



April 22, 2016

Interim Chancellor Henry C. Foley
University of Missouri
Office of the Chancellor
105 Jesse Hall
Columbia, Missouri 65211

Sent via U.S. Mail and Electronic Mail (foleyh@missouri.edu)

Dear Interim Chancellor Foley:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned by the University of Missouri's (Mizzou's) refusal to allow a recognized student group, the University of Missouri chapter of the National Organization for the Reform of Marijuana Laws (MU NORML), to create and use promotional artwork containing a marijuana leaf. Mizzou's repeated denials are motivated by concerns about the message such artwork might be perceived to express. Restricting student speech on the basis of viewpoint violates First Amendment rights that Mizzou is legally bound to honor.

The following is our understanding of the facts. Please inform us if you believe we are in error.

MU NORML has been a recognized student organization at Mizzou since the 1970s, with occasional periods of inactivity. The group has used marijuana leaves in the vast majority of its messaging for the duration of its existence.¹

¹ In the correspondence below, MU NORML refers to marijuana as cannabis, the plant's taxonomic name. The term is favored by drug policy reform advocates like MU NORML. *See, e.g.,* Jon Gettman, *Marijuana vs. Cannabis: Pot-Related Terms to Use and Words We Should Lose*, HIGH TIMES (Sept. 10, 2015), <http://www.hightimes.com/read/marijuana-vs-cannabis-pot-related-terms-use-and-words-we-should-lose>.

Student organization activities at Mizzou are overseen and facilitated by the Department of Student Life's Organization Resource Group (ORG). The organizational activities under ORG's purview include fundraising, defined as "any income-producing activity, whether or not [the student organizations] make a profit."² Before engaging in on-campus fundraising, ORG requires all student organizations to obtain approval via a "Fundraising Request Form" that must be submitted three weeks prior to the planned activity.

Last fall, MU NORML sought to raise funds for their organization and student awareness of their mission by selling T-shirts of their own design. As depicted in proofs created by an outside vendor (UTS Promos, formerly Universi-T's), the proposed T-shirt included images and script on the front and back. The front of the shirt featured the group's website address, LegalizeMizzou.org, and a marijuana leaf in the form of an animal paw. The back of the shirt featured the logos and names of MU NORML (spelled out in full as "University of Missouri – Columbia NORML, National Organization for the Reform of Marijuana Laws, legalizemizzou.org") and the University of Missouri chapter of Students for Sensible Drug Policy (SSDP). The MU NORML logo includes a stylized depiction of the Mizzou campus skyline and a marijuana leaf.

In August 2015, student Benton Ryan Berigan, president of MU NORML, submitted a fundraising request to ORG for the planned T-shirt sale, attaching a copy of the T-shirt proofs. On August 31, Berigan was informed in an email from ORG graduate assistant Ana Gutierrez that because the proposed T-shirts included the name "University of Missouri – Columbia," he would need to receive prior approval from Mizzou's Office of Licensing & Trademarks before his fundraising request would be granted.

On September 5, Berigan submitted an Art Approval / Royalty Waiver request to the Office of Licensing & Trademarks, again attaching a copy of the T-shirt proofs. On September 8, licensing assistant Traci Blackwell rejected Berigan's submission via email. Blackwell wrote that while "the attached design looks fine," the office "would like for the cannabis leaf images to be removed from the design." Blackwell explained that MU's licensing policy "prohibits the use of alcohol or drug related images."³

Berigan responded to Blackwell on September 21, explaining that while he understood the university's policy, he did not believe it was applicable to MU NORML's proposed design. Berigan wrote:

² *Fundraising*, ORG. RES. GROUP, DEP'T OF STUDENT LIFE, UNIV. OF MISSOURI
<http://getinvolved.missouri.edu/fundraising> (last visited Apr. 6, 2016).

³ Specifically, the "Design Guidelines" for student organization requests state that "[n]o use of the university's name or logo may be approved in connection with *promotion* of alcohol, tobacco or other drugs or in connection with pornography or other forms of expression limited by law." *Student Organization / Campus Departments Requests*, LICENSING & TRADEMARKS, UNIV. OF MISSOURI, <https://licensing.missouri.edu/student-org-dept-requests> (last visited Apr. 6, 2016) (emphasis added). As explained in Berigan's September 21 letter to Blackwell, MU NORML does not "promote" marijuana as contemplated by the guidelines.

I understand the policy regarding the inability to use the university's name or logo in connection with the promotion of alcohol, tobacco or other drugs. However, I do not agree with the interpretation that our use of a leaf or the unique animal pawprint/leaf artwork promotes drugs, specifically the genus *Cannabis*, when combined with our organization's name, the University of Missouri National Organization for the Reform of Marijuana Laws (NORML).

I acknowledge the use of this leaf is identifying to *Cannabis*; however, the leaf is simply a morphological aspect of a plant used for identification purposes, not drug imagery. It does not establish nor promote the consumption of *Cannabis*. We believe the use of this leaf is not offensive nor does it insinuate drug use, rather it is purely an identifying symbol to our organization's mission.

Our organization exists to reform *Cannabis* laws through political engagement and community education. We focus on topics such as scientific research, industrial hemp production, and benefits of a regulation and taxation system similar to alcohol. We do not advocate the use of *Cannabis* as a drug, more specifically, we do not promote it through the use of a *Cannabis* leaf in combination with our organization's name.

I would like to ask that you please reconsider your position on our logo's use of a *Cannabis* leaf in combination with our organization's name, University of Missouri NORML.

I would also like to request that you consider the use of our unique animal print/leaf artwork as a separate issue than the use of a distinctive *Cannabis* leaf.

On September 24, Blackwell thanked Berigan for his letter and informed him that she had forwarded his request to her supervisor.

While attempting to obtain approval for MU NORML's T-shirt design, Berigan simultaneously pursued permission for a new logo for the organization that would again incorporate the campus skyline. After contacting the Student Design Center, Berigan was informed by graduate assistant Jeffrey Markworth in a September 9 email that "campus landmarks are considered trademarks of the university and any use of landmarks or campus imagery for logo purposes needs to be approved by MU Marketing and Communications."

Berigan wrote to MU's Division of Marketing & Communications on September 13, forwarding Markworth's instruction and restating his request for "permission to use the skyline" in MU NORML's logo. On September 14, graphic designer Allison VanSciver responded to Berigan, stating that it was "absolutely fine" for MU NORML to have its own

logo, as long as the design did not incorporate “any of the university’s existing marks/insignia” or combine “the university’s name and likeness . . . with drug-related imagery.”

On October 5, Berigan received an email concerning both of his efforts from Lori Croy, Chief Creative Officer of Mizzou Creative, and Sonja Derboven, Director of Licensing & Trademarks for MU’s Division of Marketing & Communications. Croy and Derboven thanked Berigan and MU NORML for attempting to “find solutions to your identity needs” via the university’s offices, but rejected Berigan’s proposed designs on account of their “drug-related imagery, specifically the cannabis leaf.” Explaining that “public opinion in general associates the cannabis leaf image with recreational drug culture,” Croy and Derboven wrote:

Leaving personal opinions out of the equation, we must look at the facts: because cannabis is not legal in the state of Missouri (specifically marijuana), the university cannot appear to endorse its use. Using an image of a cannabis leaf in conjunction with university icons could be considered a form of endorsement, and therefore we cannot approve of any of the following:

- * Using a cannabis leaf image (or any other drug imagery) in conjunction with any of the university’s registered trademarks, including our name and nicknames;
- * Using a cannabis leaf image (or any other drug imagery) as a part of a logo that also includes images of campus icons.

The above restrictions apply to all materials on which the university’s name and/or likeness appears, including, but not limited to: printed materials, websites, social media, t-shirts, banners, promotional items and signage.

To be clear, using your organization’s name in conjunction with campus imagery is acceptable — the issue here is the use of drug-related imagery, specifically the cannabis leaf.

As the legality of cannabis evolves, so too might these policies, but for now, we appreciate your understanding.

MU NORML strongly believes that the marijuana leaf is the most effective symbol for communicating their political message—a determination informed by more than four decades of campus experience at Mizzou. As a result of Croy and Derboven’s decision to forbid the group from using the marijuana leaf image in conjunction with its name, MU NORML has been unable to effectively express its viewpoint to fellow students. Berigan and MU NORML have been unable to produce their preferred T-shirts or hold their planned fundraising event, and the group has refrained from using any promotional material including a depiction of a marijuana leaf. Since Croy and Derboven’s rejection of MU NORML’s proposals—a rejection apparently based either on an unprecedented and unreasonable interpretation of Mizzou’s design guidelines or on a new, unpublished policy

regarding the appearance of endorsement—the group has not held other fundraising events.

The University of Missouri’s refusal to allow MU NORML to use a marijuana leaf on its promotional materials raises serious First Amendment concerns and must be reversed.

As you know, the First Amendment is fully binding on public universities like Mizzou. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted). The law is clearly established: “[T]he First Amendment must flourish as much in the academic setting as anywhere else.” *Gay Lib v. University of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977).

Accordingly, the First Amendment protects the expressive rights of student organizations like MU NORML, and Mizzou cannot restrict a student organization’s expression because it disapproves of the viewpoint the group wishes to communicate. Because a public college like Mizzou acts “as the instrumentality of the State, [it] 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. “In this respect, the governing bodies of schools have no greater authority than do other state officials.” *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976). To the extent that the rejection of MU NORML’s design relies on Mizzou’s disapproval of the “recreational drug culture” that Croy and Derboven believe is associated with “the cannabis leaf image,” it constitutes impermissible viewpoint-based discrimination. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828–29 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”); *Gay & Lesbian Students Association v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988) (finding First Amendment violation in denial of funding to student organization “because of the views it espoused”).

Croy and Derboven attempt to justify their decision by pointing out that “cannabis is not legal in the state of Missouri,” and stating that “[a]s the legality of cannabis evolves, so too might these policies.” But Mizzou’s decision cannot be salvaged by the fact that under Missouri state law, possession and use of marijuana is illegal. MU NORML does not advocate for the drug’s use, as Berigan explained at length; the group calls for the reform of existing laws, not their violation. Further, and more fundamentally, even if MU NORML were advocating for the use of marijuana and thus the violation of state law, this speech would *still* be protected by the First Amendment, and thus its censorship by Mizzou would

still be prohibited. The United States Court of Appeals for the Eighth Circuit made this principle clear in *Gay & Lesbian Students Association v. Gohn*, 850 F.2d at 368:

True, sodomy is illegal in Arkansas. However, the [Gay & Lesbian Students Association] does not advocate sodomy, and, even if it did, its speech about an illegal activity would still be protected by the First Amendment. People may extol the virtues of arson or even cannibalism. They simply may not commit the acts. Thus, we reverse the District Court on the First Amendment issue. Conduct may be prohibited or regulated, within broad limits. But government may not discriminate against people because it dislikes their ideas, not even when the ideas include advocating that certain conduct now criminal be legalized.

Croy and Derboven further attempt to explain their decision by arguing that allowing MU NORML to use the marijuana leaf in their promotional materials might somehow be interpreted as an official Mizzou endorsement of the use of marijuana. They write that because marijuana is illegal, “the university cannot appear to endorse its use,” and they inform Berigan that MU NORML’s use of “an image of a cannabis leaf in conjunction with university icons could be considered a form of endorsement.”

As an initial matter, it is simply implausible to believe a reasonable person could conclude that MU NORML’s promotional materials constituted an official endorsement by the university of not only MU NORML’s desired policy reforms, but the use of marijuana itself. No reasonable person would believe that the university had endorsed the political views espoused by the Mizzou College Republicans or the Mizzou College Democrats after seeing either groups’ T-shirts worn around campus, and MU NORML’s desired logo and promotional materials are not substantively different than the promotional materials used by both groups.⁴

Even setting aside the unlikeliness of this misunderstanding, the law is clear: Public universities like Mizzou may not refuse a recognized student organization the expressive rights and opportunities offered to other groups out of an unsubstantiated concern that the organization’s viewpoint might be interpreted as the university’s own. In *Widmar v. Vincent*, for example, the Supreme Court struck down on First Amendment grounds a University of Missouri at Kansas City policy that prohibited student organizations from meeting on campus “for purposes of religious worship or religious teaching.” *Widmar*, 454 U.S. at 265. The Court rejected the university’s argument that allowing student groups to engage in religious expression on campus would amount to a *de facto* endorsement. Ruling instead that allowing religious student groups to speak their truths “does not confer any

⁴ See, e.g., Mizzou College Democrats, FACEBOOK (Oct. 12, 2012), <https://www.facebook.com/mizzoudems/photos/a.341554895932754.80547.341546032600307/364895976931979/?type=3&theater>; Mizzou College Republicans, FACEBOOK (Feb. 24, 2014), <https://www.facebook.com/mucrs/photos/a.362632347105747.74939.228340717201578/634405856595060/?type=3&theater>.

imprimatur of state approval on religious sects or practices,” the Court observed that granting religious groups the same expressive rights that other organizations enjoyed “would no more commit the University . . . to religious goals than it is now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities.” *Id.* at 274 (internal quotation marks omitted) (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980)).

Similarly, in *Rosenberger v. Rector and Visitors of University of Virginia*, the Court found that a religious student organization’s speech did not constitute institutional speech even when funded by student activity fees. In *Rosenberger*, the University of Virginia argued that refusing to fund the printing of a religious student group’s newspaper was necessary, lest the student group’s religious viewpoints “be attributed to the University.” *Rosenberger*, 515 U.S. at 842. The Court dismissed this argument, stating that it was “not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State.” *Id.* at 841–42. Mizzou’s justification here is similarly unfounded. Just as in *Rosenberger*, there is no reasonable possibility that observers would be led to believe that Mizzou had endorsed the use of marijuana, or even arguments for the reform of laws concerning marijuana, simply because of the existence of MU NORML’s use of a cannabis leaf on promotional materials.

Please be advised that the validity of Mizzou’s argument against MU NORML’s use of the cannabis leaf is called into further question by recent judicial developments elsewhere in the Eighth Circuit. As you may be aware, the United States District Court for the Southern District of Iowa, Central Division resolved a case involving a strikingly similar set of facts in favor of the Iowa State University chapter of the National Organization for the Reform of Marijuana Laws (NORML ISU). In *Gerlich v. Leath*, No. 4:14-cv-00264, 2015 U.S. Dist. LEXIS 91368 (S.D. Iowa Jan. 6, 2015), Chief United States District Judge James E. Gritzner confronted a First Amendment lawsuit arising from the following dispute:

On February 12, 2013 — after the revised Trademark Guidelines had become effective — the Trademark Office approved a t-shirt design submitted by NORML ISU that stated “NORML ISU” on the front and “We are NORML” across the back — without the image of the marijuana leaf that was on the previous design. On April 15, 2013, the Trademark Office approved another t-shirt design that simply stated “NORML ISU Student Chapter” on the front.

In May or June 2013, the organization submitted another t-shirt design to the Trademark Office for approval. The front of this t-shirt had the slogan “NORML ISU Supports Legalizing Marijuana” with a marijuana leaf graphic. The back of the t-shirt design spelled out the acronym NORML: “National Organization for the Reform of Marijuana Laws.” On June 13, 2013, Zimmerman, on behalf of the Trademark Office, denied the t-shirt design, stating that it represented a call to action, the message could be misconstrued as the university’s position on marijuana, the design was unnecessarily sensational, and the design would not change the public’s perception of

marijuana. Hill supported Zimmerman’s decision to deny the organization’s t-shirt design. NORML ISU did not appeal the decision. NORML ISU believed an appeal would be futile because Madden, who oversees the Trademark Office and created the revised Trademark Guidelines, was the individual empowered to decide any appeals to the office’s application of the Guidelines.

In March 2014, NORML ISU submitted a t-shirt design that displayed “NORML ISU” on the front in ink that was varied to create an outline of a marijuana leaf. The design was denied. The Trademark Office indicated that the full organization’s name needs to be inserted in the design, and the silhouette of the marijuana leaf must be removed because it is a symbol of an illegal drug.

Id. at *6–7. The district court found that students and NORML ISU members Paul Gerlich and Erin Furleigh had alleged sufficient facts to allow their First Amendment claims against the Iowa State University administrators named as defendants:

The Complaint alleges that Defendants prohibited NORML ISU from making any reference in its t-shirts to the object of the group’s advocacy, marijuana. Plaintiffs are excluded from using both the word “marijuana” and any images relating to marijuana. It is alleged that Defendants denied NORML ISU the use of Iowa State University’s trademarks after the university received pressure from donors and members of the legislature who disagreed with NORML ISU’s message and the university’s association with the group’s message. The Complaint alleges that other campus groups were permitted to use Iowa State University’s trademarks, despite their support of potentially controversial philosophies and ideas. The decisions of *Healy*, *Rosenberger*, and *Gohn* are guiding as they hold that college administrators cannot control the speech of campus groups because of disagreements with the groups’ viewpoints. Although the prior cases dealt with students’ rights to associate and to receive school funding — unlike the use of the university’s trademarks as alleged here — each case concerns a university discriminating against a student group based on the group’s viewpoints by denying the group a university benefit provided to other groups. Like the entitlement to funding, one of the benefits of being a school-approved student organization at Iowa State University is the ability to use the school’s name and logo for certain purposes. Compl. ¶ 25, ECF No. 1; see also *Christian Legal Soc. Ch. of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 669, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (noting that one of the benefits student groups receive is the use of the school’s name and logo). Furthermore, *Gohn* stated that universities cannot deny a student group benefits based on the group’s message, even if the message or philosophy it advocates is illegal. 850 F.2d at 368. Accordingly, Plaintiffs have pled sufficient factual allegations to create a

plausible claim for relief for violations of their First and Fourteenth Amendment rights to free speech.

Id. at *19–21. Further, in recognition of the jurisprudential clarity regarding student First Amendment rights at our nation’s public colleges, the district court denied defendants the defense of qualified immunity. In rejecting defendants’ qualified immunity claim, the court held that “the Complaint, as pled, sufficiently alleges facts indicating that a reasonable college administrator would know that restricting students’ speech based on viewpoint is a constitutional violation.” *Id.* at *28. As a result, defendants may be found personally liable for violating plaintiffs’ First Amendment rights.

Expanding on the reasoning in its ruling on defendants’ motion to dismiss, the district court issued an order in January 2016 granting plaintiffs’ motion for summary judgment in part and permanently enjoining Iowa State University 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 similar cannabis leaf.” *Gerlich v. Leath*, No. 4:14-cv-00264, 2016 U.S. Dist. LEXIS 9899, *68 (S.D. Iowa Jan. 22, 2016). The court based its ruling on “the straightforward principle that a public university may not discriminate among student groups on the basis of their espoused views”:

Even assuming Defendants are correct that ISU did not establish a forum for student speech with its trademark licensing program, Defendants would nonetheless be forbidden from denying a license to NORML ISU on impermissible grounds. In *Gohn*, confronted with a similar issue, the Eighth Circuit concluded that even if the GLSA had no right to receive university funding at all, it could still not be denied those funds “for a reason which violates its First Amendment rights.” Therefore, under *Gohn*, even if NORML ISU was not entitled to use ISU marks, be it in a public forum or otherwise, ISU could not deny use of the marks to NORML ISU based on the group’s political viewpoint.

Id. at *41–42.

The defendants have appealed the district court’s ruling in *Gerlich* to the United States Court of Appeals for the Eighth Circuit. Earlier this month, the Eighth Circuit summarily denied the defendants’ request for a stay of the lower court’s injunction. *Gerlich v. Leath*, No: 16-1518 (8th Cir. Apr. 7, 2016) (denying motion for stay filed by defendants).

The legal principles involved—and the weight of their authority—are clear: Mizzou may not prohibit MU NORML from using a cannabis leaf in its promotional materials. The expression of student groups is distinct from that of the university and does not have to conform to those positions officially sanctioned by the institution. Mizzou has demonstrated through its actions and statements that it is motivated by a disagreement

with MU NORML's viewpoint. Discriminating against MU NORML on that basis is impermissible under the First Amendment.

To ensure that this matter may be resolved quickly and amicably, FIRE calls upon the University of Missouri to promptly approve MU NORML's proposed designs and unequivocally assure all Mizzou students that the university will respect its students' free speech rights. FIRE is committed to using the resources at our disposal to see this matter through to a just conclusion.

We request a response to this letter by May 13, 2016.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Creeley". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Will Creeley
Vice President of Legal and Public Advocacy

cc:

Jeffrey Mittman, Executive Director, American Civil Liberties Union of Missouri
Dan Viets, Missouri Civil Liberties Association