

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

PAUL GERLICH and ERIN FURLEIGH,

D. Exhaustion Is Not Required Under Section 198319

drug-law reform message, after state officials complained about a news story that described ISU NORML's activities. Compl. ¶¶ 31-35. ISU officials summarily replaced the group's faculty advisor, *id.* ¶¶ 36-38, and rescinded prior approval of a t-shirt design that had drawn the state officials' ire. *Id.* ¶¶ 32-34. Defendants then adopted and enforced new University trademark regulations expressly to restrict NORML ISU's message. *Id.* ¶¶ 39-41. Applying those new regulations, the Defendants rejected two additional NORML ISU t-shirt designs, including one that stated "NORML ISU Supports Marijuana Legalization." *Id.* ¶¶ 47-58.

Accordingly, this is not, as Defendants try to frame it, simply a "case about Plaintiffs' desire to use Iowa State University trademarks." Motion at 3. It is, instead, a case where university officials caved to political pressure out of embarrassment and a desire to restrict or control a student group's political message. Compl. ¶¶ 31-35. The fact that Defendants used ISU's trade-

of university trademarks. *See University of Ala. Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1276-78 (11th Cir. 2012). The same constitutional considerations apply in this case.

II. BACKGROUND

Plaintiffs are members of an approved campus organization affiliated with NORML. Compl. ¶¶ 2, 5, 21-22. Among other political activities, NORML ISU seeks to promote a better understanding of laws concerning cannabis in the state of Iowa and in the United States at large. To further this goal, NORML ISU produces t-shirts with messages designed to raise awareness of the group and its efforts. *Id.* ¶ 22. However, university guidelines (and design standards) require NORML ISU to obtain prior approval from the ISU Trademark Office before it can make the shirts. *Id.* ¶¶ 25-26. Seeking university approval is not optional if NORML ISU wants to produce *any* item that includes the name of the organization.¹

In November 2012, a lengthy front-page article in the *Des Moines Register* on efforts to legalize marijuana discussed efforts by NORML ISU to collect signatures for petitions advocating drug policy reform. The article included a photograph of the then-student president of NORML ISU wearing a t-shirt that had been approved by the Trademark office.² The shirt had the name of the organization on the front, with the “O” in “NORML” represented by the head of

¹ The Guidelines for University Trademark Use by Student and Campus Organizations require that “[t]he recognized name of the organization *must* appear in the design.” Compl. Ex. A at 5 (emphasis added). Plaintiffs therefore must request approval under the guidelines for use of its own “NORML ISU” club name because the “recognized name of the organization” includes “ISU.” *See* <https://sodb-stuorg.sws.iastate.edu/view-details.php?id=1954>.

² Compl. ¶¶ 29, 31. In the article, chapter president Josh Montgomery noted that the organization was trying to get 600,000 signatures and that NORML ISU “has gotten nothing but support from the university.” *See* Sharyn Jackson, *Legalized Marijuana: Is Iowa Next?* DES MOINES REGISTER, Nov. 19, 2012 (attached as Ex. 1). Montgomery added that ISU had also approved the t-shirt at issue.

ISU mascot “Cy the Cardinal.” Compl. ¶ 8. The text on the back of the shirt read, “Freedom is NORML at ISU” with an image of a small cannabis leaf above the acronym “NORML.”

The news story prompted an immediate adverse reaction. State legislators and private citizens complained to ISU that its mascot had been used on a shirt promoting legalization of marijuana. *Id.* ¶ 34; Ex. B, *ISU Student Group Banned From Producing More Shirts Using Cy Logo*, DES MOINES REGISTER, Nov. 30, 2012. Fearing this reaction to the perceived political

cause as an advocate for change in the laws or trying to change the publics' [sic] perception of marijuana." *Id.* ¶ 51.

In April 2014, the Trademark Office rejected another proposed design, this time claiming the design violated ISU's prohibition against promoting "dangerous, illegal or unhealthy products, actions or behaviors" and "drugs and drug paraphernalia that are illegal or unhealthy." *Id.* ¶ 55. This t-shirt design repeated the phrase "NORML ISU" but varied the ink color to create the outline of a cannabis leaf. *Id.* ¶ 54 & Ex. C.

On March 11, 2014, the Foundation for Individual Rights in Education ("FIRE"), a non-partisan, non-profit, civil rights organization that protects rights of free expression on college and university campuses, notified President Leath by letter that ISU's application of its Trademark Licensing Policy to NORML ISU violated the First Amendment. Compl. ¶ 57. ISU disagreed that the policy or its enforcement violated the First Amendment. *Id.* ¶ 58.

III. ARGUMENT

The legal standard governing motions to dismiss is daunting. The Court must assume all facts alleged in the Complaint are true, and must construe it liberally in the light most favorable to Plaintiffs. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir.1982). A Rule 12(b)(6) motion to dismiss must be denied unless it appears beyond doubt that plaintiff can prove no set of facts which would entitle the plaintiff to relief. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir.1986). While "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (internal quotations and citation omitted), this means only that plaintiff's allegations must be sufficient to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cole v. Homier Distrib. Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010). Courts must assess the plausibility of each claim with

reference to the plaintiff's allegations as a whole, not in terms of the plausibility of each individual allegation.

under the First and Fourteenth Amendments to

a university, “acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by the group to be abhorrent.” *Healy*, 408 U.S. at 187-88. The Eighth Circuit applied these foundational principles when it held the University of Arkansas violated the First Amendment by denying discretionary funding to an organization of gay students. *Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). The court acknowledged the “group ha[d] no right to funding” for its expressive activities, but held that “when funds are made available, they must be distributed in a viewpoint neutral manner.” *Id.* at 366.

The parallels between this case and *Gohn* are striking. The *Gohn* court noted that the prospect of funding a gay student organization was controversial and that “[e]v

course trademarks are a form of intellectual property, but numerous courts have cautioned that the enforcement of such rights must be tempered by First Amendment concerns. *Cliff Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 495-96 (2d Cir. 1989); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099-01 (9th Cir. 2008); *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 918-919 (6th Cir. 2003). Rights granted under trademark law are more limited than those provided by copyright or patent law, *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 777 (8th Cir. 1994), and “in deciding the reach of the Lanham Act in any case where an expressive work is alleged to infringe a trademark, it is appropriate to weigh the public interest in free expression against the public interest in avoiding consumer confusion.” *Cliffs Notes*, 886 F.2d at 494. *See New Life Art, Inc.*, 683 F.3d at 1278 (because of First Amendment concerns “we should construe the Lanham Act narrowly”).

Defendants cannot suggest that the existence of intellectual property rights empowers a state university to approve the use of school-held trademarks only by groups it favors, and to deny such use by those it dislikes. The university could not, for example, allow use of the ISU mark only by the college Republicans while denying it to the college Democrats (or vice versa), and none of the *dicta* that Defendants cite about “alternative channels of communication” or “likelihood of confusion” could ever legitimize such an abuse of power. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring) (viewpoint-based regulation is “censorship in its most odious form”).

Tellingly, none of the cases Defendants cite address the application of trademark law in the university context, much less in the situation presented here – where the university by regulation asserts blanket control over the use of the school name, and by extension the name of affected organizations (*e.g.*, NORML ISU). In this context, Defendants’ citation of *Mutual of*

Omaha Ins. Co. v. Novak, 836 F.2d 397 (8th Cir. 1987), for the proposition that trademarks “do not yield to free speech rights when adequate alternative avenues of communication exist,” Motion at 3, is entirely inapplicable. *Novak* was expressly limited to the circumstances of that case, *id.* at 402, which was a far cry from the situation here, where school organizations must get their designs and messages approved by the university if their names include “ISU,” or they plan to incorporate other school marks. Here, there is no “alternative channel” – NORML ISU *must* submit to the university’s approval process if it wants to put its name on a t-shirt, or on any other item. This process is one of the ways Defendants have exerted illegitimate control over NORML ISU’s political speech.

This specialized context of trademark enforcement also undermines Defendants’ claim that they are simply trying to avoid “consumer confusion,” which is an important purpose of trademark law. Motion at 4-5. Courts routinely reject efforts by public schools and universities to restrict student expression based on the argument that the citizenry may confuse permitting such speech as official endorsement of the expression. *Rosenberger*, 515 U.S. at 841 (attribution concern “not a plausible fear”). *See Forum for Academic & Inst. Rights*, 547 U.S. at 65. Particularly where all campus organizations must seek approval through the Trademark Office, as is required here, it is fanciful to suggest that granting use of university trademarks implies agreement with political positions of various student or university groups. *Cf. Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep’t*, 807 F. Supp. 1427, 1438 (W.D. Arkansas 1992) (Allowing participation in the “Adopt-a-Highway” program “is no more an indication of support for the Klan and its racist and other policies of intolerance than participation in the program by NORML and the placing of the sign for that organization indicates that the Arkansas Highway and Transportation Department advocates the legalization of marijuana.”).

As a factual matter, Defendants cannot seriously suggest that their actions are just about NORML ISU's t-shirts. Although they have asserted that they took various actions because of adverse reaction to a photo of 0 T

and has functioned mainly to monitor the group's activities, implement the new restrictive trademark policies, and convey criticism to the group from President Leath. Not only do these actions refute Defendants' assertion that the university is merely trying to avoid the appearance of entanglement with NORML ISU, they are constitutionally suspect in themselves. *E.g.*,

approved a design by the skeet shooting team depicting Cy the Cardinal holding a musket, *see* Complaint Ex. B, despite the fact that there are more than 11,000 gun-related homicides annually in the United States. *See* <http://www.cdc.gov/nchs/fastats/homicide.htm>. It allows (and even encourages) ISU marks to be used on football helmets and apparel even though football is linked to significant numbers of brain injuries. *See* Ken Belson,

that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In this case, the ISU Defendants’ constitutional violations are glaringly obvious.

B. Defendants Are Not Entitled to Qualified Immunity

Defendants’ plea for this Court to dismiss all claims for actions “in their individual capacities” provides no basis to dismiss this case even if their qualified immunity arguments were sound. Motion at 6-10. This is because qualified immunity does not preclude suits seeking declaratory or injunctive relief from defendants in their official capacities. *Burnham v. Ianni*, 119 F.3d 668, 673 n.7 (8th Cir. 1997) (*en banc*); *D’Aguanno v. Gallagher*, 50 F.3d 877 (11th Cir. 1995). *Cf. New York City Health & Hosps. Corp. v. Perales*, 50 F.3d 129, 135 (2d Cir. 1995) (qualified immunity does not protect against claims for attorney’s fees or fines ancillary to prospective relief). Thus, even if the individual capacity claims were dismissed, this case would continue.

Defendants’ arguments for applying qualified immunity in this case are fatally flawed on the merits as well. Qualified immunity must be denied where (1) facts set forth by the plaintiff make out a violation of a constitutional or statutory right, that (2) was clearly established at the time of the misconduct. *Burton v. St. Louis Bd. of Police Comm’rs*, 731 F.3d 784, 791 (8th Cir. 2013); *Winslow v. Smith*, 696 F.3d 716, 730 (8th Cir. 2012); *accord Pearson v. Callahan*, 555 U.S. 223, 232 (2009). In this case, both criteria clearly are satisfied.

It has long been established that a state university president and lower level administrators cannot deny recognition or other benefits to a student group because of concern about the organization’s political goals. *Healy*, 408 U.S. at 187-88. Nor may university officials engage in such viewpoint discrimination by claiming concern that others may equate the views of students with the state’s official position, *Rosenberger*, 515 U.S. at 841, or by asserting that students are

advocating illegal behavior. *Gohn*, 850 F.2d at 368. It has been the law for many decades that the government may not deny a benefit based on a person's constitutionally-protected speech or associations, even if the person had no "right" to the benefit in the first place. *Speiser v. Randall*,

on notice that their conduct violates established law even in novel factual circumstances.” *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531 (8th Cir. 2009) (*en banc*) (internal citation and quotation marks omitted). In this case, there was ample precedent that Defendants were acting in violation of well-established principles of constitutional law. *Gohn*, 850 F.2d at 367-368. *See also* Compl. ¶ 57 (Defendants were put on notice of controlling constitutional principles).

Likewise, Defendants’ argument that individual capacity claims against President Leath should be dismissed based on qualified immunity is erroneous. Motion 9-10. Contrary to the premise of this argument, liability is not predicated on a *respondeat superior* theory of supervisory responsibility, but on Defendant’s Leath’s direct actions. *See* Compl. ¶¶ 43-44, 57. In

D. Exhaustion Is Not Required Under Section 1983

Defendants' argument that Plaintiffs' procedural due process claims should be dismissed is mystifying because the Complaint contains no such claims. Count I alleges as-applied violations of Plaintiff's First

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to deny Defendants' Motion to Dismiss in its entirety.

Respectfully submitted,

By /s/ Robert Corn-Revere

MICHAEL A. GIUDICESSI
michael.giudicessi@faegrebd.com
FAEGRE BAKER DANIELS LLP
801 Grand Avenue, 33rd Floor
Des Moines, IA 50309-8011
Telephone: (515) 447-4701
Facsimile: (515) 248-9010

ROBERT CORN-REVERE (*admitted pro hac vice*)
bobcornrevere@dwt.com
RONALD G. LONDON (*admitted pro hac vice*)
ronnielondon@dwt.com
LISA B. ZYCHERMAN (*admitted pro hac vice*)
lisazycherman@dwt.com