IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, *et al*., *Plaintiffs*, v. BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-00231 **MEMORANDUM IN RESPONSE TO MOTION TO DISMISS BY WAYNE STATE UNIVERSITY DEFENDANTS**

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INTRODUCTION

Wayne State's motion to dismiss is long on sound and fury and short on application of the law to the facts. But the facts and law are clear: Wayne State's abrupt and discriminatory departure from 75 years of respecting InterVarsity's right to select its religious leaders violated the First Amendment. And since Wayne State claims the power to continue discriminating against InterVarsity, its motion to dismiss must be rejected.

Wayne State concedes several dispositive facts: it does not have an "all comers" policy of the sort the Supreme Court upheld; it has authorized dozens of exemptions to its anti-discrimination policy (and exempts itself as well); and its reason for penalizing InterVarsity is openly hostile to InterVarsity's decades-old religious exercise: "Wayne State merely chose not to subsidize . . . Plaintiffs' decision to make second-class citizens of students who refuse to accept their religious pledge." Dkt. 18. at 17. Wayne State's admissions are more than enough to confirm that InterVarsity has stated valid claims.

The law establishes that government officials must apply their policies evenhandedly to speakers in limited public forums; must apply policies in a neutral and generally applicable manner when those policies burden religious exercise; may not interfere in a religious group's selection of religious leaders; and may not penalize individuals or groups on the basis of their religious beliefs and practices. Wayne State seeks to avoid or distinguish precedent on these issues because it has engaged in each of these prohibited actions, and more.

In fact, Wayne State makes crystal clear that it wants this Court to bless its attempts to penalize InterVarsity for its religious leadership practices. Wayne State feigns disbelief that InterVarsity has not dismissed its complaint because "[a]lthough Wayne State had no legal obligation to do so . . . the university elected to grant InterVarsity-Wayne recognized organization status." Dkt. 18 at 2. But—tellingly—Wayne State eschews any claim of mootness, instead mounting a full-throated

defense of its actions. The reason is simple: Wayne State wants to maintain its current selectively-enforced patchwork policy and the ability to penalize InterVarsity again at a moment's notice. That would stand the First Amendment on its head. InterVarsity is entitled to engage in speech and religious exercise with the permanent protection of the First Amendment, not the temporary grace of hostile university officials. InterVarsity has not just sufficiently alleged its harms, but has in fact provided enough evidence for the Court to grant summary judgment for InterVarsity. *See* Dkt. 16-1 (explaining why summary judgment is warranted on Claims I, II, III, IV, VI, and VIII). Wayne State's motion to dismiss should therefore be denied in its entirety.

I. Standard of Review

Wayne State's motion to dismiss should not be granted unless InterVarsity has failed to plead "sufficient factual allegations that, if accepted as true" raise a claim that can be granted. *Men v. Cutlip,* No. 1:12-CV-34, 2012 WL 12875776, at *2 (W.D. Mich. 2012). The Court must "accept as true all factual allegations" contained in the complaint, and "draw . . . reasonable inference[s]" in favor of the validity of the complaint. *Id.* Defendants invoke *Twombly*, Dkt. 18 at 7, but the Sixth Circuit has cautioned that "it would be inaccurate to read [*Twombly* and *Iqbal*] so narrowly as to be the death of notice pleading and we recognize the continuing viability of the 'short and plain' language of Federal Rule of Civil Procedure 8." *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012) (alternations in original) (internal quotation omitted). Thus, "If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied." *Id.* at 610.

II. InterVarsity/USA has standing to bring this action.

Wayne State argues that InterVarsity/USA lacks standing to bring its claims. That is both irrelevant and incorrect. Irrelevant because there is no question that the Wayne State Chapter of InterVarsity has standing, and only one plaintiff need have standing under Article III. *See ACLU*

v. Nat'l Sec. Agency, 493 F.3d 644, 652 (6th Cir. 2007) ("[I]t is only necessary that one plaintiff has standing."). Incorrect, because InterVarsity/USA is entitled "to invoke the court's remedial powers on behalf of its members." *Warth v. Seldin*, 422 U.S. 490, 515 (1975); *see also Sigma Chi Fraternity v. Regents of Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966) (holding that a national fraternity could bring suit when its local chapter was derecognized as a result of selective membership policies). And InterVarsity/USA has also been injured by Wayne State's actions. Wayne State has interfered with InterVarsity/USA's mission to "establish and advance a witnessing community of students and faculty who follow Jesus as Savior and Lord" at Wayne State, and its religious and expressive association with the local chapter. Dkt. 1, Compl., ¶¶ 39, 46, 56.

III. Plaintiffs have stated claims under the First Amendment.

Wayne State's motion to dismiss is fairly narrow. Although it purports to seek dismissal of the entire complaint, Wayne State makes no argument on Count II, the internal autonomy claim; Count IX, the freedom of assembly claim; and only cursory arguments with respect to Counts VI and VII. Its motion should be denied as to those counts: "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citation omitted).

A. Wayne State does not seek to dismiss most of InterVarsity's constitutional claims.

Wayne State's only argument on the compelled speech claim (Count VII) appears in a footnote, where it argues that the "constitution draws a distinction 'between policies that require action and those that withhold benefits.'" Mot. at 9 & n.4 (quoting *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 682-83 (2010)). A footnote is too cursory to count as argument. "[A] passing reference to a case in a footnote does not suffice as a legal argument. Accordingly, the issue is deemed

waived." *Davis v. Lamp*, No. 1:15-cv-863, 2017 WL 8077495, at *6 (W.D. Mich. Dec. 22, 2017) (rejecting the defendant's argument in its motion to dismiss), *adopted*, 2018 WL 1141391 (W.D. Mich. Mar. 2, 2018). But even on the merits *Martinez* does not apply, since Wayne State does not have the type of policy at issue there (see *infra* at III.B.) and *Martinez* did not purport to overturn prior student speech cases, much less the entirety of the Supreme Court's compelled speech jurisprudence. The Supreme Court has since reaffirmed that the government may not condition benefits such as grants or contracts on an organization's willingness to adopt the government's preferred viewpoint. *See Agency for Int'l Dev. v. All. for an Open Soc'y Int'l*, 570 U.S. 205 (2013).

Wayne State also shoehorns its argument regarding InterVarsity's expressive association claim (Count VI) into the same footnote, arguing that such claims do not apply where access to a forum is conditioned on a non-discrimination policy. Dkt. 18 at 9 & n.4. Again, a footnote is not enough to count as "argument" on a motion to dismiss. But even so, as discussed in further detail below, Wayne State has no articulable policy on student organization membership, and *Martinez* does not apply. Courts use a three-step inquiry on expressive association claims:

> The first determination is whether a group is entitled to protection. . . . Second, courts ask whether the government action in question "significantly burden[s]" the group's expression, affording deference "to an association's view of what would impair its expression." Lastly, the government's interest in any restriction must be weighed against plaintiff's right of expressive association.

Miller v. City of Cincinnati, 622 F.3d 524, 538 (6th Cir. 2010) (internal citation omitted). InterVarsity has established the first prong: it associates for the purpose of religious expression. Compl. ¶¶ 36, 39, 41, 46, 49-50. It has also established the second: Wayne State's actions significantly burden its expression by excluding it from outreach and communication opportunities and imposing significant costs on meeting together for worship. Compl. ¶¶ 71-74, 79, 83. Such burdens occur where the government "directly or indirectly interferes with group membership." *Miller*, 622 F.3d at 538. Wayne State's actions interfere with group membership by setting the

criteria by which the group must select its leaders and requiring the group to accept speakers who may not agree with the group's message. *See* Compl. ¶¶ 50-56 (explaining the importance of leadership). And InterVarsity's interests here are stronger than the government's, particularly given its long history of peaceful existence on campus and Wayne State's decision to re-recognize the group. Compl. ¶¶ 50-56, 76; Dkt. 18 at 6. Wayne State claims that it is not forcing InterVarsity to accept a particular leader, but that is the same argument the Seventh Circuit rejected in Walker: "[the University] objects that this is not a 'forced inclusion' case like *Dale* or *Hurley* because it is not forcing [the student group] to do anything at all, but is only withdrawing its student organization status." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 864 (7th Cir. 2006). The Seventh Circuit held that the University "may not do indirectly what it is constitutionally prohibited from doing directly." *Id.* at 864. Wayne State cannot directly control the selection of religious leaders, nor may it do so indirectly by penalizing that selection.

B. Wayne State engaged in unlawful viewpoint discrimination.

InterVarsity has alleged all the elements of a claim for viewpoint discrimination under the Free Speech Clause: Wayne State is operating a public forum, which the University admits, Dkt. 18 at 9, and InterVarsity was excluded from that forum on the basis of its viewpoint regarding religious leadership, which Wayne State also admits: "Wayne State . . . chose not to subsidize . . . Plaintiffs' decision to make second-class citizens of students who refuse to accept their religious pledge." Dkt. 18 at 17. Such exclusions must pass strict scrutiny, which Wayne State cannot hope to satisfy. *See infra* at III.C. This Court needs nothing more to grant summary judgment to InterVarsity on this claim. *See* Dkt. 16-1.

As justification, Wayne State claims that (1) its policy is facially neutral under *Christian Legal Society v. Martinez*, Dkt. 18 at 8-11, and (2) its admitted facial and categorial exceptions to the policy, not to mention InterVarsity's listing of more than a dozen instances of permitted

"discrimination" in the forum, does not demonstrate unconstitutional application of the University's policy, Dkt. 18 at 11-14. Both arguments fail.

1. Wayne State's policy is not facially neutral.

Wayne State claims that its policy is facially neutral under *Martinez* and the Ninth Circuit's *Reed* decision. Dkt. 18 at 10-11. But Wayne State admits it does not have an "all comers" policy like the one in *Martinez*. Moreover, even if *Reed* were the law in this Circuit, Wayne State's policy is not comparable to the one in *Reed*.

The Supreme Court's 5-4 decision in *Martinez* was limited to consideration of policies which "mandate acceptance of all comers: School-approved groups must 'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'" *Martinez*, 561 U.S. at 671. The Court limited its opinion to such policies: "This opinion, therefore, considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution." *Id. at* 678. But Wayne State admits "the policy at issue here[] was not an all-comers policy." Dkt. 18 at 10. By its own terms, *Martinez* is not controlling.

Further, *Martinez* primarily focused on membership, not leadership. Justice Kennedy's concurrence made this point even clearer, finding that even in the face of a true all-comers policy, a student group would have a "substantial case" if the policy was "used to . . . challenge its leadership." 561 U.S. at 706. As discussed below, the Supreme Court later unanimously ruled the government may not restrict religious groups' selection of religious leaders. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Wayne State instead relies upon *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), a case which applied *Martinez*. Dkt. 18 at 10-11. In *Reed*, the university had a facial policy which expressly and specifically stated the rules and exemptions for student organizations:

> On-campus status will not be granted to any student organization whose application is incomplete or restricts membership or eligibility to hold appointed or elected student officer positions in the campus-recognized chapter or group on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law.

Reed, 648 F.3d 796. The Ninth Circuit upheld the facial policy, but reversed the district court's decision upholding the policy as applied, since there was evidence that some groups were permitted to deviate from the policy. *Id.* at 795. Wayne State says its policy is facially constitutional under *Reed*. The problem with this argument is that Wayne State's facial policy is impossible to identify. Unlike the university in *Reed*, Wayne State has no written policy that addresses discrimination by student organizations, and its own statements indicate that policy does not apply to student leaders.[1]

The policy Wayne State points to, Code 2.28.01.010-20, makes no mention of student organizations. The code applies to the University in "all of its operations, employment opportunities, educational programs and related activities," but says nothing about its application to private organizations operating in a limited public forum. *Id.* And since its inception, Wayne State has never applied the Code as written to student organizations.[2] As even Wayne State acknowledges, if the code is upheld and applied as written, then fraternities and sororities will be excluded from campus. Dkt. 18 at 14 & n.7. The most logical conclusion is that the Code that Wayne State asks this Court to permit it to impose on InterVarsity was not intended to govern

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[1] Wayne State may again point to *Martinez*, where the school had broader language in its code, but there the parties stipulated that the relevant policy was the all-comers policy. 561 U.S. at 671. The parties here agree that Wayne State does not have an all-comers policy.

[2] Wayne State's code was passed in 1986. *See Board of Governors – Code Annotated*, https://bog.wayne.edu/code/2-28-01 (last visited June 1, 2018). It has had single-sex fraternities and sororities on campus since at least the 1920s. *See, e.g.*, *Alpha Phi Alpha Fraternity, Incorporated Alpha Upsilon Chapter*, https://orgsync.com/148237/chapter (last visited June 1, 2018) (stating the chapter was founded in 1926).

student groups at all.

Second, Wayne State's student organization application indicates that the nondiscrimination provisions of the Code apply to membership in student organizations, but not to leadership. The application states, "Membership must be open to all currently registered WSU students (see Anti-Discrimination Policy)." Dkt. 18-1 at 6. Regarding leaders, it says "Only CURRENTLY enrolled Wayne State University students are eligible to be officers." *Id.* The leadership section says nothing about the Code, nor does it state that all current students must be eligible to serve as officers. *See id.* InterVarsity welcomes all students as members and only asks that its leaders share its faith. Compl. ¶¶ 49-50. Even if Wayne State's policy as stated on its application were facially neutral (and it is not—*see* III.E, *infra*), that would not justify the University's actions.

Indeed, the lack of written policy alone should be sufficient to establish a Free Speech and Due Process violation. *See, e.g.*, *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (when a policy limits "a speaker's First Amendment rights" the government's limitations on speech must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'"). But Wayne State did nothing of the sort. It acknowledges that it applies its code in a scattershot manner and that its purpose in excluding InterVarsity was to express disapproval of its "religious pledge."

2. Wayne State's policy is discriminatory as applied.

In practice, Wayne State's policy is not neutral, nor even intelligible. Wayne State admits that fraternities and sororities are exempt from the Code, claiming Wayne State has incorporated their exemption from Title IX, sub silentio, "into its application and interpretation of its policy." Dkt. 18 at 14 & n.7. And it admits that club sports are exempt, without pointing to any rule or policy authorizing such an exemption. *Id.* at 13 & n.6. Nor does Wayne State explain InterVarsity's long history as a registered student organization, religious leadership rules intact. *See id.* at 2.

The upshot is that student groups have no single rule they can consult to determine what behavior is permissible and what is not. They are at the mercy of unwritten additions, exceptions, and discretionary policies known only to Wayne State. InterVarsity reasonably believed that its religious leadership selection, which it had engaged in for many years and which was in accord with the statements on the student organization application, was permissible. Wayne State determined it was impermissible, and defended that determination for months, until it suddenly announced (after this lawsuit was filed) that "the university will not intervene in the group's leadership selection."[3] And now Wayne State comes before this Court to argue once again that it can and should prohibit InterVarsity's actions. Wayne State's course of dealings confirms that its policy, whatever it may actually be, is not neutral as applied.

This is more than enough to survive a motion to dismiss. In *Reed*, the Ninth Circuit ruled in favor of the student group on this basis: "Plaintiffs also offer evidence that San Diego State has granted official recognition to some religious student groups even though those groups, like Plaintiffs, restrict membership or eligibility to hold office based on religious belief," and that "some non-religious but officially recognized groups appear to discriminate on prohibited grounds." *Reed*, 648 F.3d at 803-04. InterVarsity's complaint includes evidence, drawn from Wayne State's own website, that multiple student organizations hold themselves out as limited to a particular religious group and that multiple other student groups hold themselves out as discriminating on other prohibited grounds. Compl. ¶¶ 95-110.

Wayne State admits, because it can hardly deny it, that club sports leagues and fraternities and

[3] Ann Zeniewski, *Wayne State University re-certifies Christian student group InterVarsity*, Detroit Free Press (Mar. 8, 2018), https://on.freep.com/2q3JlQa. Elsewhere, Wayne State has claimed this statement is inadmissible as a settlement communication, Dkt. 21 at 24, but cites no precedent suggesting that a press release is a settlement communication.

sororities have an "exemption" from its policy. Dkt. 18 at 13 & n.6 (club sports); *id.* at 14 & n.7 (fraternities and sororities). This was enough for the *Reed* court to vacate a grant of summary judgment. *See Reed*, 648 F.3d at 803 (question of discriminatory enforcement sufficient to defeat summary judgment is raised where "at least two groups, the Men's Honor Club and the Girl[s'] Honor Club, were granted [official] recognition even though their membership is based on gender, a protected ground under the [school district's nondiscrimination] policy.") (quoting *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 650 (9th Cir. 2008)) (alterations in original). InterVarsity's fraternity, sorority, and club sports allegations alone are sufficient to state a claim.

InterVarsity's evidence regarding other forms of impermissible discrimination is also more than sufficient. As noted above, InterVarsity identified multiple student organizations which hold themselves out as limiting membership or leadership to one faith, including a church that holds services on campus. Compl. ¶¶ 95-101. It also listed multiple examples of groups which hold themselves out as limiting membership in other prohibited ways. Compl. ¶¶ 95-109. And it alleged there were many more examples. Compl. ¶ 110.[4] Wayne State's response is to claim that these groups might only tend to attract like-minded students. Dkt. 18 at 13-14. But in the face of evidence that these groups hold themselves out as violating the policy (at least the version of that policy applied to InterVarsity), Wayne State denies any intention to investigate these groups: "Wayne State is not willing to do so and has no legal obligation to do so." *Id.* at 14. InterVarsity has demonstrated that Wayne State penalized its student chapter while turning a blind eye to other violations of its policy. This is not just enough to survive a motion to dismiss, it is sufficient for summary judgment. *See* Dkt. 16-1 at 14-20.

Wayne State's actions are more similar to those of the university in *Walker*, where the Seventh

[4] InterVarsity's summary judgment motion identified more than ninety such groups. Dkt. 16-2.

Circuit determined that a university violated the First Amendment when it derecognized a Christian group because it did not accord with the university's nondiscrimination policy. *Walker*, 453 F.3d at 863. In *Walker*, as here, "[t]he only apparent point of applying the policy to an organization like [Plaintiff] is to induce [Plaintiff] to modify the content of its expression or suffer the penalty of derecognition." *Walker*, 453 F.3d at 863. Wayne State has acknowledged this was its purpose: to express its disapproval of what it terms "Plaintiffs' decision to make second-class citizens of students who refuse to accept their religious pledge." Dkt. 18 at 17. Such actions violate the right of expressive association.

C. Wayne State's actions cannot pass strict scrutiny.

For all these reasons, Wayne State's actions must pass strict scrutiny. But Wayne State advances no argument that it could do so, thereby waiving the argument with respect to the motion to dismiss. Indeed, Wayne State admits that its own programs discriminate in ways that violate the code, but asserts they "discriminate[] on patently rational bases." Dkt. 18 at 12 & n.5. If Wayne State permits its own programs to discriminate with nothing more than a rational basis justification for doing so, it cannot hope to prove that enforcing its policy against InterVarsity is justified by "a state interest of the highest order." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

D. InterVarsity has stated claims under the Religion Clauses.

InterVarsity makes two claims under both Religion Clauses: that Wayne State's policies violate both InterVarsity's right to select its own religious leadership (Count I) and its right to internal autonomy in religious affairs (Count II). As noted above, Wayne State fails to address Count II at all, and so its motion to dismiss that claim must be denied.

Wayne State's only defense to Count I is a formalistic, one-paragraph assertion that the Religion Clauses' religious leadership protection is solely an affirmative defense and not a cause

of action. That is, even though Wayne State has admittedly done precisely what the First Amendment forbids, InterVarsity has no recourse unless and until Wayne State *sues* InterVarsity to enforce its policy. Not so.

As an initial matter, InterVarsity *is* raising the ministerial exception defensively: to defend against Wayne State's abrupt governmental intrusion into its internal religious affairs. And it raised that defense as a claim here only after Wayne State repeatedly rejected InterVarsity's efforts to defend itself before the Wayne State officials who derecognized it. Compl. ¶¶ 75-84.

But Wayne State's more fundamental error is that it wholly disregards the doctrinal context and grounding of the ministerial exception. *InterVarsity* emphasized that the exception "categorically prohibits federal and state governments from becoming involved in religious leadership disputes," full stop. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). As a "structural" matter separating church and state, both Religion Clauses operate together to flatly "'*bar* the government from interfering' with a religious organization's decisions as to who will serve as ministers." *Id.* at 836 (quoting *Hosanna-Tabor*, 565 U.S. at 181). Thus, the core First Amendment principle upheld by the ministerial exception is that "civil authorities have no say over matters of religious governance." *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013). The exception's operation as an affirmative defense in employment cases is an application of this principle, but not nearly the entirety of it.

Thus, in *Hosanna-Tabor*, the unanimous Supreme Court firmly rooted the ministerial exception in the broader "freedom of a religious organization to select its ministers," and *then* recognized that when this freedom "is implicated by a suit alleging discrimination in employment," it may be vindicated via an affirmative defense. *InterVarsity*, 777 F.3d at 833 (quoting *Hosanna-Tabor*, 565 U.S. at 705). The Seventh Circuit likewise agreed that *Hosanna-Tabor* "recognized

the right of churches to choose their own ministers (broadly understood) *and* adopted a constitutional ministerial exception to laws regulating employment discrimination." *Korte*, 735 F.3d at 677 (emphasis added). Accordingly, Wayne State's policy violates the exception's categorical prohibition against interference in internal religious leadership decisions not just when Wayne State tries to enforce the policy in court, but when it attempts to interfere in internal religious leadership decisions at all. It is not just the judiciary that must abstain from entangling itself in ministerial matters, but any "arm of the . . . government" generally. *InterVarsity*, 777 F.3d at 835-36. "[B]ureaucrats are no better than judges at making . . . judgment[s]" about internal religious affairs. *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 770 (6th Cir. 2018) (Kethledge, J., concurring); *accord Hutchison v. Thomas*, 789 F.2d 392, 393 (6th Cir. 1986) (recognizing "the First Amendment's command that secular authorities may not interfere with the internal ecclesiastical workings . . . of religious bodies"); *see also Conlon v. InterVarsity Christian Fellowship/USA*, 13 F. Supp. 3d 782, 786 (W.D. Mich. 2014) ("allow[ing] the state to become involved in the strictly ecclesiastic decision of who shall minister to the faithful" violates "the very concerns that underlie the ministerial exception").

Further, Wayne State is wrong that defenses and claims are necessarily mutually exclusive. The "designation of a claim as an affirmative defense" does not prevent a party "from asserting that claim in a preemptive action for declaratory or injunctive relief." Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1274 (3d ed.). Indeed, the Supreme Court itself has characterized the ministerial exception as an example of the "free-exercise claims" recognized and upheld by the Court. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (citing *Hosanna-Tabor*). That is no surprise, since the Court has previously applied the Free Exercise Clause to prohibit interference in religious leadership disputes, vindicating the rights of a plaintiff who raised

the issue offensively. *See, e.g.*, *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 707 (1976) (noting that diocese was initially sued by defrocked bishop and then filed its own complaint against the bishop; both actions were then consolidated).

Wayne State's argument is also inconsistent with 42 U.S.C. § 1983, which "provide[s] a remedy" for "deprivations of '*any* rights, privileges, or immunities secured by the Constitution.'" *Dennis v. Higgins*, 498 U.S. 439, 443-45 (1991) (emphasis in original). Section 1983 must be "broadly construed" and protects against "all forms of official violation of federally protected rights." *Id.* Wayne State's position would impose a blanket rule that a church could sue under Section 1983 to vindicate Commerce Clause rights impinged by vehicle taxes, *id.*, but not to vindicate First Amendment rights impinged by, say, a statute "vest[ing] the governor with the power to [appoint] ministers for the church." *Hosanna-Tabor*, 565 U.S. at 183 (noting that such statutes were among the evils the First Amendment was intended to forbid). That is not the law.

Nor does Wayne State identify a single case holding that the ministerial exception, alone among the universe of First Amendment rights, exists solely as an affirmative defense. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (plaintiffs generally need not await governmental enforcement lawsuits before vindicating First Amendment rights in court); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (ruling in favor of plaintiff political parties who sought injunctive and declaratory relief against a state law which interfered with their associational rights). Instead, Wayne State wrenches a footnoted sentence in *Hosanna-Tabor* out of context, and then deletes part of the sentence. Dkt. 18 at 15. What *Hosanna-Tabor* addressed was whether, in the context of defending against an "otherwise cognizable claim," the exception functioned as an affirmative defense *or* as a jurisdictional bar. Hence the full quote is, "We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim,

not a jurisdictional bar." 565 U.S. at 195 n.4 (emphasis added). Nor did *InterVarsity* purport to limit the ministerial exception doctrine in the radical way Wayne State argues.

Finally, instead of defeating Count I, Wayne State's motion *concedes* all of the elements of Count I. Under the Religion Clauses, "government cannot dictate to a religious organization who its spiritual leaders would be." *InterVarsity*, 777 F.3d at 835-36. The government violates this rule where (1) a "religious group," (2) selects "one of the group's ministers," (3) and the government "interfer[es] with the freedom of [the] religious group[]" to make that selection. *Hosanna-Tabor*, 565 U.S. at 177, 184. Here, Wayne State agrees that InterVarsity is "a multi-ethnic Christian fellowship" that has a "Christian, religious mission." Dkt. 18-1 at 2 *and* Dkt. 18 at 1. Wayne State further does not contest that InterVarsity sought to ensure that its leaders would "embrace" that mission because their position "involves significant spiritual commitment," including a responsibility to "exemplify Christ-like . . . leadership." Dkt. 18 at 1 *and* Dkt. 18-1 at 6. And Wayne State admits that it forbids InterVarsity's religious "leadership requirement" because Wayne State believes the requirement is "in clear violation of the school's non-discrimination policy." Dkt. 18 at 1; *see also* Dkt. 18-1 at 2 (rejecting InterVarsity's recognition because of its "officer requirements"). Thus, not only has InterVarsity successfully stated a claim, but Wayne State has admitted facts sufficient to grant InterVarsity summary judgment. *See* Dkt. 16-1 at 8-14.

E. InterVarsity has stated claims under the Free Exercise Clause.

Counts III and IV of InterVarsity's complaint raise claims under the Free Exercise Clause. Far from showing that these claims must be dismissed, Wayne State's position presents a textbook free exercise violation that requires entering judgment for InterVarsity. *See* Dkt. 16-1 at 21.

The right of free exercise "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws" that disfavor religion. *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of Lukumi Babalu Aye,, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993)).

The government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, slip op. 17, 584 U.S. ___ (June 4, 2018). Restrictions on religion are thus subject to strict scrutiny unless they are both "neutral" and "generally applicable." *Lukumi*, 508 U.S. at 2021; *accord Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). Wayne State's restriction is neither.

General Applicability. A law is not generally applicable if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated, and which undermines the purposes of the law "in a similar or greater degree than" the restricted religious conduct. *Lukumi*, 508 U.S. at 543; *accord Blackhawk v. Pennsylvania*, 381 F.3d 202, 208-09 (3rd Cir. 2004) (Alito, J.).

Thus, in *Lukumi*, the challenged animal slaughter ordinances fell "well below the minimum standard necessary to protect First Amendment rights" because they exempted "[m]any types of" nonreligious animal slaughter while burdening "conduct motivated by religious belief." 508 U.S. at 536-38, 543. And then-Judge Alito rejected an attempt to enforce a police department policy that "barred officers from growing beards" against a Muslim officer, since the policy "excepted officers who could not shave for medical reasons but not officers who could not shave for religious reasons." *Ward*, 667 F.3d at 740 (citing *Fraternal Order of Police Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (Alito, J.)). Likewise, in *Ward v. Polite*, the Sixth Circuit rejected a college's attempt to impose an anti-discrimination policy against a student's religiously motivated conduct while "permitting secular exemptions" to the policy and "failing to apply the policy in an even-handed . . . manner." 667 F.3d at 739. *See also Rader v. Johnston*, 924 F. Supp. 1540, 1552-53 (D. Neb. 1996) (rejecting university policy because "exceptions are granted by the

defendants for a variety of non-religious reasons, [but] are not granted for religious reasons").

Here, Wayne State's policy is "riddled with exemptions," both on its face and in practice. *Ward*, 667 F.3d at 738. On its face, the code carves out a broad exception that allows Wayne State itself to violate the code on the basis of *every protected characteristic*, including race and sex. *See* Dkt. 18-1 at 5 (stating that the policy does not "preclude the University from implementing those affirmative action measures which are designed to achieve full equality for minorities and women"). Moreover, Wayne State admits that it has exercised this discretion to allow "many" of its programs to "discriminate based on" such characteristics, including "sex." Dkt. 18 at 12 n.5; *see also* Compl. ¶¶ 111-12 (identifying examples of Wayne State programs that discriminate). Wayne State has also created categorical exemptions to the policy for recognized student groups. For instance, it admits that its "club sports [organizations] are exempted from complying with all portions of the policy." Dkt. 18 at 12-13; *see also* Compl. ¶ 94 (Wayne State's model club-sports constitution permits discrimination on the basis of sex and gender identity). Wayne State also admits that it grants a categorical "exemption from the gender discrimination aspect of the policy" for fraternities and sororities. Dkt. 18 at 14 n.7; *see also* Compl. ¶¶ 103-106. And Wayne State provides nothing more than supposition to counter InterVarsity's allegations that recognized student groups have been allowed to discriminate on the bases of religion, nationality, race, and sex. Compl. ¶¶ 95-102, 107-09.

Wayne State admits to creating categorical exemptions for fraternities to only admit men, but not for a religious organization to select religious leaders. When a government actor "creates a categorical exemption for individuals with a secular objection [to the policy] but not for individuals with a religious objection," that categorical distinction "is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Fraternal Order of Police*, 170 F.3d at 365. This

admission alone shows InterVarsity stated a claim and subjects Wayne State to strict scrutiny.

The rest of Wayne State's exemptions fare no better. Wayne State's main defense of its patchwork of exemptions is to assert that they are "obviously justifie[d]" because they are "patently rational." Dkt. 18 at 12-13 nn.5-6. The adverbs are the tell. To Wayne State, it is "obviously" and "patently" reasonable for University programs and recognized student groups to exclude individuals from participation or membership on bases such as sex, gender identity, and race, but when InterVarsity exercises its long tradition in the much narrower context of religious leadership selection, InterVarsity is turning students into "second-class citizens." *Id.* at 17.

That is precisely the kind governmental "value judgment" against religious motivations that the Free Exercise Clause does not allow. *Fraternal Order of Police*, 170 F.3d at 366. Wayne State's actions are thus subject to strict scrutiny, which it cannot hope to survive. *See supra* III.C.

***Neutrality*.** A government action is not "neutral" if its "object or purpose" is to "restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Although Wayne State claims that its action was "facially neutral," Dkt. 18 at 17, the Supreme Court has held that "[f]acial neutrality is not determinative." *Lukumi*, 508 U.S. at 534. Rather, the Free Exercise Clause also forbids "covert suppression" of religion and "subtle departures from neutrality"; government hostility that is "masked" as well as "overt." *Id.*

There's nothing subtle or masked about Wayne State's avowed hostility to InterVarsity's sincere religious beliefs. Wayne State specifically rejects InterVarsity's belief that its leaders should embrace the faith that they profess, branding that belief as a "religious pledge" which erects "discriminatory barriers" and "make[s] second-class citizens of students." Dkt. 18 at 11, 17. That hostility alone is sufficient to trigger strict scrutiny.

Moreover, that hostility has led Wayne State into singling out InterVarsity in ways that its own

policies have never required before, still do not require on their face, and which Wayne State refuses to apply to other groups. Wayne State's position before this Court marks a sharp departure from 75 years of respecting InterVarsity's right to select its leaders. Compl. ¶¶ 4-5, 40-45. And while Wayne State now finds InterVarsity's *leadership* selection to be intolerably "discriminatory," it admits that it continues to allow both its own programs and other student groups to select *members* in ways that are just as selective. But the sole piece of documentary evidence that Wayne State submitted to this Court affirms that its nondiscrimination policies are explicitly applied only to *membership* requirements, and that there is no parallel requirement regarding leadership eligibility. *See* Dkt. 18-1 at 6 (stating that "Membership must be open to all currently registered WSU students" under the "Anti-Discrimination Policy," but making no similar requirement for leadership). Accordingly, Wayne State is targeting InterVarsity for a religious leadership policy that complies with Wayne State's previous longstanding enforcement position and its current explicit language, all while it ignores other groups that violate its policy.

"A double standard is not a neutral standard." *Ward*, 667 F.3d at 740. Wayne State's "exception-ridden policy" is "the antithesis of a neutral and generally applicable policy." *Id.* Thus, it "must run the gauntlet of strict scrutiny." *Id.* As noted above, it fails that test.

Wayne State makes one passing attempt to avoid scrutiny entirely, arguing that its discriminatory targeting is permissible because it is just withholding "privileges" from InterVarsity and not imposing a ban. Dkt. 18 at 17. But the Supreme Court directly rejected that argument last summer: "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Trinity Lutheran*, 137 S. Ct. at 2022 (citation omitted). This means that "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (citation and internal quotation marks

omitted). Thus, being "denied university money and access to private university facilities for meetings" violates InterVarsity's First Amendment rights. *Walker*, 453 F.3d at 864. Moreover, by targeting InterVarsity for disfavor, ending its 75-year ministry on campus, and labeling InterVarsity as discriminatory, Wayne State is stigmatizing InterVarsity and sending a message to InterVarsity's students that they are not equal members of the campus community. That injury goes far beyond suspending access to "privileges." *Cf. Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) ("being subjected to discrimination is by itself an irreparable harm" to religious exercise); Compl. ¶ 79 (exclusion stigmatized InterVarsity and its members).

F. InterVarsity has stated a claim under the Establishment Clause.

Wayne State's actions violate the Establishment Clause both by interfering in the autonomy of a religious organization and by overtly singling out religion and religious groups for opprobrium. Only Count V deals with the Establishment Clause alone. On that count, Wayne State argues that only facially discriminatory laws must face strict scrutiny; all others are subject to the *Lemon* test. Dkt. 18 at 15 (citing *Harkness v. Secretary of Navy*, 858 F.3d 437, 447 (6th Cir. 2017)). But in *Harkness*, the Navy had a facial policy for the court to analyze, so the court did not need to look beyond it. *Harkness*, 858 F.3d at 447. Here, Wayne State has a web of policies and exemptions which result in favoritism among religious groups. Wayne State's argument would allow any government to avoid the scrutiny of *Larson* simply by making its policies vague and exploiting that vagueness in discriminatory ways. The better reading of *Harkness* is that its reasoning does not apply when there is no clear facial policy to analyze.

Even if Wayne State's actions were analyzed under *Lemon*, or the historical practices test adopted by the Supreme Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), InterVarsity has stated a claim. Wayne State's actions do not have a valid secular purpose, since its purpose was to discriminatorily penalize InterVarsity's "religious pledge"; its actions inhibit religion,

Compl. ¶¶ 71-74, 84; and its actions create excessive entanglement by leaving enforcement of the policy's various unwritten exceptions and qualifications in the hands of University personnel. *Supra* at III.B.2. Under the historical practices approach from *Town of Greece*, InterVarsity has alleged exactly the sort of interference with religious governance that the Establishment Clause was designed to prevent. *See Hosanna-Tabor*, 565 U.S. at 184 (explaining how the Establishment Clause ensures the government will not be involved in the selection of ministers).

IV. Plaintiffs adequately alleged a violation of the Equal Protection Clause.

Wayne State distorts the nature of InterVarsity's equal protection claim, arguing that InterVarsity is seeking special treatment rather than equal treatment. Dkt. 18 at 19. Not so. Of all of the student clubs, academic activities, sports teams, and fraternities and sororities that have selective membership and leadership policies, Wayne State has chosen to target only one—a religious student organization—and done so precisely because it utilizes a "religious pledge." *Id.* at 17. Since Wayne State has chosen to single out a religious organization for disfavored treatment, its actions are subject to strict scrutiny. *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008) ("Strict scrutiny applies where the classification affecting eligibility for benefits is based on religion or burdens the exercise of religion.").

And because Wayne State has employed a classification based upon religion, InterVarsity need not allege discriminatory intent. But it has done that, too. Compl. ¶¶ 64, 93-115. Discriminatory intent may be alleged by pointing to "a clear pattern" of selective application as well as "[t]he specific sequence of events leading up to the challenged decision," or "[d]epartures from the normal procedural sequence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977). Here, a "clear pattern" of selective enforcement is shown by the fact that the University has failed to enforce its policy against a wide variety of student groups, even though it concedes that some of them discriminate on the basis of sex, and InterVarsity alleged facts

indicating that many of them discriminate on other bases. *See* Complaint at ¶¶ 65, 95-110; Dkt. 18 at 14 n.7. The "sequence of events" following the University's initial decision to derecognize InterVarsity also suggest bias, such as the University's threat "to take aggressive measures" and its refusal to grant provisional recognition to InterVarsity. Compl. ¶¶ 80-82; Compl. Ex. B. Further, the University's decision to derecognize InterVarsity without any opportunity for the organization to defend itself was a departure "from the normal procedural sequence" guaranteed to students and student organizations and is further evidence of bias. Complaint ¶ 91. More evidence of discriminatory intent may be uncovered in discovery. InterVarsity has alleged more than enough for its equal protection claim to survive the motion to dismiss. *See Arlington Heights*, 429 U.S. at 266 (determining discriminatory intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").

V. InterVarsity has stated a claim under Section 1983 and the Due Process Clause.

Wayne State claims that InterVarsity has no liberty or property interest in recognition by the University, and therefore Wayne State may derecognize it by fiat and without an opportunity for a hearing. Dkt. 18 at 19-20. But in *Healy v. James*, the Supreme Court expressly rejected the argument that recognition was merely a "seal of official college respectability." *Healy v. James*, 408 U.S. 169, 182 (1972). Instead, the right of recognition was integral to the exercise of constitutional rights such as freedom of association and protected by the constitution. *Id.* at 183.

Wayne State similarly offers no support for its puzzling suggestion that the denial of a liberty interest protected by the Constitution is not protected by the right to procedural due process. Dkt. 18 at 19-20. In *Healy*, when the university president denied recognition without according the group any process, the district court held that "constitutional due process requires that a timely hearing be noticed and the petitioners be given at least an opportunity to be heard." *Healy v. James*, 311 F. Supp. 1275, 1282 (D. Conn. 1970). And the Supreme Court's decision concluded that the

university's denial of recognition violated due process in at least one respect—by improperly shifting the burden of proof to the student group. *Healy*, 408 U.S at 184-85. InterVarsity has pled more than enough to state a claim for violations of Section 1983 and the Due Process Clause.

VI. InterVarsity has stated a claim under the Michigan Constitution.

As Wayne State concedes, the provisions of the Michigan constitution that InterVarsity raises are at very least "coterminous" with the United States Constitution. Dkt. 18 at 14-15 (citing *In re Contempt of Dudzinski*, 667 N.W.2d 68, 72 (Mich. App. 2003)). InterVarsity has stated a claim under each of the provisions of the United States Constitution that it has raised and Wayne State has made no alternative arguments concerning the Michigan Constitution. Accordingly, all of InterVarsity's state constitutional claims survive the motion to dismiss for that reason alone.

However, Wayne State neglects to mention one very significant difference between the Free Exercise Clause and Article I, Section 4 of the Michigan Constitution. The Michigan Supreme Court held that claims under the state constitution are "analyze[d] . . . under the compelling state interest test developed by the United States Supreme Court in *Wisconsin v. Yoder* and *Sherbert v. Verner*." *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), *opinion vacated in part*, 593 N.W.2d 545 (Mich. 1999).[5] In other words, InterVarsity does not have to prove that Wayne State acted out of discriminatory intent in order to receive the full protection of the Michigan Constitution. As discussed above, Wayne State's policy substantially burdens InterVarsity's religious exercise, and therefore strict scrutiny applies.

VII. Plaintiffs will voluntarily dismiss Count XI.

Plaintiffs have determined that the best forum for a claim under the Higher Education Act is a complaint to the Civil Rights Division of the U.S. Dept. of Justice, and will not press this claim

[5] In response to a motion for rehearing, the Court vacated the application portion of the decision and sent it back to the circuit court for further consideration. The Court did not, however, repudiate the proper test to apply to claims brought under Article 1, Section 4 of the Michigan Constitution.

before this Court.

VIII. Plaintiffs adequately alleged violations of the Elliott-Larsen Civil Rights Act.

The Wayne State Defendants argue that Plaintiffs lack standing to bring a claim under the Elliott-Larsen Civil Rights Act ("Civil Rights Act") because portions of the act apply only to "individuals." Dkt. 18 at 20-21. This ignores the plain text of the statute. Section 37.2701 (Count XIII) protects "person[s]" rather than "individual[s]." Plaintiffs are "persons" within the meaning of the Act.[6] Second, Section 37.2402 (Count XII) prohibits educational institutions from "Announc[ing] or follow[ing] a policy of denial or limitation through a quota or otherwise of educational opportunities of *a group or its members* because of religion, race, color, national origin, or sex." Mich. Comp. Laws § 37.2402(e) (emphasis added). The use of "group or its members" demonstrates that this provision of the statute is not limited to individuals, *i.e.* members of a group, but protects groups as well. Plaintiffs are just such a group whose educational opportunities have been limited by Defendants' actions.

With regard to Count XIV,[7] Wayne State relies upon *Safiedine v. City of Ferndale*, 753 N.W.2d 260, 261 (Mich. Ct. App. 2008), *aff'd in part, vacated in part*, 755 N.W.2d 659 (Mich. 2008), which holds that a corporation may not claim a violation of Section § 37.2302 of the Civil Rights Act.[8] But *Safiedine* did not deal with an expressive association. The Supreme Court has recognized that expressive associations have unique constitutional protections that do not apply to organizations that do not engage in expressive activity. *Boy Scouts of Am. v. Dale*, 530 U.S. 640,

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[6] Mich. Comp. Laws § 37.2103(g) (defining "person" to include "an . . . association, corporation, . . . unincorporated organization, . . . or any other legal or commercial entity.").

[7] Due to a typographical error, this was listed as Count XII.

[8] The Michigan Supreme Court vacated *Safiedine* in part because the Court of Appeals overreached and applied its conclusions regarding Section § 37.2101 to the remainder of the Elliott-Larsen Civil Rights Act. *Safiedine v. City of Ferndale*, 755 N.W.2d 659 (Mich. 2008). So *Safiedine* at most applies to one of InterVarsity's state statutory claims.

648 (2000). This is because "freedom of association of this kind" is "an indispensable means of preserving other individual liberties." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). *Safiedine* itself is suspect. Supreme Court precedent since *Safiedine* calls into question the Court of Appeals' determination that the right against discrimination on the basis of characteristics such as religion are "peculiarly 'human'" and "inherently inapplicable to corporate or judicial entities." *Safiedine*, 753 N.W.2d at 263. In recent years, the Supreme Court has emphatically clarified that "First Amendment protection extends to corporations." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). That is similarly true for the right against discrimination on the basis of religion. *See Hobby Lobby*, 134 S. Ct. at 2768 ("We have entertained RFRA and free-exercise claims brought by nonprofit corporations"); *Trinity Lutheran*, 137 S. Ct. at 2039 ("the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause" as applied to religious corporations).

Defendants also argue, Dkt. 18 at 21 & n.11, that Plaintiffs' retaliation claim (Count XIII) fails because Wayne State derecognized InterVarsity before InterVarsity complained. But the record supports the retaliation complaint. In October 2017, InterVarsity still enjoyed provisional approval and had the ability to reserve free rooms. Compl. ¶ 59. It was only after the chapter president emailed the University claiming a violation of First Amendment rights of religious expression that Wayne State confirmed that the chapter was derecognized and cancelled all of the group's meeting-space reservations. Compl. ¶¶ 67, 69. Furthermore, Wayne State threatened to "take aggressive measures" after InterVarsity warned that it may need to sue to enforce its rights. Compl. ¶ 80. A reasonable jury could infer that Wayne State's actions constitute retaliation.

CONCLUSION

For all these reasons, Wayne State's motion should be DENIED in its entirety.

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Respectfully submitted,

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