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

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, and INTERVARSITY CHRISTIAN FELLOWSHIP WAYNE STATE UNIVERSITY CHAPTER,

Plaintiffs,

v.

BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, GOVERNOR RICHARD SNYDER, ATTORNEY GENERAL WILLIAM SCHUETTE, DIRECTOR AGUSTIN ARBULU, ROY WILSON, SANDRA HUGHES O'BRIEN, DAVID A. NICHOLSON, MICHAEL BUSUITO, DIANE DUNASKISS, MARK GAFFNEY, MARILYN KELLY, DANA THOMPSON, KIM TRENT, DAVID STRAUSS, and RICARDO VILLAROSA,

Defendants.

Case No. 1:18-cv-00231-PLM-RSK

Hon. Paul L. Maloney

ORAL ARGUMENT REQUESTED

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REPLY BRIEF IN SUPPORT OF THE WAYNE STATE DEFENDANTS' MOTION TO DISMISS – ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs' Response ("Resp.") to Wayne State's Motion to Dismiss ("MTD") advances a jumble of arguments that seem intended to confuse this Court into believing that somewhere in all these counts a valid claim must exist. None does.

II. ARGUMENT

Plaintiffs summarize their claims this way: "Simply put, Wayne State is unconstitutionally targeting InterVarsity because of [its] religious beliefs." Compl. ¶ 7. Their central claims thus involve the speech clause and the free exercise clause of the First Amendment.[1] Plaintiffs raise the former in Counts VI, VII, and VIII and the latter in Counts I, II, III, IV, and V. These eight counts thus amount to two, because Plaintiffs either have a claim under these clauses or they do not—regardless of how many labels they use.[2] The remaining twelve counts consist of add-on claims under various federal and state laws that contribute nothing to Plaintiffs' case.

A. Plaintiffs Have No Claim Under the Speech Clause

In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), a religious student organization challenged a public law school's requirement that it comply with the institution's non-discrimination policy in order to receive the benefits of recognition. The club required all its members and officers to sign a "statement of faith," the same sort of commitment InterVarsity-Wayne seeks from its leaders. *Id.* at 672. The law school, like Wayne State, rejected the club's application for recognition because it demanded (in the words of the United States Supreme Court) a "preferential exemption" from the policy. *Id.* at 669.

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[1] Plaintiffs also invoke the Establishment Clause in many of their free exercise counts, but, as will be discussed, that claim is redundant with their free exercise claim as pled.

[2] It is a well settled principle that courts are "not bound by a party's choice of labels," but rather "seek to determine the gravamen of a party's claim" *Attorney Gen. v. Merck*, 807 N.W.2d 343, 347 (Mich. Ct. App. 2011).

On its face, the law school's policy is indistinguishable from the one at issue here. It prohibited discrimination on numerous bases, including religion; the school applied it to student organizations; it prohibited discrimination both as to membership and leadership; and it denied non-compliant organizations the benefits of recognition, but did not ban them from campus. *Id.* at 671, 673.[3] Plaintiff there, like Plaintiffs here, claimed that applying this policy violated its rights to free speech, expressive association, and free exercise of religion. *Id.* at 668. The Supreme Court upheld the policy.

In so doing, the Court ruled that a public-university-created program for recognized student organizations constitutes a "limited public forum." *Id.* at 679 n. 12.[4] Under this analytic model, a university has "a right" to control access to the forum, so long as any barrier to access is reasonable and viewpoint neutral. *Id.* at 679. The Court noted that this "less restrictive" review of the policy was particularly appropriate because the club remained free to exclude any person for any reason; it just could not do so and receive official recognition. *Id.* at 682, 687 n. 17.

The Court easily found the law school's policy reasonable. *Id.* at 687-90. And the Court concluded that the policy was viewpoint neutral for a variety of reasons. Among them was that the policy targeted the organization's act of rejecting a would-be group member, not its viewpoint. *Id.* at 696. The Court stressed that what stood between the group and recognized student organization status was its conduct, not its perspective. *Id.* Indeed, the Court observed that the student

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[3] The only distinction between the policies lies in interpretation. The law school interpreted its nondiscrimination policy as standing for the proposition that student organizations had to accept all comers. *Id.* at 675. Wayne State, in contrast, interprets its policy as prohibiting discrimination based on certain specified criteria. As will be discussed, the only federal appellate court opining on the issue has held that this distinction does not make a difference to the legal analysis or outcome.

[4] The Court held that the limited public forum doctrine controlled *both* the free speech and expressive association claims. *Id.* at 680. This disposes of Plaintiffs' argument here that the latter requires separate or different analysis. *See* Resp. at 4.

organization had confused its own "viewpoint-based objections to nondiscrimination laws" with institutional viewpoint discrimination. *Id.*[5]

In their Response, Plaintiffs raise several arguments to try to distance this case from *Martinez*. All of them fail.

Plaintiffs attempt to distinguish *Martinez* on the basis that the Court there "focused on membership, not leadership." Resp. at 6. This is untrue. To the contrary, one of the law school's principal arguments focused on the equal leadership opportunities its policy fostered. *Martinez*, 561 U.S. at 688. Furthermore, the *Martinez* Court discussed at length, and rejected, the plaintiff's argument that the law school's policy would allow antagonists to engage in a "hostile takeover" of organizational leadership. *Id.* at 692-94.

Plaintiffs here further argue that *Martinez* is distinguishable because the law school interpreted its policy to apply to "all comers" while Wayne State's policy prohibits discrimination. Resp. at 6. This factual distinction makes no legal difference. As discussed in Wayne State's Motion to Dismiss, in *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011) the court upheld the validity of a university nondiscrimination policy based on the same analysis used in *Martinez*. Plaintiff cites no authority that contravenes *Reed*.

This prompts Plaintiffs to take the bizarre position that *Reed* is distinguishable because Wayne State actually has no policy addressing discrimination by student organizations. Resp. at 7. They argue that, because Wayne State's policy does not explicitly mention student

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[5] Plaintiffs here are similarly confused. This leads them to cite *Agency for Int'l Dev. v. All for an Open Soc'y Int'l*, 570 U.S. 205 (2013), which they say stands for the proposition that the government cannot "condition benefits such as grants or contracts on an organization's willingness to adopt the government's preferred viewpoint." Resp. at 4. As the Supreme Court observed in *Martinez*, such an argument misses the point entirely because a nondiscrimination policy does not require a student group to adopt a particular view, it just requires them not to treat students differently on prohibited bases.

organizations, it must not apply to them. But this inexplicably ignores the use of the word "all" in the policy.[6] And, ironically, the policy at issue in *Martinez* does not appear to have explicitly included student organizations, either.[7]

Finally, Plaintiffs argue that *Reed* actually helps them because the Ninth Circuit remanded the case in light of evidence that the university had applied its policy in a discriminatory way. Resp. at 9. Plaintiffs contend they have similar evidence. *Id.* They are wrong. In *Reed*, the plaintiff submitted evidence that the university recognized the Newman Center even though *its application for official status* provided that its officers had to be members of the Catholic Church. *Reed*, 648 F.3d at 804. Further, the plaintiff there provided evidence that the African Student Drama Association's *constitution* limited its leadership positions to students from Africa. *Id.* In contrast, Plaintiffs here have pointed to nothing more than a miscellany of informal statements made online by various student organizations that do not exclude the possibility that those clubs comply with the nondiscrimination policy. *See* MTD at 12-14.

On this point, Plaintiffs' Response reflects a deep misunderstanding of what federal pleading standards require after *Twombly* and *Iqbal*. As an initial matter, in a 12(b)(6) context a court does not credit conclusory legal allegations, including allegations of discriminatory intent. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). *See also id.* at 686-87 (holding that it does not suffice under rule 8 for a plaintiff to allege discriminatory intent

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6 *See Nixon v. Kent Cty.*, 76 F.3d 1381, 1386 (6th Cir. 1996), reiterating the general rule that in interpreting statutes the plain meaning of the language controls.

7 Plaintiffs seem to think that it is unclear whether the policy applies to student organizations because some exceptions exist. Resp. at 7. This makes no sense. An otherwise generally applicable nondiscrimination policy may be subject to exceptions—indeed, they commonly are. For example, a nondiscrimination policy may generally apply to employment decisions, while also allowing for the consideration of gender in the case of hiring a locker room attendant.

generally). This matters here because, even if it were the case that other student organizations were not in compliance with the nondiscrimination policy (*see* Resp. at 9-10), Plaintiffs would have to plead specific allegations showing that Wayne State was aware of their noncompliance, chose to do nothing about it, and made this decision out of an intent to discriminate against Plaintiffs. Of course, the Complaint includes no such factual allegations because those facts do not exist.

Furthermore, Plaintiffs' allegations that other student organizations are not in compliance with the nondiscrimination policy (again, *see* Resp. at 9-10) do not pass muster under *Iqbal.* Plaintiffs rely upon allegations that they believe make it *conceivable* other student organizations do not follow the policy or that Plaintiffs believe are *consistent with* the conclusion they do not do so. But *Iqbal* and its progeny make clear that such allegations do not suffice. *See Iqbal*, 556 U.S. at 680 ("[R]espondent's complaint has not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"). *See also In re Century Alum. Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*."). Nothing in Plaintiffs' allegations "tends to exclude the possibility" that the cited student organizations comply with the nondiscrimination policy. To the contrary, as noted in the Motion to Dismiss, a student organization can have the goal of advancing a group's interests or bringing a group together without discriminating against those outside the group. *See* MTD at 13.

For all these reasons, Plaintiffs have failed to state a claim under the speech clause.[8]

B. Plaintiffs Have No Claim Under the Free Exercise Clause

The Court in *Martinez* rejected the plaintiff's free exercise claim because the student organization was seeking preferential treatment, not equal treatment. *Martinez*, 561 U.S. at 697 n. 27. The same holds true here.

Plaintiffs raise two arguments in response. First, they contend that the free exercise clause gives a student organization an absolute right to choose its leaders.[9] Resp. at 11-15. This is inconsistent with *Martinez*, where the Court upheld the law school's requirement that the student organization take "all comers" for its leadership positions. Plaintiffs' argument would require the Supreme Court to reverse *Martinez*, which it plainly has not done.

Second, Plaintiffs argue that Wayne State has treated them unequally. In support of this claim, Plaintiffs cite a collection of cases where the record showed government hostility toward a particular religious belief. *See* Resp. at 16. The Complaint does not, and cannot, allege any facts showing similar hostility here.

Plaintiffs further argue that Wayne State has treated them unequally because the school has carved out some exceptions to its nondiscrimination policy, pointing specifically to fraternities, sororities, and club sports. Resp. at 17. This argument ignores the relevant legal test, which is whether Wayne State implemented these exceptions *for the purpose* of suppressing Plaintiff's viewpoint. *See Reed*, 648 F.3d at 801. The Complaint includes no facts making it plausible that

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[8] These arguments dispose of *all* of Plaintiffs' duplicative claims in Counts VI, VII, and VIII. As *Martinez* held, the concepts of "expressive association" and "compelled speech" add nothing here. *See Martinez*, 561 U.S. at 680.

[9] In support of this argument, Plaintiffs continue to rely upon the inapposite case of *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012), which Wayne State distinguished in its Motion to Dismiss and will not belabor further. *See* MTD at 15.

Wayne State did any such thing.

Further, Plaintiffs' argument is simply a variation on one that *Reed* rejected. Plaintiff there contended that the school's policy was unconstitutional because it did not cover political ideology, effectively creating an exception for some student organizations. The *Reed* court held that this did not show an intent to suppress religious views, just as Wayne State's reasonable exceptions do not. *Id.* Indeed, Plaintiffs' position defies common sense and leads to absurd results: under their argument, a decision by Wayne State to allow a women's lacrosse club to limit its membership to women would somehow reveal an intent to disfavor a different group's religious viewpoint.[10] It obviously doesn't.

C. Plaintiffs' Add-On Claims Add Nothing

The Response confirms that Counts IX, X, and XX simply reiterate Plaintiffs' free exercise claim under other labels. Count IX alleges that Wayne State interfered with Plaintiffs' right to assemble to engage in protected religious activities and speech. Compl. ¶ 193. But, as discussed, no violation of Plaintiffs' speech or free exercise rights has occurred. Count X claims that Plaintiffs' Equal Protection rights have been violated because Wayne State has favored other religious organizations. Compl. ¶ 32. As noted above, however, Plaintiffs have failed to make factual allegations sufficient to support their claim of unequal treatment. Finally, Count XX claims that Wayne State deprived Plaintiffs of their "Constitutional rights" without due process. Compl. ¶ 272. Wayne State did not deprive Plaintiffs of any of their rights, period.

[10] Plaintiffs' Establishment Clause claim is based on the theory that Wayne State "interfer[ed] in the autonomy of a religious organization" and "overtly single[d] out religion and religious groups for opprobrium." Resp. at 20. The Response thus makes clear that Plaintiffs' Establishment Clause claim is nothing more than a reiteration of their free exercise claim under a different label. Their Establishment Clause claim therefore fails for all the reasons just stated, as well as the additional reasons set forth in the Motion to Dismiss.

Counts XII, XIII, and XIV[11] purport to raise claims under the Michigan Elliott-Larsen Civil Rights Act (ELCRA). Those claims primarily fail because, as discussed above, the Complaint does not include factual allegations that support a claim of discriminatory treatment. They fail for other, more technical reasons as well.

Count XII relies upon MCL 37.2402. By its express terms, the nondiscrimination provision of ELCRA (MCL 37.2402(a)) applies only to "individuals." In its Response, Plaintiffs contend that it also applies to groups, citing MCL 37.2402(e). Section (e), however, obviously concerns a narrower and different issue. The language of (e) clearly signals that this provision addresses matters like applying "quotas" to "groups" in ways that deny them "educational opportunities," such as admission.[12] Plaintiffs' argument stretches section (e) beyond all recognition and they cite no case law in support of their strained interpretation of this provision.

Count XIII fails because it relies upon MCLA 37.2701, which prohibits retaliation against a person who has opposed a violation of the Act. The Complaint itself belies this claim. Wayne State applied the nondiscrimination policy to Plaintiffs immediately upon receipt of their application, not in "retaliation" for anything. Compl. ¶¶ 59-61. The Response argues that Wayne State did not derecognize InterVarsity-Wayne until it asserted its rights. Resp. at 25. But the Complaint shows that, throughout the process, Wayne State consistently took the position that the nondiscrimination policy applied to the organization. *See* Compl. at ¶¶ 60-82.

Count XIV[13] relies on MCL 37.2302. As Wayne State pointed out in its Motion to Dismiss,

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[11] This count is mislabeled as a second Count XII.

[12] So, for example, this section would prohibit a public university from adopting a policy that imposed a quota on the number of Jewish students it admitted. "Group" in this context plainly refers to an identity group, not to a student organization as Plaintiffs contend.

[13] Again, Count XIV is mislabeled as a second Count XII.

the Michigan Supreme Court in *Safeidine v. City of Ferndale*, 755 N.W.2d 659 (Mich. 2008) held that entities do not have standing to bring claims under this section. *See* MTD at 20. The Response appears to concede that *Safeidine* disposes of Plaintiffs' statutory claim under this provision (*see* Resp. at 24 n. 8), but oddly does not agree to dismiss it.[14]

This leaves only Plaintiffs' claims under the Michigan Constitution, Counts XV-XIX.[15] The Response generally concedes that the state constitutional protections are "coterminous" with the federal, Resp. at 23, and so add nothing. The Response does, however, argue that the Michigan free exercise clause differs from its federal counterpart by not requiring proof of discriminatory intent. Response at 23. Plaintiffs misread the case they cite in support of that proposition, *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998). *McCready* nowhere states that the Michigan Constitution applies a different standard than the United States Constitution. To the contrary, the Court concludes the relevant portion of its analysis by declaring that "[t]he Defendants' freedom to exercise their religion *under the Michigan and federal constitutions*" had not been violated. *Id.* at 729.

III. CONCLUSION

In a good faith effort to resolve this dispute, Wayne State granted InterVarsity-Wayne recognized student organization status and refunded the fees it paid when it was unrecognized. Plaintiffs have nevertheless persisted in a case that names unnecessary defendants,[16] that includes claims so frivolous that Plaintiffs have abandoned them, and that—despite twenty counts and more

[14] As noted above, the Response does, however, agree to dismiss voluntarily Plaintiffs' meritless claim under the Higher Education Act. Resp. at 23.

[15] Count XV is mislabeled as Count XIII and Count XVI is mislabeled as Count XIV.

[16] Wayne State agrees that defendants Snyder, Schuette, and Arbulu do not belong in this case.

than forty pages—fails to advance a single valid cause of action.[17] For the reasons set forth above, Wayne State respectfully requests that this Court grant its Motion to Dismiss.

Dated: June 18, 2018

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[17] Indeed, this case has served no purpose beyond giving The Becket Fund for Religious Liberty the opportunity to promote itself and issue press releases. *See* InterVarsity Christian Fellowship v. Wayne State University, https://www.becketlaw.org/case/intervarsity%E2%80%AFchristian%E2%80%AFfellowship%E2%80%AFv-wayne-state-university/# (last visited June 11, 2018).

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of such filing to all attorneys of record. The foregoing paper was re-filed pursuant to Case Manager Deborah Tofil's instructions after the matter was transferred from the United States District Court for the Western District of Michigan to Judge Borman of the United States District Court for the Eastern District of Michigan.

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