond to a specific allegation of discrimination.

I don't think, I mean, it's a legal conclusion about whether or not it was well settled. I don't think Judge Rose's comment about it is

binding with regard to the specific knowledge.

But the other thing that's important is this Court applies a reasonable administrator standard. I mean, this is a reasonableness, objective standard, and the discussion about prior memos based on different facts I think is somewhat of a red herring because, you know, as Judge Benton mentioned, I mean, this wasn't just about membership; it was about leadership. And much of what --

THE COURT: Counsel, let me interrupt you. Doesn't that make it worse? You may know that there are religious organizations that don't believe you should have clergy. Don't believe you should have leaders who are ordained. They believe the leaders should be elected or just rise up or be ad hoc. And when you're talking about who can lead a religious organization, aren't you head on into about four or five of the parts of the First Amendment?

MR. THOMPSON: Well, I mean, again, they're implicated. But this case, if you look at the file, look at the petition, when it was filed, it was filed as a case that was clearly set up to argue to extend the Hosanna-Tabor case which as you talked about is a ministerial exception in the

context of a religious organization to a university. And Mr. Baxter will not be able to point to any case anywhere where that has been done. And so that --

THE COURT: Well, what about Martinez? He points to Martinez.

MR. THOMPSON: Well, that's not what Martinez does. It rejects that. And the other thing that Martinez does is, again, I think Martinez clearly clarifies the standard for limited public forum analysis. It basically merges the First Amendment and the expressive association standard into one. But what it does kind of on a stipulated record, it opines about frankly a nonexistent policy. It was a stipulated all-comers policy that the whole court spends a lot of pages talking about whether it, in fact, existed or not. But I think that -- and it clarified that that type of policy would not be discriminatory.

But this is not what we have here. I mean, it is, I agree with Mr. Baxter, that the policy is closer to Reed but because it's not an all-comers policy, everybody has agreed to that. But in Martinez, I think one of the really important things that happened there that's getting lost in this shuffle is in the Walker case, there was an

argument made which is the very same argument that you see throughout the briefing in this case which is that Blake was not discriminating against sexual orientation in violation of the policy. They were just saying you have to affirm or make a statement about conduct. In fact, Judge Rose talks about an admission where the state said you could be gay as long as you, you know, adopt this statement of beliefs.

And one thing that Martinez absolutely did is absolutely rejected that structure. You know, Justice Ginsberg wrote that this conduct versus status distinction in the context of sexual orientation is not true and an attack on that conduct so central to the sexual orientation is an attack on the person.

And so, I mean, that's one of the reasons why Martinez and Reed and Walker don't clarify this. I mean, that's what these officials are grappling with is that this context, for the first time of any case where you see a frank conflict, if you will, between not just the existence of a policy and a refusal to register an organization, which is what you saw in Martinez and Reed, but a frank complaint about a violation of a human rights policy

(inaudible) out there and that's what these administrators were grappling with.

The other thing to be frank, and again, I think Mr. Baxter was -- has been clear about it, the administrators were grappling in the midst of this with trying to comply with an injunction that was actually issued in the case. Right? In other words, we have conduct that occurred that led to the lawsuit, the complaint, and in the context of that there's an early injunction, and a lot of the conduct complained about here is administrators trying to figure out what to do, how to comply with the injunction.

I mean, and so ultimately, Judge Rose concludes that the conduct violated the constitution. We have not appealed that, Your Honor. But she also correctly concluded that this whole area specific to universities in the context of human rights policies is not sufficiently clear to warrant the denial of qualified immunity. You know, Judge Rose was, I think, you know, very specific as she went through the analysis.

And I think one of the things that really distinguishes this case from Gerlich is Judge Gritzner in Gerlich denied qualified immunity. He

said, here's how I see the law. You know, we've argued with that. We appealed that. We had a hard-fought case at the circuit court level. But in this case, a federal judge, Judge Rose, explained why it is that she on the bench doesn't think that this is a clear question. She talks about the particularized facts of the case, the nature of the policy, the university setting. She actually doesn't mention the specific issue that there was an actual complaint pending and they were acting on a student complaint of discrimination which distinguishes it from any of the prior cases. She says that -- she acknowledges that Martinez, Reed, and Walker are the most factually similar, but she then says they don't give me clear conclusions on this. In fact, they give us no conclusion at all on the free exercise provision that is part of this case and that I, District Court judge, in order to reach my conclusion on the merits has had to fill in the gaps using higher level -

THE COURT: Well, counsel, let me again ask you. You know, about this, Rose in this circuit, the Trinity Lutheran case. And the Supreme Court uses words like "unremarkable" and "established" and similar words to say a policy that

discriminates against otherwise eligible recipients by disqualifying them from any public benefit solely because of their religious character violates the free exercise clause. Judge Rose did not discuss that; right?

MR. THOMPSON: That's true.

THE COURT: Well, what light do you think that throws in this case?

MR. THOMPSON: Well, I think that, you know, I don't accept the premise that that is absolutely on point because I think that -- should she have discussed it? Yes, Your Honor, I agree. But solely because is the limiting factor here; right? This isn't just pure, you know, we're not going to register like some of these other older cases because we don't like what you say. This gets triggered by a complaint by a student, just like --

THE COURT: About a religious issue, counsel. About a religious group.

MR. THOMPSON: Exactly. But let me go back to what I was saying before about the construct here. In other words, BLinC continues to argue, and has throughout, that this is about conduct. In other words, they have certain conduct that they expect members and leaders to abide by and that's

what we're focused on, not the status. Not the sexual orientation. I've already said that I think the Supreme Court has rejected that construct.

But the flipside of that, Your Honor, and this is really to your question, is that the University of Iowa has taken the position that they are not trying to regulate or deny this because of speech. And you see the different quotes in the fact records cited by the Court that are dismissed but that say our focus is on what we think is status discrimination based on sexual orientation and not the beliefs. And that that's the trigger.

And so, I mean, I think, and I mean, I appreciate, I mean, I understand it's two sides of the same coin but it's something that really, if you read the record, even the recitation of the record by Judge Rose, it's something that the administrators were struggling with, and it's something that is not resolved by any of these cases other than Martinez, which on another set of facts says that is not -- you can't -- they don't get to exclude somebody who is gay because they won't embrace beliefs that basically cut to the heart of being gay. And Justice Ginsberg wrote that and rejected the same argument that was made in the

Walker case by the plaintiff.

JUDGE SMITH: Mr. Thompson, this is Judge Smith.

Do you see any difference in the clarity of the law with respect to free exercise versus free speech?

MR. THOMPSON: Yeah. I mean, I'll concede that I think it's a little tighter fit. In other words, when you look at -- you can again look at Judge Rose's decision and kind of get a guide in the briefing in this case that at least when we move from Rosenberger to Martinez and Walker and Reed in the free speech cases, you know, we're in the context of universities. We're in the context of dealing with RSOs. You know, the free exercise cases, Smith and Lukumi are not in the same ballpark. I mean, again, it becomes a much broader statement, general statement. I mean, I think Smith was a workers' comp case that dealt with employment and the Lukumi was an animal slaughter statute. So, I mean, I think one of the things that Martinez expressly dealt with was the fact that dealing with institutions of higher learning and this -- that framework, it is essential to take into account the unique nature of a university and its goals and its

focuses and its, you know, its purpose.

Does that answer your question, Your Honor?

THE COURT: Yes. It's my sense that there probably is -- I don't think the two can be lumped together in terms of the clarity of the law and its applicability to particularly higher education institutions.

MR. THOMPSON: Yes. So I mean, I do think it's a closer call because we have this series of cases that have been litigated in one area but not the other.

I mean, with regard to the qualified immunity issue, I mean, again, it's noteworthy I believe that, you know, we sit here today after a very hard-fought battle in the Court below, and in having appealed only the qualified immunity issue in part because the complexities are, you know, impose a cost for everybody. But I think that if you read the record, again, even as recited by Judge Rose, I don't necessarily adopt all of her conclusions, but what you see is administrators over time really wrestling with a difficult issue and really not finding clarity as to exactly how to deal with it. And I think that that's the purpose of qualified

immunity. It serves an important public service and public purpose. And I would urge this Court to follow Judge Rose's conclusion that this is difficult stuff. It's not clear. And that if you apply the U.S. Supreme Court standards that relate to qualified immunity, the fact that she found liability, if you will, for the constitutional violation, she found a violation that that does not lead under the Court's clear jurisprudence to a conclusion that the individual defendant should be liable for damages.

And with that I'd be happy to answer any further questions.

THE COURT: One more. Qualified immunity is quite a difficult doctrine to apply to specific facts. And the Supreme Court has given us a number of recent cases, but most of those cases have been in the law enforcement context and involve what seems like a more strict application of it with respect to quick decisions of people in times of exigency. But development of an operative policy for a higher education institution being done with benefit of counsel and through meetings and the like seem to be a different kind of circumstance than a number of the qualified immunity cases. Do you

think that makes a difference in how the Court should analyze qualified immunity?

MR. THOMPSON: Well, I think it changes, again, I think I said up front that it's definitely an objective standard. You know, a reasonable police officer, you know, in a stakeout or a shootout versus a reasonable university official or administrator. So I will concede that the exigencies of facts that matter are different.

But having said that, I mean, just like Mr. Baxter has said vehemently and will say it again, how important the rights that he's here to vindicate are, I mean, dealing with those rights therefore is very important as well, and subjecting public servants to personal liability when they don't get it right, that that policy remains intact. And so I do think that's why the fact-specific requirement of the Supreme Court jurisprudence that we've been talking about is so important. I mean, White v. Pauly says look at particularized facts. So looking to cases that deal with decisions and actions by university administrators is important to deciding whether or not the law was generally established, well established.

THE COURT: Thank you, Mr. Thompson.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: Mr. Baxter, your rebuttal?

And as you begin, I'd like for you to address the same question I asked opposing counsel about there being any difference between the state of and clarity of the law with respect to free exercise and free speech.

Unmute your mic, please.

MR. BAXTER: Thank you, Your Honor.

The free exercise law is exceedingly clear on this issue. As far back as 1970s in McDaniel v. Paty through the Trinity Lutheran decision on 2007, the Supreme Court has repeatedly stated that targeting religious beliefs as such is impermissible. And that's exactly what happened here. You have two organizations. One that accepts any students as long as they have a gay-affirming view of Christianity. That's Love Works. Another group, BLinC that accepts any student regardless of sexual orientation or other status as long as they share BLinC's religious beliefs. BLinC was told it could not do that and was deregistered. Love Works was told it could do that even though it was basically saying it could reject students based on their religion. That is straight viewpoint and

religious discrimination. And the Supreme Court cases on religious discrimination are clear on this issue. And so is this Court. I would point again this Court to the Wagner v. Jones case where the teacher was discriminated against because of her religious social conservative views.

I would add that the free speech law is also exceedingly clear. I mentioned the CLS v. -- I may have said Martinez -- CLS v. Walker from the Seventh Circuit. That's 453 F.3rd 853 where the Court unequivocally held that you cannot engage in viewpoint discrimination just because you have a nondiscrimination policy.

I would also point to the InterVarsity v. Wayne State case in the Eastern District of Michigan, which was the subject of our October 28(j) letter.

Defendants would say, well, just because someone complained we had to do something. Well, I'd point the Court to Good News Club v. Milford Central School, 533 U.S. 98, where the Court can't rely on -- the government can't rely on complainants as its only enforcement mechanism. That gives power to the majority to silence their opposition or people who have a minority view. And it's

impermissible. And defendants claim that there's a confusion about balancing rights. They've identified no real conflict here. They could protect both students who identify as LGBTQ and religious students by allowing both to exist on equal terms on campus. That's the entire point of viewpoint discrimination, that even when there are complicated, complex, and controversial views, that all government officials have an ironclad obligation to maintain viewpoint neutrality. This is not a closed question and we would ask this Court to reverse the District Court for holding that it was and hold these defendants liable for deliberately violating clearly established law.

THE COURT: Thank you, Mr. Baxter. Thank you also, Mr. Thompson. The Court appreciates both of you participating in our oral argument in our virtual forum. It's been very helpful to us in working through the issues in this case and we'll take the case under advisement and render a decision as promptly as possible. Thank you both.

COUNSEL: Thank you, Your Honor.

(WHEREUPON, the proceedings concluded.)

CERTIFICATE

I, Valerie J. Morrison, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 23rd day of September, 2020.

Valerie J. Morrison

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