UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PAUL GERLICH and ERIN FURLEIGH, Plaintiffs, v. **STEVEN LEATH, WARREN MADDEN, THOMAS HILL, and LEESHA ZIMMERMAN,** Defendants.	Case No. 4:14-cv-264 **REPLY TO PLAINTIFFS' RESISTANCE TO DEFENDANTS' MOTION TO DISMISS**

Defendants' motion to dismiss and Plaintiff's resistance ask this Court to determine *whose* speech is at issue, specifically, whether it is government speech (through ISU's control of its trademarks) or student group speech. As raised in Defendants' motion and explained further below, this case clearly concerns government speech through control of its trademarks, which is not subject to First Amendment, thus requiring dismissal of Plaintiffs' Complaint. But even if this case involves student group speech, as Plaintiffs argue in their resistance, Defendants' actions did not violate the First Amendment and are entitled to qualified immunity under the circumstances of this case.

1. Plaintiffs' First Amendment Rights Are Not At Issue

As argued in Defendants' motion to dismiss, Plaintiffs have no First Amendment right to the use of ISU's trademarks, which are the property of ISU that, by their use, suggest ISU's endorsement of particular messages. In this way, ISU's trademarks are *government* speech. The United States Supreme Court enunciated the law on government speech in the analogous case of

If petitioners [(the government defendants)] were engaging in their

was because "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park." *Id*. at 473 (citation omitted).

The same is true in the instant case where ISU and Defendants have "effectively controlled" the messages conveyed through the usage of ISU trademarks by exercising "final approval authority" over their usage, with particular regard to "the image ISU wishes to project" to the public. The *Pleasant Grove* analysis also shows that ISU's trademark policies are not overbroad or vague because they regulate government speech, not private speech. Plaintiffs' Complaint must therefore be dismissed because they have no First Amendment right to dictate ISU's government speech, specifically by exercising control over its trademarks.

2. <u>There Was No Infringement of Plaintiffs' Speech</u>

Even if ISU's exercise of control over its trademarks was not government speech, the United States Supreme Court has made clear that "[a] school must [] retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use…"

communication exist." *Mut. Of Omaha Ins. Co. v. Novak*

Given the similarity of the legitimate pedagogical concerns upheld in *Hazelwood* and *Morse* to those at issue here, Plaintiffs have failed to state a claim that Defendants' control of ISU's trademarks in conjunction with school-related speech concerning illegal drugs violates their First Amendment Rights.

Contrary to Plaintiffs' resistance, Defendants did not deny Plaintiffs a benefit at all, but instead simply required that ISU's trademarks be used only for authorized purposes. This is the same rationale endorsed by the United States Supreme Court in *Rust v. Sullivan*, 500 U.S. 173, 196 (1991), where the court found no First Amendment violation when the Department of Health and Human Services prohibited Title X projects from engaging iom ei n-2(on w)2(i)-2ve Xi(t)-2(s)rom-2(a)vo-2

Plaintiffs attempt to analogize their case to *Gay and Lesbian Students Assoc. v. Gohn*, 850 F.2d 361 (8th Cir. 1988), where the Eighth Circuit Court of Appeals found that a student body violated the First Amendment by denying a gay and lesbian organization university recognition based on their viewpoint. Unlike *Gohn*, however, Plaintiffs' student organization NORML has been recognized as a student group and funded by the university, thus cutting against Plaintiffs' argument of viewpoint discrimination. *See* Complaint ¶22. Indeed, not only has NORML ISU been recognized by ISU, it has also been "publishing a website, hosting events, conducting student outreach, and other related activities…" as well as "meet[ing] regularly to promote 'innovative ideas…'" regarding marijuana, all apparently without interference from ISU given the absence of any such allegation in Plaintiffs' Complaint. Thus, *Gohn* demonstrates that Plaintiffs have not experienced viewpoint discrimination in the traditional sense. Rather, Plaintiffs' Complaint seeks special and previously unrecognized entitlement to use school trademarks as they deem fit under the auspices of free speech. No such claim exists as a matter of law, requiring dismissal of Plaintiffs' Complaint.

3. Defendants are Entitled to Qualified Immunity.

The above authority demonstrates Plaintiffs' perceived rights were not sufficiently clear that a reasonable official would understand that what he or smpntcr dong ev(e)4(woa)4(t)-12(e)(s)-1(P)-4

WHEREFORE, Defendants request that each count of Plaintiffs' Complaint be dismissed and for such other relief as the Court deems proper.

Respectfully submitted,

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