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**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

BUSINESS LEADERS IN CHRIST,

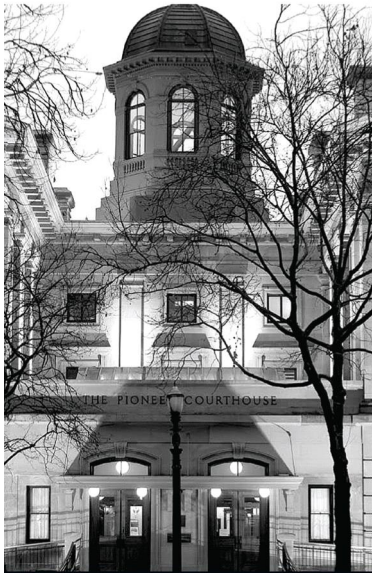
Plaintiff-Appellant,

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**

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8

9 **MR. BAXTER:** -- go after BLinC because of

10 its leadership requirements because it did not have

11 a membership requirement. BLinC invited everyone,

12 including the complainant in this case to

13 participate fully in their activities. And when the

14 university met with BLinC in September of 2017, the

15 university told BLinC that it actually didn't

16 require, you know, have any policy against leaders

17 signing a statement of faith or some other statement

18 of mission alignment. That that was perfectly

19 permissible that the university had always required

20 it. The university told BLinC in that meeting that

21 it couldn't force them to select leaders who didn't

22 share their faith any more than it could require an

23 environmental group to select a climate denier to be

24 their leader.

25 And BLinC and the university both left

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

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

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

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

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

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

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

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

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

14 **THE COURT:** Sure. Happy to.

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

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

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

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

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

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

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

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

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

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

1 involve an organization; right?

2 **MR. BAXTER:** That's correct.

3 **THE COURT:** It was a graduate program.

4 **MR. BAXTER:** That's correct.

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

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

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



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

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

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

4           If the Court looks there at Joint Appendix  
5 2449, paragraphs, beginning 14 through roughly 30,  
6 identifying lists of organizations that discriminate  
7 on protected categories and were never, ever  
8 addressed by the university despite the many  
9 warnings from the District Court over two  
10 preliminary injunctions. And these cases are  
11 consistent with a long line of cases from the  
12 Supreme Court, this Court in Gerlich, Gay Lib, and  
13 Doan (phonetic), all cases involving viewpoint  
14 neutrality on the student, you know, with student  
15 organizations in a limited public forum.

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

1 beliefs and goals.

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

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

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

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

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

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

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

10 **THE COURT:** Mr. Baxter?

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

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

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

25 **THE COURT:** Okay. Then what's your case

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

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

15 I would also point this Court to its own  
16 decision in Cuffley v. Mickes which is at 208 F.3rd  
17 702, where this Court held that application of a  
18 nondiscrimination policy could not be used to  
19 exclude the KKK from participating in what could  
20 have been considered a limited public forum. The  
21 Court said it actually didn't matter if it was a  
22 limited public forum or not because the viewpoint  
23 discrimination was impermissible in any context.  
24 But here we're not even talking about something that  
25 extreme. We're talking about a religious group on

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

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

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

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

1 under three minutes remaining.

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

5 **THE COURT:** All right.

6 **MR. THOMPSON:** May I proceed, Your Honor?

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

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

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

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



1 law. And I think --

2 **THE COURT:** Counsel, let me interrupt you.

3 It's more than that. It's a presumption, right,

4 that it's unconstitutional? The Supreme Court uses

5 the term "presumption" and "presumed"?

6 **MR. THOMPSON:** Correct.

7 **THE COURT:** Well, that's --

8 **MR. THOMPSON:** -- viewpoint

9 discrimination.

10 **THE COURT:** -- I think that's stronger

11 than you stated it; right?

12 **MR. THOMPSON:** Yes.

13 **THE COURT:** Okay. Proceed.

14 **MR. THOMPSON:** Presumptively

15 unconstitutional.

16 **THE COURT:** Right.

17 **MR. THOMPSON:** If you can prove viewpoint

18 discrimination, Your Honor. Thank you for the

19 clarification.

20 But that a public university should

21 decline to enforce the terms of a nondiscrimination

22 policy against a publicly-funded student

23 organization when faced with resolving a specific

24 civil rights complaint by a student alleging that he

25 has been excluded from participation as a leader in

1 that organization is not well settled.

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

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

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

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

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

1 binding with regard to the specific knowledge.

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

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

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

1 context of a religious organization to a university.

2 And Mr. Baxter will not be able to point to any case  
3 anywhere where that has been done. And so that --

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

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

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

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

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

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

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

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

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

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

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

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



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

6 **MR. THOMPSON:** That's true.

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

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

18 **THE COURT:** About a religious issue,  
19 counsel. About a religious group.

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

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

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

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

1 Walker case by the plaintiff.

2 **JUDGE SMITH:** Mr. Thompson, this is Judge  
3 Smith.

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

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

1 focuses and its, you know, its purpose.

2 Does that answer your question, Your  
3 Honor?

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

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

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

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

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

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

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

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

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

25 **THE COURT:** Thank you, Mr. Thompson.

1           **MR. THOMPSON:** Thank you, Your Honor.

2           **THE COURT:** Mr. Baxter, your rebuttal?

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

8           Unmute your mic, please.

9           **MR. BAXTER:** Thank you, Your Honor.

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

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

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

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

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



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

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

22 **COUNSEL:** Thank you, Your Honor.

23 **(WHEREUPON, the proceedings concluded.)**

24

25

1 CERTIFICATE

2  
3 I, Valerie J. Morrison, do hereby certify  
4 that the proceeding named herein was professionally  
5 transcribed on the date set forth in the certificate  
6 herein; that I transcribed all testimony adduced and other  
7 oral proceedings had in the foregoing matter; and that the  
8 foregoing transcript pages constitute a full, true, and  
9 correct record of such testimony adduced and oral  
10 proceeding had and of the whole thereof.

11  
12 IN WITNESS HEREOF, I have hereunto set my  
13 hand this 23rd day of September, 2020.

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20 Valerie J. Morrison  
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