

**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-00264 DEFENDANTS' MOTION TO STAY
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COME NOW DEFENDANTS, Steven Leath, Warren Madden, Thomas Hill, and Leesha Zimmerman (collectively "Defendants") by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure 62, and for this Motion to Stay STATE:

I. Procedure

This Court entered an Order on January 22, 2016 (Docket No. 60), on the parties' cross-motions for summary judgment. Among other things, the Order denied Defendants qualified immunity and granted Plaintiffs' request for injunctive relief. This Court entered partial judgment on the Order on February 5, 2016 (Docket No. 61).

Defendants filed a notice of appeal on February 4, 2016 (Docket No. 64), and a supplemental notice of appeal on February 17, 2016 (Docket No. 70), appealing as a matter of right the Order's denial of qualified immunity for Defendants, the Order's granting of injunctive relief to Plaintiffs, and all issues inextricably intertwined with and directly implicated thereby.

Defendants now move to stay all proceedings to enforce the partial judgment, all proceedings on damages and attorney fees, and enforcement of the injunctive relief granted in the Order pending appeal of this matter. This motion would preserve the status quo of the case pending appeal.

II. Legal Standard

In applying the correlative Rule 8 of Appellate Procedure, the Eighth Circuit considers “four factors in determining whether to issue a stay: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (internal quotation and citation omitted). These factors are balanced; a stronger showing on one may reduce the need to rely on another. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991).

To obtain a stay, the movant need not always show a strong likelihood or high probability of success on the merits. *Michigan Coalition*, 945 F.2d at 153; *Thiry*, 891 F.Supp. at 566. “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury” that the movant will suffer absent a stay. *Michigan Coalition*, 945 F.2d at 153. If the other “equitable factors strongly favor interim relief, the court ‘is not required to find that ultimate success by the movant is a mathematical probability’ and ‘may grant a stay even though its own approach may be contrary to movant's view of the merits.’ ” *Thiry*, 891 F.Supp. at 566 (citations omitted); see *Hilton*, 481 U.S. at 778, 107 S.Ct. at 2120 (a stay is permissible when a substantial case on the merits exists and the other factors support the stay); *Standard Havens Products v. Gencor Industries*, 897 F.2d at 512–13; *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981). When the other three factors strongly support the interim relief, the court may grant the stay if the movant presents a substantial case on the merits. *Hilton*, 481 U.S. at 778, 107 S.Ct. at 2120; *Ruiz*, 650 F.2d at 565; *McGregor Printing Corp. v. Kemp*, 811 F.Supp. at 12 (“serious legal questions”).

First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 163 F.R.D. 612, 615 (D. Kan. 1995).

III. Application

A. Defendants have a likelihood of success on the merits.¹

Defendants respectfully submit there is substantial ground for difference of opinion, and thus a reasonable likelihood of success, as to whether the federally registered Iowa State University trademarks which Defendants took steps to protect constitute government speech that is not subject to First Amendment analysis, particularly in light of recent case law extending application of the government speech doctrine. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2241, 192 L. Ed. 2d 274 (2015) (“A government is generally entitled to promote a program, espouse a policy, *or take a position.*”) (emphasis added); *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070 (11th Cir. 2015).

Absent cases holding a university’s federally registered trademarks are *not* government speech, such that a university can be compelled to associate its marks with others’ messages, it remains an open question. As this Court stated in its Order, “Defendants have not cited to any cases applying the government speech doctrine in the context of a university licensing program, nor have they cited any cases discussing government speech by a college or university.” This absence of authority demonstrates that the rights at issue were not “clearly established.” “We do not require a case directly on point, but existing precedent must have placed the statutory or

¹ Defendants note they are placed in the uncomfortable position of asking a district court to determine whether its decision is likely to be overturned. However, “the Court need not determine that it erred and will likely be reversed—an acknowledgment one would expect few courts to make; instead, so long as the other factors strongly favor a stay, such remedy is appropriate if “a serious legal question is presented.” *Loving v. I.R.S.*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (quoting *CREW v. Office of Admin.*, 593 F.Supp.2d 156, 160 (D.D.C. 2009)). It has been noted that “district courts should still apply the familiar ‘fair chance of prevailing’ test where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes,” *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir.2008) (en banc), “with a ‘fair chance of prevailing’ on the merits, with a ‘fair chance’ meaning something less than fifty percent,” *id.* at 730. However, “[o]nly in a case ... where a preliminary injunction is sought to enjoin the implementation of a duly enacted state [or federal] statute, must district courts make a threshold finding that a party is likely to prevail on the merits.” *Id.* at 732–33 (footnote omitted). *Gomez v. Allbee*, No. 3:15-CV-00048-JEG, 2015 WL 5783803, at *9 (S.D. Iowa Sept. 30, 2015).

constitutional question *beyond debate*. We are cautious “not to define clearly established law at a high level of generality.” *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2083-4, 179 L.Ed.2d 1149 (2011) (internal quotations omitted, emphasis added)).

While existing authority answers constitutional questions about student group recognition and student group funding (both of which NORML ISU was undisputedly granted here), no such authority exists that would put “beyond debate” whether a university can control the extent to which permits its official trademarks to be associated with other groups’ particular messages.

“Qualified immunity is ‘an immunity from suit rather than a mere defense to liability, [so that] it is effectively lost if a case is erroneously permitted to go to trial.’ ” *Peters v. Woodbury Cty., Iowa*, 979 F. Supp. 2d 901, 927 (N.D. Iowa 2013) *aff’d sub nom. Peters v. Risdal*, 786 F.3d 1095 (8th Cir. 2015). Such would be the case here if a trial on damages were permitted, and the injunctive relief was enforced, before the appeal of the qualified immunity issue was final. The Eighth Circuit has held that “[a] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously[.]” and that the filing of a notice of appeal “confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *U.S. v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)). Once a notice of appeal has been filed in a case in which there has been denial of a summary judgment motion raising the issue of qualified immunity, the district court should then stay its hand. *Johnson v. Hay*, 931 F.2d 466, 469 n.2 (8th Cir. 1991). Jurisdiction has then been vested in the court of appeals and a district court should not act further. *Id.*

For these reasons, this Court should stay further proceedings and enforcement of the injunctive relief pending a determination by the Eighth Circuit on ISU's rights to control its own speech—namely, its trademarks.

B. Defendants would be irreparably injured absent a stay.

An injury may be irreparable if compensatory damages are unsuitable. *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992). Here, compensatory damages would not be suitable to redress the harm to the university's trademarks by compelling their association with NORML and its political messages—not to mention whatever other trademark permissions ISU is compelled to grant under the Order.

Defendants are administrators at Iowa State University (ISU) responsible for protecting and managing the university's federally registered trademarks. The summary judgment record was undisputed that ISU has invested decades of concerted effort to imbue its trademarks with goodwill, uses its trademarks to communicate with stakeholders, limits the licensing of its marks in a manner that it believes appropriately portrays the image of the university, and maintains a trademark licensing program with full time staff dedicated solely to reviewing, approving, and monitoring the use of ISU trademarks with these considerations in mind.

The effect of the order and injunction would be to compel Defendants to license ISU trademarks to be co-branded with other non-university trademarks (National Organization for Reform of Marijuana Laws) a pot leaf, which is a widely (though perhaps not unanimously) recognized symbol of illicit drug use, and legislative proposals, which ISU is prohibited from endorsing. Moreover, the injunction does not clearly limit the manner or uses for which Defendants must license ISU trademarks. As stated in the record, “[f]ailure to exercise control over the use of the University's trademarks can hurt the University's brand, dilute the value of its

trademarks, and hinder the University's efforts to attract prospective students, private and governmental support, new faculty and staff, and to encourage alumni participation and support." (D. App. 61). If Defendants are compelled to license ISU trademarks to Plaintiffs, those messages and goods cannot be easily recalled in the event of a reversal by the Eighth Circuit, effectively nullifying the federally recognized trademark rights and protections Defendants sought to invoke. Monetary damages simply could not compensate Defendants and ISU for this kind of harm.

Defendants have appealed this injunctive relief as a matter of right, and would be irreparably harmed if the relief is not stayed until the Eighth Circuit has exercised its appellate jurisdiction over this issue.

C. A stay will not irreparably injure Plaintiffs.

Neither Plaintiff has been active in NORML ISU for the past year, deciding instead to focus on other interests rather than attend meetings or hold leadership roles. (Defs.' Stmt. of Undisp. Facts ¶¶66-69). It has now been more than three years since ISU permitted some uses of its trademarks to NORML ISU, but denied the others at issue. According to Plaintiffs, their group met outstanding success since that time notwithstanding the few designs that were rejected. (Defs.' Stmt. of Undisp. Facts ¶74). There is no evidence in the record that there are any pending activities by NORML ISU that in any way hinge on their ability to co-brand with ISU trademarks beyond what ISU has already permitted. Staying the pending injunction would maintain this status quo without injury to Plaintiffs.

D. Public interest.

The public has an interest in its government's speech:

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant*

Grove City v. Sumnum, 555 U.S. 460, 467–468, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 559, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. See *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (observing that “our constitutional system” seeks to maintain “the opportunity for free political discussion to the end that government may be responsive to the will of the people”).

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245-46, 192 L. Ed. 2d 274 (2015).

The *Walker* court recognized the public’s interest in government speech by refusing “[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.” *Id.* at 2246 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)).

Here, the record was undisputed that ISU funds a trademark licensing program, that it limits the licensing of its trademarks to uses it deems “appropriately portray the image of Iowa State University,” and that members of the public and public servants questioned whether associating ISU’s trademarks with marijuana (images, legislative proposals, or otherwise) appropriately portrayed the university’s image. (Order, p.3; J. App. 127, 131, 177). This Court generally recognized “ISU’s images are associated in the public mind with ISU as an institution . . .” (Order, pp.32-33).

However, the Order’s focus on whether ISU’s trademarks signaled *endorsement*—actual or perceived, intended or not—of NORML ISU’s cause, missed the broader question of the government’s right avoid even *association* with private messages, as addressed in *Summum*² and *Walker*³. In this, the public has an interest.

IV. Conclusion

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). “Although the filing of an interlocutory appeal does not automatically stay proceedings in the district court, the district court has broad discretion to decide whether a stay is appropriate.” *Ass’n of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008).

Defendants ask for a stay on proceedings for damages and attorney fees and enforcement of injunctive relief until the Eighth Circuit has ruled on the pending appeals. Such a stay would maintain the status quo, protect all the parties’ interests, and allow the orderly disposition of this case. No bond would be necessary because there are, at this stage, no monetary damages. In the alternative, Defendants request an interim stay to protect Defendants’ interests pending a renewed application to the court of appeals for a stay on appeal.

² It “is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be *associated*.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 471, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (emphasis added).

³ “[I]ssuers of ID typically do not permit the placement on their IDs of messages with which they do not wish to be *associated*. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249, 192 L. Ed. 2d 274 (2015) (internal quotations and citation omitted) (emphasis added).

Respectfully submitted,
THOMAS J. MILLER
Attorney General of Iowa

/s/ TYLER M. SMITH
TYLER M. SMITH
Assistant Attorney General
Hoover Building, Second Floor
1305 East Walnut Street
Des Moines, Iowa 50319
P: (515) 281-8330 / FAX: (515) 281-7219
E-MAIL: tyler.smith@iowa.gov
ATTORNEY FOR DEFENDANTS

Original filed electronically.

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PROOF OF SERVICE	
The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on February 19, 2016:	
<input type="checkbox"/> U.S. Mail	<input type="checkbox"/> FAX
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Signature: /s/ BETTY CHRISTENSEN	