
No. 16-1518

Paul Gerlich; Erin Furleigh

Plaintiffs - Appellees

v.

Steven Leath; Warren Madden; Thomas Hill; Leesha Zimmerman

Defendants - Appellants

Student Press Law Center; Ratio Christi; Students for Life of America; Christian
Legal Society; Young America's Foundation; Young Americans for Liberty

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: December 14, 2016
Filed: February 13, 2017

Before LOKEN, MURPHY, and KELLY, Circuit Judges.

MURPHY, Circuit Judge.

Iowa State University (ISU) grants student organizations permission to use its trademarks if certain conditions are met. The ISU student chapter of the National Organization for the Reform of Marijuana Laws (NORML ISU) had several of its trademark licensing requests denied because its designs included a cannabis leaf. Two members of the student group subsequently filed this 42 U.S.C. § 1983 action, alleging various violations of their First and Fourteenth Amendment rights. The district court

that had "NORML ISU" on the front with the "O" represented by Cy the Cardinal. On the back the shirt read, "Freedom is NORML at ISU" with a small cannabis leaf above "NORML." The Trademark Office approved T-Shirt Design #1.

On November 19, 2012, the Des Moines Register published a front page article about the marijuana legalization referenda in Colorado and Washington and pending legislative efforts in Iowa to legalize recreational and medicinal marijuana. The article quoted NORML ISU President Josh Montgomery regarding the group's political efforts to change Iowa's marijuana laws. The article then stated "Montgomery said his group has gotten nothing but support from the university. He even got approval from the licensing office to make a NORML T-shirt with the ISU logo; the red shirt features Cy the Cardinal on the front, and a pot leaf on the back" The article also contained a photograph of the front and back of T-Shirt Design #1.

At 8:50 AM on November 19, Zimmerman provided ISU's public relations office with the following statement regarding the article:

The university's Trademark Policy and Student Use Guidelines allow officially recognized student organizations the ability to use Iowa State's trademarks as long as they observe the proper procedures and follow specified design standards. Groups, including NORML, may use any of the university's indicia (names, graphics, logos, etc.) as long as they seek review and approval from the Trademark Licensing Office, which they did for the T-shirts. This does not mean that we take a position on what any of the organizations represent. We have 800 groups from The ISU Line Dancer's [sic], CUFFS, the ISU Baseball Club, LGBTAA, John Paul Jones Society, Game Renegades, ROTC, and many more. I believe that the statement in the article indicating "his group has gotten nothing but support from the university" is a bit misleading. He may be confusing recognition of the group as the university "supporting" it.

article. Wollery's email indicated that he was "curious about the accuracy of the student's statement cited in the report, and perhaps the process used by ISU to make such determinations." Wollery's concerns were shared with Zimmerman, Lackey, and Leath on November 21. Leath testified at his deposition that "anytime someone from the governor's staff calls complaining, yeah, I'm going to pay attention, absolutely." Leath further elaborated, "we are a state entity and he's the chief executive of the state, and so directly or indirectly we're responsible to the governor."

On November 21, the head of ISU's public relations office responded to Wollery's messages by stating that NORML ISU's use of ISU's trademarks was "permitted under the policies governing student organizations." The email went on to say, "[h]owever, this procedure is being reviewed."

On November 24, NORML ISU requested permission from ISU's Trademark Office to use T-Shirt Design #1 for another order. Madden decided to place this reorder on hol.0075(n)-5nt afte policindeis

and Hill prior to submitting the designs to the Trademark Office. Zimmerman testified that to her knowledge this was the first time ISU had imposed a prior review procedure to a student group's trademark design application process.

NORML ISU's reorder of T-Shirt Design #1 was rejected by ISU's Trademark Office on December 3. On January 16, 2013 the Trademark Guidelines were revised. The new Trademark Guidelines prohibited "designs that suggest promotion of the below listed items . . . dangerous, illegal or unhealthy products, actions or behaviors; . . . [or] drugs and drug paraphernalia that are illegal or unhealthful." Madden indicated that this revision to the Trademark Guidelines "was done as the result of a number of external comments including interpretations that the t-shirt developed indicated that Iowa State University supported the NORMAL [sic] ISU advocacy for the reform of marijuana laws."

After the Trademark Guidelines were revised, the Trademark Office rejected every NORML ISU design application that included the image of a cannabis leaf. The Trademark Office also rejected designs that spelled out the NORML acronym but replaced "Marijuana" with either "M*****" or "M[CENSORED]." The Trademark Office however approved several designs which did not use a cannabis leaf, but simply stated the group's name, and fully spelled out the NORML acronym.

In July 2014 Paul Gerlich and Erin Furleigh filed this action against Leath, Madden, Hill, and Zimmerman stating claims under 42 U.S.C. § 1983 for alleged violations of their First and Fourteenth Amendment rights. At the time the complaint was filed, Gerlich was the president of NORML ISU and Furleigh was the group's vice president. Count I alleged that defendants' trademark licensing decisions, as applied to plaintiffs, violated their right to free speech. Counts II through IV alleged that the trademark guidelines were unconstitutional on their face and unconstitutionally vague. The district court granted plaintiffs' motion for summary judgment on Count I, but dismissed Counts II through IV. The district court also

entered a permanent injunction that prohibits defendants "from enforcing trademark licensing policies against Plaintiffs in a viewpoint discriminatory manner and from further prohibiting Plaintiffs from producing licensed apparel on the basis that their designs include the image of a . . . cannabis leaf."

II.

Defendants argue that the district court improperly concluded that plaintiffs have standing to bring this action. We review de novo "the district court's conclusion that the plaintiffs had standing." Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006). Standing is a "jurisdictional prerequisite that must be resolved before reaching the merits of a suit." Hodak v. City of St. Peters, 535 F.3d 899, 903 (8th Cir. 2008) (quoting Medalie v. Bayer Corp., 510 F.3d 828, 829 (8th Cir. 2007)). Under Article

attempts to obtain approval to use ISU's trademarks on NORML ISU's merchandise amounted to constitutionally protected speech. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–37 (1995). Plaintiffs' allegations that ISU

to claims for injunctive relief, however. Mead v. Palmer, 794 F.3d 932, 937 (8th Cir.

Trademark Office had already approved the design. Defendants claim that the hold on NORML ISU's reorder request was not specific to that group because they also placed on hold a trademark request for a plaque made by the Association of Malaysian Students. Zimmerman indicated in an email, however, that if that group were to tell administrators when it needed the plaque, the Trademark Office "may be able to move that review forward." ISU did not offer NORML ISU similar flexibility. Moreover, Zimmerman testified that she could not recall ever placing another student group's reorder request on hold, and Madden testified that he did not order the Trademark Office to hold reorder requests from any other student group.

Another example of the unique scrutiny imposed on NORML ISU is that the group was required to obtain approval from Madden and Hill for any future designs using ISU trademarks prior to submitting the designs to the Trademark Office. Zimmerman testified that to her knowledge this was the first time ISU had imposed such a prior review procedure. Defendants argue that this type of scrutiny was not unique to NORML ISU because the hockey club was also subject to additional oversight over its trademark applications. The university had imposed additional scrutiny on the hockey club because the club mismanaged funds and misrepresented itself as an intercollegiate sport, however. NORML ISU had not engaged in similar malfeasance. Moreover, the hockey club was not required to receive preapproval of its designs by two ISU senior vice presidents.

A third example of the unique scrutiny NORML ISU received is that NORML ISU is the only ISU student group to have had its trademark application denied for fear that the university would be endorsing a political cause. Defendants point to six examples of design requests that were rejected to avoid the appearance of an endorsement. All of these examples are inapposite, however. Four of the designs were rejected because it appeared ISU was endorsing a corporate logo. Another design was rejected because it suggested that a club sport was an official athletic department sport. The final design was rejected because it appeared that ISU was

in an interview with the Ames Tribune that the reason student groups associated with political parties could use ISU's logos, but groups like NORML ISU may not, is because "[w]e encourage students to be involved in their duties as a citizen." Such a statement implies that Hill believed that the members of NORML ISU were not undertaking their duties as citizens by advocating for a change in the law.

Zimmerman stated in an email to NORML ISU's faculty advisor in May 2013 that the group's design that included the statement "Legalize Marijuana" was rejected because "'Legalize Marijuana' is a call to action but it does not suggest any specific way your organization is making that happen." Zimmerman went on to say that the group's design applications "appear to have a certain shock or attention grabbing sensationalism." Zimmerman further stated that her "interpretation is that these do not further your cause as an advocate for change in the laws or trying to change the public's perception of marijuana." There is no evidence in the record of Zimmerman offering advocacy advice to any other student group.

Finally, Madden indicated that the Trademark Guidelines were revised "as the result of a number of external comments including interpretations that the t-shirt developed indicated that Iowa State University supported the NORMAL [sic] ISU advocacy for the reform of marijuana laws." As noted above, however, the Trademark Office had never before rejected a student group's design application due to confusion over endorsement of the group's cause. Moreover, defendants consistently stated throughout the record that a student organization's use of ISU marks does not indicate university approval of that group's beliefs.

The instant facts are somewhat similar to those in Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988). In that case, the University of Arkansas made funding available to student groups but denied funding one advocating for gay and lesbian rights. Id. at 362–65. We concluded that the university had engaged in viewpoint discrimination. Id. at 367. In reaching this conclusion our court relied on

the fact that the university followed an unusual funding procedure that was specific to the gay and lesbian group, some of the decision makers "freely admitted that they voted against the group because of its views," and "[u]iversity officials were feeling pressure from state legislators not to fund" the group. Id.

Similar to the university in Gohn, ISU followed an unusual trademark approval process with respect to all of NORML ISU's trademark design applications after the Des Moines Register article was published. Moreover, defendants at least implied that the additional scrutiny imposed on NORML ISU was due to the views for which it was advocating. Finally, defendants were motivated at least in part by pressure from Iowa politicians.

The district court did not err by concluding that defendants violated plaintiffs' First Amendment rights because defendants engaged in viewpoint discrimination and did not argue that their administration of the trademark licensing program was narrowly tailored to satisfy a compelling governmental interest.

C.

Defendants argue that even if they did engage in viewpoint discrimination, they did not violate plaintiffs' First Amendment rights because the administration of the trademark licensing regime should be considered government speech. The "Free Speech Clause restricts government regulation of private speech" but "it does not regulate government speech." Roach v. Stouffer, 560 F.3d 860, 863 (8th Cir. 2009) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009)). When the "government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

The government speech doctrine does not apply if a government entity has created a limited public forum for speech. Pleasant Grove City, 555 U.S. at 470, 478–80. As noted above, ISU created a limited public forum when it made its trademarks available for student organizations to use if they abided by certain conditions. The administration of its trademark licensing regime therefore did not constitute government speech.

Even if the trademark licensing regime here did not amount to a limited public forum, however, the government speech doctrine still does not apply on this record. The Walker decision considered three factors when determining whether certain speech is

Defendants argue that the injunctive relief granted by the district court is too broad because it grants NORML ISU the ability to use its trademarks in a way that violates its viewpoint neutral trademark guidelines. We review a challenge to a "district court's issuance of a permanent injunction for abuse of discretion." Randolph v. Rodgers, 170 F.3d 850, 856 (8th Cir. 1999). An injunction must not be "broader than necessary to remedy the underlying wrong." Coca-Cola Co. v. Purdy, 382 F.3d 774, 790 (8th Cir. 2004). As noted above, NORML ISU's use of the cannabis leaf does not violate ISU's trademark policies because the organization advocates for reform to marijuana laws, not the illegal use of marijuana. The district court's injunctive order therefore did not abuse its discretion.

V.

For these reasons, we affirm the judgment of the district court.
