

United States Court of Appeals
For the Eighth Circuit

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: June 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 referendum in Colorado and Washington and pending legislative efforts in Iowa to legalize recreational and medicinal marijuana. The article quoted NORML ISU President John 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 ~~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 ~~in~~ his deposition that "anytime someone from the governor's staff calls complaining, ~~yeah~~ ~~am~~ 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~~ 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 ~~request~~ ~~ed~~ 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.

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 view 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. Peter, 535 F.3d 899, 903 (8th Cir. 2008) (quoting Medalie v. Bayer Corp., 510 F.3d 828, 829 (8th Cir. 2007)). Under Article III of the Constitution, a plaintiff must demonstrate three elements to establish standing: "(1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) a likelihood that a favorable decision by the court will redress the alleged injury." Young Am. Corp. v. Affiliated Computer Servs. (ACS), Inc., 424 F.3d 840, 843 (8th Cir. 2005). Plaintiffs bear the burden of proving these elements. See

Defendants argue that plaintiffs lack injury in fact because plaintiffs are asserting NORML ISU's right to free speech, not their own. To establish an injury in fact, a party must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). An injury is defined under 42 U.S.C. § 1983 as a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

We conclude that plaintiffs suffered an injury in fact in their individual capacities, and that they therefore have standing to bring this action. Plaintiffs' attempts to obtain approval to use ISU trademarks on NORML ISU's merchandise amounted to constitutionally protected speech. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–37 (1995). Plaintiffs' allegations that ISU violated their First Amendment rights by rejecting their designs and therefore preventing their ability to spread NORML ISU message are sufficient to establish an injury in fact. Moreover, in both Widmar v. Vincent, 454 U.S. 263 (1981), and Rosenberger, 515 U.S. 819, individual students sued universities on behalf of their student organizations and the Supreme Court did not conclude that it lacked subject matter jurisdiction over the students' actions. We therefore conclude that plaintiffs have standing to bring this action.

III.

Defendants next argue that the district court erred by denying them qualified immunity and granting plaintiffs summary judgment on their as applied First Amendment claim. We review a district court's "grant of summary judgment de novo and consider the facts in the light most favorable to the nonmoving party." Nichols v. Tri-Nat'l Logistics, Inc., 809 F.3d 981, 985 (8th Cir. 2016). A district court's grant of "[s]ummary judgment is only appropriate when 'there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.'" Id. (quoting Pinson v. 45 Dev., LLC, 758 F.3d 948, 951–52 (8th Cir. 2014)).

To review the denial of qualified immunity, we examine "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." See Foster v. Mo. Dep't of Health & Senior Servs., 736 F.3d 759, 762 (8th Cir. 2013) (quoting Winslow v. Smith, 696 F.3d 716, 731 (8th Cir. 2012)). We may take up these questions in either order at 763.

A.

We begin with plaintiffs' claim that the defendants violated their First Amendment rights by engaging in viewpoint discrimination.

1.

If a state university creates a limited public forum for speech, it may not "discriminate against speech on the basis of its viewpoint." Rosenberger, 515 U.S. at 829. A university "establish[es] limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects." Christian Legal Soc. Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010) (internal quotation mark and citation omitted). A university's student activity fund is an example of a limited public forum. Rosenberger, 515 U.S. at 823–27, 829–30. ISU created a limited public forum when it made its trademarks available for student organizations to use if they abided by certain conditions.

The defendants' rejection of NORML ISU's designs discriminated against that group on the basis of the group's viewpoint. The state engages in viewpoint discrimination when the rationale for its regulation of speech is "the specific motivating ideology or the opinion or perspective of the speaker." Rosenberger, 515 U.S. at 829. Every viewpoint discrimination claim "requires, by its very nature, that the purposes or motives of governmental officials be determined." Gay & Lesbian Students Ass'n v. Goh, 850 F.2d 361, 367 (8th Cir. 1988). Viewpoint discrimination "can be ju the1oi8 ewpo

Trademark Office had already approved the design. Defendants claim that the hold on NORML ISU's reorder reque

endorsing the views of the Students for Life

in an interview with the Ames Tribune that the reason student groups associated with political parties could use ISU's logos without 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 text "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 certain shock or attention grabbing sensationalism." Zimmerman further stated that the "interpretation is that these do not further your cause as an advocate for changing 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]niversity officials were feeling pressure from state legislators not to fund" the group. *Id.*

Similar to the university in *Goh*, ISU followed an unusual trademark approval process with respect to all of NORML ISU 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.

2.

Defendants argue that even if they 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. Stout*, 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

not engage in viewpoint discrimination within that forum. Martinez, 561 U.S. at 667–68; Rosenberg, 515 U.S. at 829–30. The Supreme Court explained in Martinez that, "this Court has emphasized that the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints." 561 U.S. at 667–68 (citing Rosen, 545 U.S. 819; Widmar, 454 U.S. 263; Healy v. James, 408 U.S. 169 (1972)). Given this history, plaintiffs' right not to be subjected to viewpoint discrimination while speaking in a university's limited public forum was thus clearly established at the times in question.

Because defendants violated plaintiffs' clearly established First Amendment rights, the district court did not err by denying qualified immunity to defendants and granting plaintiffs summary judgment on their First Amendment claims.

IV.

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 Tc8jjanca law, tot t

V.

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

KELLY, Circuit Judge, concurring.

I join the court's well-reasoned opinion in

563 U.S. at 741 (determining whether “existing precedent” clearly established the right “at the time of the cha

availability of campus meeting space in Widmar, ISU's decision to grant recognized organizations "the privilege of using ISU's marks" created a limited public forum, and ISU cannot accord that privilege on the basis of the organization's viewpoint. See Gohn, 850 F.2d at 362 ("The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed."); see Sisbiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975) ("[U]niversity President Williams cannot avoid responsibility for his abridgment of First Amendment rights because his motives were to serve the best interest of the school.").

These factually analogous precedents are less apposite simply because the court cites no case addressing a trademark licensing program. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope, 536 U.S. at 741. The dissent highlights the fact that the trademark program allowed student groups to place ISU's symbols "side-by-side with a student organization's message." This was also the case in Rosenberger, where the name of the religious group petitioning for funds included the university's name in the title of its publication, 515 U.S. at 826, and in Martinez, where the law school allowed officially recognized groups to use its name and logo, 561 U.S. at 670. These facts did not affect the Court's application of forum analysis in those cases. Cf. Rosenberger, 515 U.S. at 832 (concluding that the university could not "escape the consequences" of the court's prior prohibition on viewpoint discrimination by arguing that "this case involves the provision of funds rather than access to facilities"). These cases clearly established that ISU created a limited public forum and that viewpoint discrimination is prohibited in such a forum.

²Even if the trademark licensing program were a nonpublic forum, it was clearly established by fall 2012 that viewpoint discrimination was equally prohibited in such a forum. See Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1001 n.1 (8th Cir. 2012) ("[B]ecause the district's exclusion of CEF from the after-school program is viewpoint-based, there is no need

B.

Adopting ISU's argument, the dissent posits it is not clearly established that ISU's policy³ of permitting student organizations to use the University's marks is not government speech. At the time of the challenged conduct, the defendants could have been aware of only two of the government speech cases cited by the dissent, as the rest post-date the events at issue by several years. Missouri v. Seely, 472 U.S. 511, 535 (1985) ("The decisive fact is . . . that the question was open at the time he acted."). With respect to those two cases, it is hard to see how Sumner v. Mata, 555 U.S. at 464, a case concerning the private donation of monuments to a public park, or Knights of Ku Klux Klan v. Curators of Univ. of Missouri, 203 F.3d 1085, 1093 (8th Cir. 2000), a case concerning the "very different context of public television broadcasting," could have disrupted the well-established Supreme Court precedent holding that a university's dissemination of benefits to student groups is not government speech.

Rosenberger rejected an argument indistinguishable from that offered by ISU to support its actions. There, the university argued that it was entitled to decide whether to pay printing costs on behalf of student publications based on the

to analyze the nature of the forum of the after-school program Even in a nonpublic forum, restrictions must be viewpoint neutral."); Burnham, 19 F.3d at 675 ("[T]he nature of the forum makes little difference" in the qualified immunity analysis

publications' religious perspective. 515 U.S. at 833–35. The Court rejected this argument, explaining that viewpoint discrimination is improper “when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Id.* at 834. It was evident to the Court that there was a “distinction between the University’s own favored message and the private speech of students” because the university disclaimed any control over the student group or approval of the “organizations’ goals or activities.” *Id.* at 824, 834–35.

The resemblance to the present case is striking. Similar to the policy in *Rosenberger*, the Student Organization Recognition Policy provides that the mission of ISU’s student organization program is, in part, to “increase and support diversity in the university community” because “[d]iversity enlivens the exchange of ideas, broadens scholarship, and prepares students for lifelong, productive participation in society.” It further states that even though ISU may recognize a student group, it “does not support or endorse the purposes of registered student organizations. Three of the defendants unequivocally testified that a student organization’s use of an ISU mark does not indicate that the university endorses or supports the organization’s message. In a further effort to separate, the Trademark Guidelines require language or design details “to show how an Organization is connected to the University,” such as “the verbiage ‘club,’ ‘student chapter,’ or other nomenclature.” Furthermore, by

529 U.S. 217, 229 (2000) (expressive activities undertaken by registered student organizations “spring[] from the initiative of the students, who alone give [them] purpose and content in the course of their

or for the discussion of certain topics.” Rosenberg, 515 U.S. at 829. But there are “constitutional constraints on the boundaries the State may set:” It “may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.” Martinez, 561 U.S. at 685 (alterations original) (quoting Rosenberg, 515 U.S. at 829). Assuming the dissent’s purported purpose for the forum—“to protect and promote ISU’s public image”—were the one the defendants would advocate, the rationales offered for excluding NORML ISU from the forum are not reasonable or viewpoint-neutral.

First, the dissent suggests that NORML ISU was targeted because its t-shirt

from using its marks when the product “convey[ed] the perception that ISU endorse[d] the message.” For example, ISU approved a t-shirt which included “Just Proud” on the front and “ISU LGBTQA Alliance” on the back; a vinyl banner that said “ISU Tea Party” with the ISU mascot holding a Tea Party flag; a t-shirt with the ISU Cuffs logo including a pair of handcuffs on the front and a message stating “Play Hard” on the back; and a banner that stated “Choose Peace Choose Life!” sponsored by the “Students for Life Club at Iowa State University.” ISU’s decision to permit these groups to use ISU marks but to deny NORML ISU’s t-shirt submissions was not reasonably based on a distinction in the receipt of university endorsement. “From no other group does [ISU] require the sterility of speech that it demands of [NORML ISU]. . . . This is blatant viewpoint discrimination.” Good News Club v. Milford Cent. Sch. 533 U.S. 98, 124 (2001) (Scalia, J., concurring); Steeley v. Magrath 719 F.2d 279, 284 (8th Cir. 1983) (concluding that the defendants’ decision to reduce a student newspaper’s funding was improperly motivated by the content of an issue because “[i]f the Regents had truly been motivated by [a viewpoint neutral justification], then one would expect that they would have taken some action in regard to the newspapers at the other campuses”).

ISU’s alleged concern that the public would perceive endorsement was limited to one group whose message it disagreed with. Since at least 1972, it has been clearly established that “[t]he College acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.” Healy 408 U.S. at 187–88. Rather than revoke NORML ISU’s permission and subject it to unique scrutiny, “the school’s adherence to a rule of viewpoint neutrality in administering its [trademark] program would prevent ‘any mistaken impression that [NORML ISU] speak[s] for the University.’” Southworth

⁷Cuffs is a registered student group ISU organized around alternative sexual practices such as kink, fetish, and BDSM.

529 U.S. at 233 (quoting Rosenberg, 515 U.S. at 841). Defendants failure to follow this clearly established rule make qualified immunity inappropriate.

Second, the dissent contends that ISU should have reasonably denied NORML ISU's t-shirt design because it "appear[ed] to link ISU to unsafe or illegal activities such as illegal drug use." Assuming such restriction on a limited public forum is proper, ISU had no such provision in its Trademark Guidelines, nor did it rely on this rationale when it rejected NORML ISU's order of T-Shirt Design #1. The court cannot grant defendants qualified immunity based on a forum limitation they did not assert. Nor is such a limitation supported by our case law. No court of appeals has applied Morse v. Frederick, 551 U.S. 393 (2007) in a university setting. And, Justice Alito's controlling concurrence states in the case "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use." Id. 422 (Alito, J., concurring) (internal quotation marks omitted). Defendants, and the dissent, acknowledge that T-Shirt Design #1 conveyed NORML ISU's support for legalization of marijuana, making Morse inapplicable. Even if NORML ISU did advocate illegal drug use, defendants were on notice that student organizations' speech about an illegal activity would still be protected by the First Amendment." Gold, 850 F.2d at 368 (rejecting the

⁸The dissent's reliance on Hazelwood Sch. Dist. v. Kuhlmeier, 457 U.S. 260 (1988) is misplaced. That case concerned whether "educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum." Id.

university's argument that it could refuse to fund a gay and lesbian student group because "sodomy is illegal in Arkansas").

The district court properly denied the defendants qualified immunity.

LOKEN, Circuit Judge, dissenting.

This is a difficult case raising important First Amendment issues. I agree with the district court that Iowa State University administrators over-reacted to a publicly sensitive situation, warranting injunctive relief, though I would not affirm the court's permanent injunction as worded. I write separately to dissent from our court's decision to deny the individual Defendants qualified immunity from the Plaintiffs' claims for compensatory damages and attorneys' fees.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Sutton v. Bailey, 702 F.3d 444, 449 (8th Cir. 2012), quoting Messerschmidt v. Millender, 565 U.S. 535, 546 (2012). In my view, the ISU administrators were neither plainly incompetent nor knowing lawbreakers. "Many aspects of the law with respect to students' speech . . . are difficult to understand and apply Public officials could not predict, at their financial peril, how constitutional uncertainties will be resolved." Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005) (en banc), cert. denied, 546 U.S. 1169 (2006).

A public official is entitled to qualified immunity if his or her conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known” Mullenix v. Luna

university with unsafe or illegal activities such as drug use constitute unlawful viewpoint discrimination or permissible content regulation.

A. Long before ISU rejected a NORMSU design, its trademark licensing program guidelines stated that the program exists to promote ISU to the public, because ISU “benefits from public recognition of its names, symbols, logos, and other identifying marks.” The program’s restrictions were necessary to “promote and protect the university’s image.” Student organizations using the marks must adhere to ISU-drafted design standards -- each design must state the recognized name of the student organization; use high quality images and colors from the ISU official color palette; and avoid vulgar language, profanity, or words with inappropriate double meanings. Multiple guideline provisions warn of the need to avoid “the appearance of a University endorsement.” ISU’s general licensing requirements stated: “No products considered dangerous or offensive will be approved, including but not limited to products causing potential health risks, promoting firearms, drugs, alcohol, gaming, or tobacco.”

Based on these undisputed program policies, it was far from clear prior to this litigation that ISU’s trademark licensing program was a form of government speech. If it was government speech, “the Free Speech Clause has no application.” Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009). The Court in Summum recognized that “[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its behalf or is providing a forum for private speech.” Id. at 470. The majority brushes the issue aside, concluding it “was clearly established . . . that the government speech doctrine does not insulate a state actor from First Amendment scrutiny when the state has created a limited public forum for speech.” Ante at 16. But this simply begs the question. When the government speaks, “forum analysis is misp

At the time in question, the Supreme Court had decided Summum, holding that privately donated monuments displayed on public property were a form of government speech. 555 U.S. at 481. Court had held that a university radio station's decision not to air an acknowledgment of a Ku Klux Klan contribution was government speech, even though the state accepted and acknowledged contributions from a diverse array of groups. Knights of Ku Klux Klan v. Curators of Univ. of Mo. 203 F.3d 1085, 1095 (8th Ci

including one parent of an ISU student who worried that, if Cy becomes a role model for drug use," will public school anti-drug programs need to "teach, 'just say no to Cy'"? On this record, the government speech issue is far more difficult than the court posits; at a minimum, it warrants qualified immunity because the issue is clearly not "beyond debate." Ascroft v. al-Kidd 563 U.S. 731, 741 (2011); see, e.g., Summun, 555 U.S. at 481 (Stevens, J., concurring) (government speech is "recently minted");

determining whether a public university is

more rigorously than those of the SU hockey club and other groups.¹¹ The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whet

For the foregoing reasons, I respectfully dissent.
