No. 16-1518

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PAUL GERLICH; ERIN FURLEIGH,

Plaintiffs – Appellees,

v.

STEVEN LEATH; WARREN MADDEN; THOMAS HILL; LEESHA ZIMMERMAN,

Defendants – Appellants.

Appeal From an Order by the U.S. District Court for the S.D. of Iowa
The Honorable James E. Gritzner, Senior Judge Presiding
(Case No. 4:14-cv-00264-JEG-HCA)

BRIEF OF THE STUDENT PRESS LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTEREST OF *AMICUS CURIAE*[1]

The Student Press Law Center is a nonprofit, nonpartisan organization founded in 1974 to promote youth involvement in civic life through journalism. The Center provides free educational materials and workshops to students across the country about the First Amendment and about ways to protect their rights, and the Center's attorneys are the authors of the widely used reference text, *Law of the Student Press*. The Center regularly appears in state and federal appellate courts to provide additional perspective and context as an advocate with many years of experience working directly with students who are prevented by their schools from speaking out on matters of public concern.

The university defendants' arguments in this case would apply as much to student newspapers as to other groups. A university's initials

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

and mascot are quick, effective, and familiar ways for a student newspaper to make clear that it is published by students. Yet if the defendants' position is accepted, universities would be able to pick and choose which independent student newspapers can identify themselves this way, and could thus make it harder for the excluded newspapers to reach their intended audience.

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly held that public universities may not deny a student organization access to a limited public forum based on the organization's viewpoint. Yet that is what Iowa State University did when it prohibited the student chapter of the National Organization for Reform of Marijuana Laws (NORML) from using ISU's trademarks, based on NORML's advocacy for changing marijuana laws.

The Supreme Court has held that public universities create limited public fora when, to encourage diverse student speech on campus, they make physical property (meeting rooms) and tangible property (funding)

available to student organizations. ISU's policy of letting student organizations use the university's intellectual property (the university name and mascot), in order to facilitate student speech, is no different.

The public understands that student speech on a university campus is not speech by the university. This understanding stems from the long history of student groups espousing many views that are notoriously not those of the university, and that sometimes even criticize the university. Student use of the ISU name and mascot is thus private student speech, not government speech. And the government may not restrict such private student speech based on its viewpoint.

ARGUMENT

I. ISU created a limited public forum when it made its intellectual property available to student organizations

Programs that encourage diverse student speech by making university property available to student organizations are classic limited public fora. The Court has so found when universities have let student groups

1. "use [the university's] name and logo," as well as classrooms, bulletin boards, and funding, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 669-70, 679 (2010);

2. get reimbursed for the printing costs of student publications, even though such a funding program was "a forum more in a metaphysical than in a spatial or geographic sense," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823-27, 829-30 (1995); and
3. use classrooms for meetings as part of a program to "encourage the activities of student organizations," *Widmar v. Vincent*, 454 U.S. 263, 265, 267 (1981).

When the university uses such programs "to encourage a diversity of views from private speakers," a limited public forum is created. *Rosenberger*, 515 U.S. at 834.

Like the public universities in *Christian Legal Society*, *Rosenberger*, and *Widmar*, ISU made its property available to student organizations to support the organizations' speech and enrich the campus environment. ISU recognizes student organizations because it "value[s] . . . a diversity of ideas" and "intellectual freedom";[2] because it believes that "[s]tudents bring to the campus a variety of interests" and "should be free to organize

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[2] Iowa State Univ., *Core Values*, App. 173.

and join associations to promote their interests";[3] and because "[r]ecognized organizations play an important role" in "providing [a] quality campus environment[]."[4] The "[u]se of [the] university's name in [the] organization's title in accordance with ISU Trademark Licensing Office's Policy" is listed as one of the possible benefits of this recognition.[5]

As in *Christian Legal Society*, *Rosenberger*, and *Widmar*, then, ISU created a limited public forum for speech, and must administer this forum in a viewpoint-neutral way. Even if the program is viewed as a nonpublic forum, the viewpoint-neutrality rule applies equally to nonpublic fora and to limited public fora. "Even in a nonpublic forum, restrictions must be viewpoint neutral." *Child Evangelism Fellowship of Minn. v. Minneapolis Special School Dist. No. 1*, 690 F.3d 996, 1000 n.1 (8th Cir. 2012); *see also, e.g.*, *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998);

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[3] Iowa State Univ., *Introduction*, App. 167, 168.

[4] *Id.*

[5] Iowa State Univ., *Benefits of Recognition*, App. 168.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); *Green v. Nocciero*, 676 F.3d 748, 754 (8th Cir. 2012). Indeed, as the court below concluded, this is just part of a broader restriction on governmental viewpoint discrimination that transcends forum doctrine. Dist. Ct. Op. 26-27 [Leath Br. Addendum 26-27]. And the case for equal treatment here is even stronger than in *Rosenberger*: Plaintiffs are not seeking equal access to money or other scarce resources, but only the freedom to use certain words and symbols without viewpoint-based university interference.

And the ability to depict the ISU name and mascot is practically important to student groups—student newspapers, advocacy groups, social groups, and more—because it lets those groups easily identify themselves as associations of ISU students. An ISU student seeing a T-shirt with the words "NORML ISU" and with the ISU mascot on it will quickly grasp that the T-shirt was created by fellow students. To the extent the student wants to hear from fellow students, the T-shirt will thus facilitate discussion and debate within the university. Viewpoint-based prohibitions on the use of the ISU name and mascot undermine such debate.

II. The decision below is consistent with *Walker v. Sons of Confederate Veterans*, because the public does not perceive speech by student organizations as government speech

The conclusion that the ISU program is a limited public forum for private speech, and is not a venue for the government's own speech, is consistent with *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015). In *Walker*, the Court held that specialty license plates were government speech because (1) license plates have a long history of conveying government messages, (2) the public often closely identifies license plate designs with the government, and (3) the state government maintained direct control over the messages conveyed on its specialty plates. *Id.* at 2248-50. Thus, because it was "untenable that the State intended specialty plates to serve as a forum for public discourse," and because the state was "engaging in expressive conduct," the plates were properly characterized as government speech. *Id.* at 2251.

But the long history here is of student groups speaking for themselves, not for the university. Student groups, whether or not they use the university's name and mascot, are not closely tied in the public's mind to government speech the way the license plates in *Walker* were.

Indeed, the Court has repeatedly recognized that university student groups' speech is not government speech. In *Rosenberger*, the Court concluded that "[t]he distinction between the University's own favored message and the private speech of students [was] evident" because "[t]he University declares that the student groups . . . are not the University's agents, are not subject to its control, and are not its responsibility." *Id.* at 834-35. Likewise, in *Widmar*, the Court reasoned that making university property broadly available to student groups "does not confer any imprimatur of state approval on" private speech. 454 U.S. at 274. And in *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000), the Court made clear that, when "[t]he University's whole justification for fostering . . . expression is that it springs from the initiative of the students, who alone give it purpose and content," the program "does not raise the issue of the government's right . . . to use its own funds to advance a particular message."

ISU similarly declares that student group "recognition does not imply Iowa State's endorsement of the purposes of any affiliated student organization."[6] Nor does ISU "support or endorse the purposes of . . . registered organizations."[7] The student groups' speech is the groups' own, not the university's. While license plates serve a clear governmental function—helping identify a vehicle's registered owner—a student organization's license to use university insignia is merely part of the university's attempt to foster speech by students.

Indeed, three precedents that the *Walker* opinion reaffirmed help show that programs offering benefits to student groups are not government speech. (All three precedents involve fora that have been labeled nonpublic fora, but, as noted at p. 5 above, the viewpoint neutrality rule applies equally to nonpublic fora and limited public fora.)

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[6] Iowa State Univ., *Affiliated Organizations*, App. 174.

[7] *Id.* at 175.

1. In *Cornelius*, 473 U.S. at 790-91, the federal government printed a pamphlet containing 30-word statements from various charitable organizations, and let federal employees distribute the pamphlet in federal workplaces during business hours. Yet despite the government's heavy participation in the *Cornelius* program, the *Walker* Court reaffirmed that such "a charitable fundraising program directed at federal employees" was not designed "to communicate messages from the government." *Walker*, 135 S. Ct. at 2252.

Such a program, *Walker* concluded, "lacked the kind of history [of state affiliation] present" with respect to license plates and "had never been a medium for government speech." *Id.* Instead, the program was treated as a "nonpublic forum," *id.*, in which viewpoint discrimination was forbidden. Similarly, ISU's trademark licensing program is designed to promote the private speech of individual ISU student organizations, not to communicate messages from ISU.

2. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39-41 (1983), a school opened its internal mail system to various groups.

In *Walker*, the Court reaffirmed that this system—though owned, operated, and funded by the government—was a nonpublic forum, in which viewpoint neutrality would be required; the system was not a place for government speech, where viewpoint discrimination was allowed.

Because "a number of private organizations . . . had access to the mail system," "[i]t was therefore clear that private parties, and not only the government, used the system to communicate." *Walker*, 135 S. Ct. at 2252. Likewise, when ISU trademarks appear on the T-shirts and banners of many diverse student organizations communicating their own private messages, it is equally clear that ISU's trademarks are facilitating private speech rather than expressing ISU's own speech.

3. In *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299-300 (1974), a city opened up its bus system to commercial advertisements. In *Walker*, the Court reaffirmed that this advertising space was a nonpublic forum, in which viewpoint discrimination was forbidden.

The advertisements were not government speech, the Court held, because "the messages were located in a context (advertising space) that is traditionally available for private speech" and "in contrast to license

plates, bore no indicia that the speech was owned or conveyed by the government." *Walker*, 135 S. Ct. at 2252. Likewise, speech on student organizations' T-shirts, regardless of the use of university insignia, has traditionally been understood as the private speech of that organization.

Thus, because ISU's trademark program was intended to promote diversity of private speech, it is not government speech. Instead, for the reasons discussed in Part I, it is a limited public forum, one of the many contexts in which the government may not discriminate based on viewpoint. And, for reasons given by the district court and by appellees, Dist. Ct. Op. 27-29 [Leath Br. Addendum 27-29]; Gerlich Br. 21-36, the university's refusal to let NORML ISU use the university's name and mascot did indeed stem from the viewpoint that NORML expressed.

CONCLUSION

The Court has often found that state universities created a limited public forum when they let student organizations use university real and personal property for the organizations' own speech. Likewise, ISU created a limited public forum when it let student organizations use the uni-

versity's intellectual property for those organizations' speech. The university's viewpoint discrimination against ISU NORML in this forum thus violates the First Amendment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,132 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook.

3. In compliance with Rule 28A(h)(2) of the Eighth Circuit Rules of Appellate Procedure, this brief has been scanned for viruses and is virus-free.

May 17, 2016

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