IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, *et. al.*,

Plaintiffs,

v.

BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, *et. al.*,

Defendants.

Case No. 3:19-cv-10375
Hon. Robert H. Cleland

/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in the attached brief, Defendants Board of Governors of Wayne State University, Roy Wilson, Sandra Hughes O'Brien, Michael Busuito, Mark Gaffney, Marilyn Kelly, Dana Thompson, Bryan C. Barnhill II, Anil Kumar, Shirley Stancato,[1] David Strauss, and Ricardo Villarosa (collectively, "Defendants"), by and through their attorneys Honigman LLP, hereby move this Court pursuant to Fed. R. Civ. P. 56 for an order granting summary judgment in favor of Defendants on the remaining claims in Plaintiffs' Complaint.

[1] The individual board members are sued only in their official capacity. The Complaint originally named David A. Nicholson, Diane Dunaskiss, and Kim Trent as defendant members of the Board of Governors of Wayne State University. Since the filing of this lawsuit, Nicholson, Dunaskiss, and Trent have been replaced by Barnhill, Kumar, and Stancato.

Pursuant to Local Rule 7.1, on October 21, 2020, counsel for Defendants spoke with Plaintiffs' counsel requesting concurrence in the relief sought in this motion, and concurrence has not been reached.

Respectfully submitted,

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Dated: October 22, 2020

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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WSU's Non-Discrimination Policy

1. In 1959, Wayne State University ("WSU") adopted a Nondiscrimination Policy. Historic Policy, Appx. Ex. 1, WSU005323-324. As a general matter, since its inception, the Nondiscrimination Policy has provided that "[i]n the operations and activities of the university there shall be no discrimination on the basis of race, color, religious belief, country of origin, or ancestry." *Id.* at WSU005323.

2. In 2010, WSU adopted the current version of the policy, now named the Non-Discrimination/Affirmative Action Policy and identified as Ch. 2.28.01 of the Board of Governors Code (the "Non-Discrimination Policy"). Non-Discrimination Policy, Appx. Ex. 2, WSU001371-373.

3. The Non-Discrimination Policy provides that "Wayne State University is committed to a policy of non-discrimination and equal opportunity in all of its operations, employment opportunities, educational programs and related activities." *Id.* Specifically, in relevant part Chapter 2.28.01.020 provides:

> This policy embraces all persons regardless of race, color, sex (including gender identity), national origin, religion, age, sexual orientation, familial status, marital status, height, weight, disability, or veteran status and expressly forbids sexual harassment and discrimination in hiring, terms of employment, tenure, promotion, placement and discharge of employees, admission, training and treatment of students, extracurricular activities, the use of University services, facilities, and the awarding of contracts.

Id. at WSU001371.

4. The Non-Discrimination Policy further makes clear that it "shall not preclude the University from implementing those affirmative action measures which are designed to achieve full equity for minorities and women." *Id.*

5. The Non-Discrimination Policy on its face extends to extracurricular activities. *Id.* Defendant David Strauss ("Strauss"), Dean of Students, testified that WSU understands the Non-Discrimination Policy to apply to student organizations and their leadership and membership decisions. Transcript of the Deposition of David Strauss ("Strauss Dep."), Appx. Ex. 3, pg. 129.

6. Further, the Student Code of Conduct, which applies to students and student organizations, prohibits failure to comply with published regulations or policies, including "University statutes prohibiting discrimination." Excerpt of Student Code of Conduct, Appx. Ex. 4, WSU001002.

Student Organizations at WSU

7. WSU, through the Dean of Students Office, administers a system of registered student organizations. Strauss Dep. at pg. 16-17.

8. There are currently roughly 550 registered student organizations on campus. Strauss Dep at pg. 119; Transcript of the Deposition of Ricardo Villarosa ("Villarosa Dep."), Appx. Ex. 5, pg. 41. These organizations cover a wide variety of interests. *See* Get Involved Website, Appx. Ex. 6, WSU001240.

9. The mission of the Dean of Students Office, as it relates to student organizations, is to:

a. "support student organizations as a means of enriching the campus life experience for organization members and the greater campus community;"

b. "[d]evelop student organizations so that they may provide quality programs, services, and leadership opportunities that enhance classroom learning and compliment the Wayne State experience;" and

c. "support student intellectual growth and social maturity through promoting ethical development, appreciating diversity, encouraging civic engagement, providing leadership development, and supporting the establishment of meaningful interpersonal relationships."

WSU Website: Student organization resources, Appx Ex. 7, WSU000603; Villarosa Dep., Appx. Ex. 5 at pg. 43-44.

10. In addition, Strauss testified that student organizations serve students and the University by promoting "student involvement [that] leads to feeling – to being connected to campus. And when a student is connected to something or some things or someone on campus, the data will show you that those students retain at a higher rate and graduate at a higher rate." Strauss Dep., Appx. Ex. 3 at 120-121.

11. Registered status provides certain privileges to student organizations. WSU Website: Get involved on campus, Appx. Ex. 7; Villarosa Dep., Appx. Ex. 5, pg. 44-45.

12. Registered student organizations have the ability to reserve space in the Student Center on campus or other WSU spaces for free or at a discounted rate. WSU Website: Get involved on campus, Appx. Ex. 7, WSU000630-631; Sample Contract, Appx. Ex. 8, WSU001318. Students may also reserve tables in the Student Center for recruiting purposes. Villarosa Dep., Appx. Ex. 5, pg. 53-54.

13. Registered student organizations may apply for funding from the Student Activities Funding Board. WSU Website: Get involved on campus, Appx. Ex. 9; Villarosa Dep., Appx. Ex. 5, pg. 44-45.

14. Registered student organizations may participate in campus events, including FestiFall, Student Organization Day, and Winterfest. *Id.* These are campus wide events that allow registered student organizations to set up information tables to meet students. Strauss Dep., Appx. Ex. 3, pg. 21-23.

15. Registered student organizations have access to lockers in the WSU Student Center. WSU Website: Get involved on campus, Appx. Ex. 7, WSU000603; Villarosa Dep., Appx. Ex. 5, pg. 44-45.

16. Registered student organizations are also listed as active on the Dean of Students Office's website and have access to certain online functions through

Engage, the platform utilized by WSU to manage student organization registrations. Strauss Dep., Appx. Ex. 3, pg. 116-17. Registered student organizations may use Engage to calendar events, manage membership, and communicate with members. *Id.* at 117-18.

17. WSU provides all organizations with equal access to the benefits identified above, but, because resources are limited, not every organization receives an equal benefit: for example, there are not enough lockers in the Student Center for each organization, so each registered organization will not receive one. Villarosa Dep., Appx. Ex. 5, pg. 46-47.

18. Social Greek organizations—fraternities and sororities—do not receive benefits in addition to or distinct from those received by other registered student organizations. *Id.*; Strauss Dep., Appx. Ex. 3, pg. 122; Transcript of the Deposition of Ryan Mitchell ("Mitchell Dep."), Appx. Ex. 10, pg. 32.

19. Organizations must complete the registration process annually. Strauss Dep., Appx. Ex. 3, pg. 48.

20. To register an organization, students must complete a form, currently submitted through Engage. Villarosa Dep., Appx. Ex. 5, pg. 14-16. In order to successfully register, the proposed student organization's submission through Engage must:

a. Identify at least two currently registered students who are members of the organization, Students Sharing Success Registration, Appx. Ex. 11, WSU001301-302;

b. Acknowledge certain WSU policies, including the Non-Discrimination Policy, *id.* at WSU001308-310; and

c. Submit a valid operating agreement, *id.* at WSU001303-306.

21. Ricardo Villarosa, Coordinator for Student Life, at all relevant times has handled the registration process for student organizations. Villarosa Dep. at pg. 14, 19, 22. As part of the registration process, Mr. Villarosa reviews every student organization submission to ensure that the organization's leadership and membership criteria in the operating agreement comply with the Non-Discrimination Policy. *Id.* at pg. 91-94. Registered student organizations may not discriminate on the basis of any of the characteristics included in the Non-Discrimination Policy with regards to the selection of leaders or members. *Id.* There is no subsequent monitoring of student organizations for compliance with the policy, unless complaints are brought to the Dean of Students Office. Strauss Dep at pg. 164.

22. Engage allows Villarosa to deny a potential registration and provide comments to the student organization when the application fails to satisfy the requirements for registration. Villarosa Dep. at pg. 26-27. This process allows

students to correct any issues and resubmit the application. *Id.* Villarosa may also meet with the student organization to further discuss the denial, or communicate with them via email. *Id.* at pg. 35-36.

23. Villarosa consults with Strauss or the Office of General Counsel regarding a student organization's application for registration "if there was a flag, if there was something that didn't seem to be the mechanical or the technical" issue. Villarosa Dep. at 29. As an example, Villarosa testified regarding consulting with Strauss and the Office of General Counsel regarding the registration of an organization called Sister 2 Sister due to "membership requirements [that] seemed to be in violation of our gender discrimination policy." *Id.* at pg. 30.

24. Ultimately, decisions to register a student organization or to refuse to register a student organization fall under the authority of Strauss as the Dean of Students, as the designee of the Provost. Strauss Dep. at pg. 32. Strauss testified that "if there's ever a question, [the Dean of Students Office is] consulting with general counsel before we make a final decision." *Id.*

25. WSU's registered student organizations policy recognizes two exceptions to the Non-Discrimination Policy regarding leadership of and membership in registered student organizations. WSU Resp. to Interrogatories, Appx. Ex. 12, pg. 9-10. First, social Greek organizations—in other words, fraternities and sororities—may limit leadership and membership, as well as the

benefits associated therewith, by gender identity in accordance with each organization's respective national charter. Strauss Dep. at pg. 138-140.

26. As Strauss testified, this exception is based on nationally recognized historical exceptions: "When it comes to social fraternities and sororities, [WSU] subscribe[s] to or follow[s] the policies, the historical – the historical operation of the fraternities and sororities in this country and the practices that are followed at all other higher education institutions that have social Greek organizations." Strauss Dep. at pg. 142.

27. Social fraternities and sororities must comply with the remainder of the Non-Discrimination Policy. Villarosa Dep. at pg. 261-262.

28. Second, club sports may limit membership and leadership, as well as the benefits associated therewith, by gender identity. Strauss Dep. at 148. This limitation is necessary in order to "permit[] them to compete in competitions with other teams at other universities." *Id.* at 147. Club sports teams compete externally and must follow the policies of the league in which they compete. *Id.* at pg. 154-156.

29. Club sports must comply with the remainder of the Non-Discrimination Policy. Sample Club Sport Registration Document, Appx. Ex. 13, WSU001262.

30. WSU recognizes these two limited exceptions to the Non-Discrimination Policy consistent with the manner in which the federal government has interpreted Title IX. WSU Resp. to Interrogatories, Appx. Ex. 12, pg. 9-10; Strauss Dep. at pg. 147-148, 153.

31. WSU consistently applies the Non-Discrimination Policy, read in light of the two exceptions stated above, to all student organizations and has denied registration to organizations that improperly restrict membership or leadership based on characteristics identified in the Non-Discrimination Policy. Villarosa Dep. at pg. 202, 215.

32. For example, in 2016, WSU rejected the request for registration by a student group named International Students Life Organization. Int'l Students Life Org. 2016 Registration, Appx. Ex. 14, WSU001867. The International Students Life Organization registration submission limited membership and leadership to "international students." *Id.* at WSU001871. Villarosa, denying registration based on the form submitted, commented, "You must revise your membership statement. All WSU students must be eligible for membership." *Id.* at WSU001867.

33. Similarly, WSU denied registration by the Saudi Student Association in 2017. Saudi Student Ass'n 2017 Registration, Appx. Ex. 15, WSU002166. The Saudi Student Association registration submission limited membership and leadership to Saudi students. *Id.* at WSU002171, WSU002173. Villarosa, denying

registration, commented "Your membership section is inconsistent with the non-discrimination policy" and indicated the criteria must be revised to "offer full membership rights to current WSU students without any prohibited discrimination based on" the characteristics identified in the Non-Discrimination Policy. *Id.* at WSU002166.

34. As a further example, in 2017, WSU denied the request for registration submitted by Sister 2 Sister. Sister 2 Sister 2017 Registration, Appx. Ex. 16, WSU002436. Although the application stated that Sister 2 Sister did not discriminate on the basis of the characteristics enumerated in the Non-Discrimination Policy, Sister 2 Sister limited active membership to students who attended certain events that "are restricted to women." *Id.* at WSU002441. Accordingly, Villarosa denied registration because the requirement "result[ed] in full membership being restricted to women is a violation of" the Non-Discrimination Policy. *Id.* at WSU002436.

35. In 2017, WSU denied the request for registration submitted by the Graduate Indian Student's Association. GISA 2017 Registration, Appx. Ex. 17, WSU002553. In relevant part, the organization listed the following membership criteria: "Must be an Indian origin [sic]." *Id.* at WSU002558. Villarosa denied registration, stating "Must be an Indian origin--violates University nondiscrimination policy." *Id.* at WSU002553.

36. WSU has also applied the Non-Discrimination Policy to refuse to register religious organizations in addition to InterVarsity-Wayne; for example, in 2016, WSU denied the request for registration submitted by Virtuous 31 "an organization of women striving to be Proverbs 31 women by deepening a relationship with Jesus through fellowship and fun." Virtuous 31 2016 Registration, Appx. Ex. 18, WSU001848. Although Virtuous 31 indicated that it was "open to all WSU students," *id.*, Virtuous 31 limited membership (and thus also leadership) to "female" students, *id.* at WSU001852. Villarosa denied the registration, commenting "the portion that includes 'female' as part of the requirement is in violation of the Anti-discrimination policy and is impermissible." *Id.* at WSU001848.

37. Similarly, in January 2017, WSU denied the registration request submitted by Simply Alexis Women's Ministry, an organization "dedicated to young women between the ages of 18-30 years old." SAWM Registration 2017 Registration, Appx. Ex. 19, WSU002069. The organization limited membership to "young women between the ages of 18-30," and leadership was "through selection from the founder ONLY." *Id.* at WSU002073. Villarosa denied the registration, stating the need "to address issues with your registration request." *Id.* at WSU002069.

38. WSU also applied the Non-Discrimination Policy to refuse to register Christians on Campus. COC 2017 Registration, Appx. Ex. 20, WSU002666. Christians on Campus, in its registration, sought to limit leadership by requiring candidates "be a believer in Jesus Christ and uphold the Bible as the complete divine revelation inspired by God through the Holy Spirit." *Id.* at WSU002671. Villarosa declined to register the organization, commenting "Please contact me regarding your requirements for officers Must be a believer in Jesus Christ and uphold the Bible as the complete divine revelation inspired by God through the Holy Spirit." *Id.* at WSU002666. Christians on Campus eliminated this requirement, and WSU registered the organization. Spreadsheet of Registrations from Org Sync System for Agreed Upon Student Organizations ("2016-2018 Registrations"), Appx. Ex. 21 at Row 22.

39. On very rare occasions, WSU grants registered status to student organizations that limit membership or leadership based on characteristics included in the Non-Discrimination Policy. For the 2016-2018 school years, WSU registered the following organizations despite leadership or membership criteria plausibly in violation of the Non-Discrimination Policy:

a. Ratio Christi at Wayne: WSU registered Ratio Christi at Wayne, which requires leaders, in relevant part, to "profess a personal relationship with Jesus Christ." 2016-2018 Registrations, Appx. Ex. 21 at

Row 85, Column AL. Villarosa attributed the registration of Ratio Christi at Wayne to an inadvertent oversight. Declaration of R. Villarosa, Appx. Ex. 22 at ¶¶ 9-10.

b. WSU Student Veterans Organization: WSU registered the WSU Student Veterans Organization, which states in relevant part that members Must be an honorably discharged Veteran of the Armed Forces of the United States, a dependent of a Veteran or enrolled in the Reserve Officers Training Corps (ROTC) program." *Id.* at Row 131, Column AJ. Despite this limitation, WSU considers the promotion of certain minority interests, including those of veterans, to be an affirmative action program permitted under the Non-Discrimination Policy. Villarosa Dep. at pg. 116-118.

40. There are a number of registered student organizations at WSU that state religious missions or are affiliated with national religious organizations or churches. 2016-2018 Registrations, Appx. Ex. 21. For example, for the 2016-2018 school years (the years in which InterVarsity-Wayne had its application rejected, as described *infra*), the following are only a handful of the religious organizations registered on campus and whose applications did not limit membership or leadership on the basis of any characteristic in the Non-Discrimination Policy:

a. Campus Bible Fellowship

b. Christians on Campus

c. Detroit Cru

d. Jewish Students' Association

e. Muslim Students' Association.

Id.

41. As a further example, New Life registered as a student organization at WSU. Appx. Ex. 21 at Row 73. New Life states a clearly religious purpose, including "To help students who wish to pursue God [and] develop a deeper understanding and closer relationship with Jesus." *Id.* at Row 73, Column AG. At the time of registration, New Life was "currently led by students who are members of New Life Church of Detroit, but it is also a separate group from New Life Church of Detroit, governed on its own and not by New Life Church." *Id.* at Row 73, Column AI. Though the leadership at the time of registration consisted of members of New Life Church of Detroit, the organization's leadership and membership is open to all students at WSU: "The only requirement at this time is that members must be students of Wayne State University and must make efforts to advance the efforts of the New Life student org." *Id.* at Row 73, Column AJ; *see also id.* at Row 73, Column AL (stating leadership requirements as "The same as for members").

42. Student organizations may limit membership and leadership based on characteristics not protected by the Non-Discrimination Policy, such a grade point average. Villarosa Dep. at pg. 99-101.

43. Student organizations may promote issues that tend to benefit specific groups, provided that they do not limit membership or leadership in violation of the Non-Discrimination Policy. Villarosa Dep. at 96-98. In fact, a number of registered student organizations at WSU articulate a mission to serve the interests of a certain group but do not limit leadership or membership to individuals who are members of that group. Registration Spreadsheet, Appx. Ex. 21. For example, the following registered organizations do not limit membership or leadership based on any prohibited factor, despite a mission that serves to further or promote the interests of a particular group[1]:

a. **Ahmadiyya Muslim Students Association:** The Ahmadiyya Muslim Students Association states its mission is to spread awareness and a general appreciation if [sic] Islam and its doctrines to all Muslims and non

[1] The organizations described in this and the following paragraph were identified in Plaintiffs' Complaint as allegedly "organizations which appear to limit membership and/or leadership based upon 'race, color, sex (including gender identity), national origin, religion' or other prohibited factors." (Compl. ¶¶ 99-109.) These are merely a representative sample of organizations that do not limit membership or leadership based on any prohibited factor, despite a mission that serves to further or promote the interests of a particular group. For a more complete list of such organizations as of the 2016-2018 school year, the years in which WSU declined to register InterVarsity-Wayne, *see* Appx. Ex. 21.

Muslims alike." *Id.* at Row 4, Column AG. Membership in the organization is open to "all students, faculty and staff," and any member is eligible to become a leader. *Id.* at Row 4, Columns AJ & AL.

b. **Albanian American Student Association:** The Albanian American Student Association states that, with regards to membership, it "shall conform to university regulations and all non-discriminatory rules. Membership shall not be determined by gender, race, ethnic background, or age." *Id.* at Row 5, Column AJ. Leadership positions are similarly open to all members who have attended a minimum number of meetings, excluding the role of president, for which preference is shown to prior leaders. *Id.* at Row 5, Column AL.

c. **Anakh Sherniyan Di:** This dance group does not limit membership or leadership based on any protected characteristics. *Id*. at Row 13, Columns AJ & AL.

d. **Association of Black Social Workers:** The Association of Black Social Workers is open to any student in the School of Social Work "who accepts and adheres to the Constitution and bylaws of the Association of Black Social Workers at Wayne State University." *Id.* at Row 15, Column AJ. Leadership is open to dues paying members who attend at least half of

the organization's scheduled meetings and who is able to serve for an entire school year. *Id.* at Row 15, Column AL.

e. **Association of Latino Professionals for America:** Though "focused on the professional development of Latino Students," *id.* at Row 16, Column X, membership and leadership are open to all, *id.* at Row 16, Columns AJ & AL.

44. Social Greek organizations similarly do not limit membership or leadership based on any prohibited factor, except for gender identity, for which it is exempt from the terms of the Non-Discrimination Policy (*see* SOF ¶¶ 25-27). This exception is permitted by federal law and in accordance with longstanding historical practice nationwide. (*Id.*) For example:

a. **Alpha Epsilon Phi:** Though a historically Jewish sorority, reflected in the "Jewish heritage events" identified by the organization as typical events, *see* Appx. Ex. 21 at Row 6, Column V, Alpha Epsilon Phi, a social sorority, is open to all female, full-time students who meet a minimum GPA requirement, *id.* at Row 6, Column AJ. Leadership is open to all active members who have been a member for at least one semester and who are "in good standing academically, socially, and financially." *Id.* at Row 6, Column AL.

b. **Alpha Epsilon Pi:** Though a historically Jewish social fraternity, reflected in its holding of "events involving Judaism," *see id.* at Row 7, Column V, Alpha Epsilon Phi membership is open to "Any male student in regular attendance and in good standing at Wayne State University, pursuing a course leading to a degree or its equivalent, and who is eligible, as provided in the Supreme Constitution, may be elected to Brotherhood in this colony," *id.* at Row 7, Column AJ.[2] Similarly, leadership is open to "active brothers in good standing of the colony" who meet certain requirements regarding length of membership and behavior. *Id.* at Row 7, Column AL.

c. **Alpha Gamma Delta:** Alpha Gamma Delta, a social sorority, seeks to promote, among other values, "a loving spirit of sisterhood." *Id.* at Row 8, Column AG. Membership in the sorority is open to "female, full-time undergraduate students of Wayne State University," and leadership positions are open to any "member in good standing." *Id.* at Row 8, Columns AJ & AL.

d. **Alpha Kappa Alpha Sorority:** Membership in Alpha Kappa Alpha, a social sorority, is open to female, full-time WSU undergraduate students who satisfy certain academic requirements. *Id.* at Row 9, Column

[2] The Supreme Constitution is available online at https://www.aepi.org/about/about-aepi/supreme-constitution/.

AJ. Leadership is similarly open to active participating and financial members of the organization, subject to academic requirements. *Id.* at Row 9, Column AL.

e. **Alpha Phi Alpha:** Alpha Phi Alpha was founded as the "first intercollegiate Greek-letter fraternity established for African Americans." Appx. Ex. 23, Alpha Phi Alpha Registration Request, WSU004342. Alpha Phi Alpha is open to, and does in fact have, non-African American members. Mitchell Dep., Appx. Ex. 10 at p. 78.

f. **Alpha Sigma Phi:** Alpha Sigma Phi is open to any male student who meets a minimum GPA standard. Appx. Ex. 21 at Row 11, Column AJ. All members who are in "good financial standing" are eligible to run for office. *Id.* at Row 11, Column AL. Alpha Sigma Phi does not articulate any intent to further the interest of any particular group, other than men. *Id.* at Row 11.

InterVarsity's Registration

45. InterVarsity USA is an organization with chapters at a number of college campuses throughout the United States. InterVarsity Chapter Affiliation Application, Appx. Ex. 24, IVCF Wayne 000013. Its stated mission "is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord." *Id.*.

46. InterVarsity-Wayne is the chapter of InterVarsity USA located at WSU and comprised of WSU students and community members. *See, e,g.*, 03/30/2017 Application, Appx. Ex. 25, WSU002245-246. InterVarsity-Wayne, as a part of InterVarsity USA, requires its leaders to accept a statement of faith because "in order to be a leader in an organization like ours, these are the basic things that we ask our student leaders, not our members, just our leaders to affirm." Transcript of the 30(b)(6) Deposition of InterVarsity ("InterVarsity Dep."), Appx. Ex. 26 at pp. 25-26.

47. No student who does not share InterVarsity's beliefs has ever attempted to lead InterVarsity-Wayne. *Id.* WSU has never told InterVarsity-Wayne that it must accept a particular person to be a leader. *Id.*

48. On March 30, 2017, InterVarsity-Wayne applied for registered student organization status at WSU. 03/30/2017 Application, Appx. Ex. 25, WSU002247.

49. The application contained the following eligibility requirement to serve as a leader: "Chapter leaders are expected to indicate their agreement with InterVarsity's Doctrine and Purpose Statements and exemplify Christ-like character, conduct and leadership . . . ." *Id.* at WSU002246.

50. Villarosa, upon reviewing the registration, sent the following comment through the Engage system: "Neither membership, nor officer

requirements may violate the university anti-discrimination policy – please amend the officer requirements accordingly and resubmit." *Id.* at WSU002241.

51. InterVarsity-Wayne did not take any action in response to Villarosa's comment. InterVarsity Dep. at pg. 18.

52. Despite never successfully registering for the 2016-2017 school year, InterVarsity-Wayne was active on WSU's campus and reserved rooms on campus. InterVarsity Dep. at pg. 18-19. Ann Beyerlein, testifying on behalf of InterVarsity-Wayne, stated that she was not made aware of any issues with InterVarsity's ability to operate at WSU in the 2016-2017 school year. *Id.* at pg. 19.

53. On September 15, 2017, InterVarsity-Wayne submitted its application to register as a student organization for the 2017-2018 school year. 09/15/2017 Application, Appx. Ex. 27, WSU0022854.

54. The application contained the following eligibility requirement to serve as a leader: "Active members of the Chapter who wish to be leaders must sign the Statement of Agreement (Purpose Statement) and Doctrinal Basis, commit to abide by the Statement of Agreement in their conduct, and agrees to devote sufficient time to the Chapter, as indicated by completing and signing the leadership application." *Id.* at WSU002852.

55. That same day, Villarosa commented "Please contact me regarding your Membership and Officer requirements." *Id.* at WSU002847.

56. In response, on September 18, 2017, Christina Garza, the student president of InterVarsity-Wayne, emailed Villarosa and provided a copy of InterVarsity-USA's Constitution. 09/18/2017 Email, Appx. Ex. 28, WSU001789.

57. Villarosa responded that he would look into the issue. 09/24/2017 Email, Appx. Ex. 29, WSU001780.

58. On October 3, 2017, Villarosa sent another message to InterVarsity-Wyane through the Engage system, stating "Your currently written officer requirements violate the University Non-discrimination policy. Please adjust and resubmit." 09/15/2017 Application, Appx. Ex. 27, WSU002847.

59. Villarosa also sent an email to Garza on the same day, stating "I have confirmation from our office of general counsel. The leadership requirements violate the University Policy on Anti-Discrimination and must be amended." 10/03/2017 Email, Appx. Ex. 30, WSU001775.

60. Villarosa testified that at no time during this process did he consider the sincerity of the religious beliefs held by the InterVarsity-Wayne student members or leaders. Villarosa Dep. at pg. 194.

61. On October 17, 2017, Garza requested a letter from WSU's Office of General Counsel clarifying WSU's position and policy with regards to InterVarsity's application. 10/17/2017 Email, Appx. Ex. 31, WSU001774.

62. On October 23, 2017, Sarah Luke, Assistant General Counsel, responded to Garza, stating that WSU's "policy does not transgress First Amendment limitations because the policy is viewpoint neutral and is applied equally to all organizations seeking recognition." 10/23/2017 Letter, Appx. Ex. 32, WSU001716.

63. At this time, the Dean of Students Office officially denied InterVarsity-Waynes's request to register. Strauss Dep. at pg. 72-73. WSU informed Garza that all current room reservations for InterVarsity had been cancelled as a result. 10/26/2017 Email, Appx. Ex. 33, WSU001770-771.

64. Despite not being a registered student organization, InterVarsity-Wayne continued to operate at WSU, including holding meetings. InterVarsity Dep. at pg. 28-29. InterVarsity was, however, required to pay to reserve rooms and tables to conduct meetings and outreach. *Id.* According to Beyerlein, testifying on behalf of InterVarsity-Wayne, the organization continued to meet three times per week, roughly the same number of weekly meetings the organization would hold as a registered student organization. *Id.* at pg. 29-30. InterVarsity-Wayne could not identify any specific meetings that were cancelled or not held, except that it "cut back" on table space and "special meetings." *Id.* at pg. 30-31. Despite cutting back, InterVarsity-Wayne still reserved at least two tables the first two weeks of the spring semester. *Id.* at pg. 32.

65. InterVarsity-Wayne also participated at WinterFest as a vendor. *Id.* at pg. 35-36. Though InterVarsity-Wayne was not permitted to participate in the ballroom with other student organizations, WSU allowed InterVarsity-Wayne to rent a table in the student center near the Starbucks. *Id.* InterVarsity-Wayne was the only student organization with a table outside the ballroom. *Id.* at pg. 38-39. When asked to compare the 2016-2017 WinterFest to the 2017-2018 WinterFest, Beyerlein, testifying on behalf of InterVarsity-Wayne, could not recall any difference in the amount of students with whom InterVarsity-Wayne interacted. *Id.* at pg. 37-38.

66. In total, InterVarsity-Wayne paid $3,580 for reservations while it was not a registered student organization at WSU. Payment Chart, Appx. Ex. 34, IVCF Wayne 000056; InterVarsity Dep. at pg. 64-65.

67. Despite not being a registered organization for several months of the 2017-2018 school year, InterVarsity-Wayne could not identify any loss of membership in the 2017-2018 school year. InterVarsity Dep. at pg. 50-51. Beyerlein, testifying on behalf of InterVarsity-Wayne, stated that for the 2015-2016 and 2017-2018 school years, InterVarsity-Wayne had roughly 20-25 members as a registered student organization. *Id.* at pg. 44, 49. In fact, in an email dated March 10, 2016, Beyerlein stated in an email that for "[t]he last 15 years we

have been around 20 to 25 [students] and have felt the influence of more Christian groups around us." 03/10/2016 Email, Appx. Ex. 35, IVCF Wayne 002192.[3]

68. For the 2017-2018 school year, despite not being registered for the majority of the school year, InterVarsity-Wayne still had membership "in that 20 to 35 range." InterVarsity Dep. at pg. 50.

69. On March 8, 2018, WSU informed InterVarsity-Wayne of its decision to register it as a student organization. Strauss Dep. at pg. 83. Strauss made that decision and communicated it to Villarosa in order to activate the group in the Engage system. *Id.* at pg. 84-87.

70. Following the decision to register InterVarsity-Wayne, WSU reimbursed InterVarsity-Wayne, through payment to InterVarsity USA, the entire $3,580 paid for reservations. InterVarsity Dep. at pg. 64-65.

71. Since registering InterVarsity-Wayne on March 8, 2018, and during the pendency of this lawsuit, WSU has permitted religious organizations, including InterVarsity, to register with leadership criteria that otherwise violate the Non-Discrimination Policy by imposing religious leadership criteria. 2018-2020 Organizations Spreadsheet, Appx. Ex. 36 (including Newman Center and Christian on Campus). For example, Strauss testified that organizations requiring leaders to

[3] Plaintiffs designated Exhibit 35 as Confidential under the Court's Protective Order. (*See* ECF No. 38.) Pursuant to the agreement of the parties, Plaintiffs have consented to the removal of the Confidential designation for Exhibit 35, allowing filing of the document on the public record.

be "Christian," Strauss Dep. at pg. 97-98, and Catholic, *id.* at pg. 101-102, have been allowed to register as student organizations.

STATEMENT OF ISSUES PRESENTED

Religion Clause Claims

1. Should this Court enter judgment in favor of Defendants on Plaintiffs' claims based on the "ministerial exception" and "internal autonomy" where these claims are based on a doctrine that only constitutes an affirmative defense, not a cause of action?

2. Should this Court enter judgment in favor of Defendants on Plaintiffs' claims under the Free Exercise Clause where the Registered Student Organization Policy (the "RSO Policy", as defined in § IV.A) is neutral on its face, is generally and neutrally applied, and does not target or discriminate against Plaintiffs' religious beliefs?

3. Should this Court enter judgment in favor of Defendants on Plaintiffs' claims under the Establishment Clause where the RSO Policy, facially and as applied, does not discriminate among religions and the policy otherwise satisfies the *Lemon* test?

Speech, Association, and Assembly Claims

4. Should this Court enter judgment in favor of Defendants on Plaintiffs' claims under the First Amendment related to speech, assembly, and expressive association because the RSO Policy is viewpoint neutral on its face and in its application, thus satisfying the standard of review appropriate where a government creates a limited public forum?

5. Should this Court enter judgment in favor of Defendants on Plaintiffs' claims related to expressive association and compelled speech where Plaintiffs have not been compelled to accept any members or alter their message, and Defendants merely withhold from Plaintiffs a government benefit based on the application of a viewpoint neutral non-discrimination policy?

6. Should this Court enter judgment in favor of Defendants on Plaintiffs' claim based on the right to peaceably assemble where Plaintiffs admit they continue to assemble on campus without any impact?

State Constitutional Claims

7. Should the Court enter judgment in favor of Defendants on Plaintiffs' claims under the parallel provisions of the Michigan Constitution where the analysis is identical to that applied under the federal constitution and the federal clams fail as a matter of law?

Fourteenth Amendment Claims

8. Should the Court enter judgment in favor of Defendants on Plaintiffs' claim for violation of the Equal Protection Clause where the undisputed facts establish that Plaintiffs did not suffer disparate treatment and that Defendants did not act with religious animus or discriminatory intent?

9. Should the Court enter judgment in favor of Defendants on Plaintiffs' claim for violation of their right to Procedural Due Process where Plaintiffs were not deprived of a liberty interest without due process?

Elliott-Larsen Retaliation Claim

10. Should the Court enter judgment in favor of Defendants on Plaintiffs' claim for retaliation under the Elliott-Larsen Civil Rights Act where Defendants twice denied Plaintiffs' registration prior to Plaintiffs' raising any complaint or claim with WSU?

Qualified Immunity

11. Are Strauss and Villarosa, sued in their individual capacities, entitled to qualified immunity where Plaintiffs cannot show that Strauss and Villarosa violated any constitutional rights, let alone a clearly established constitutional right of which a reasonable person would have known?

Defendants answer "Yes" to each of these questions.

CONTROLLING AND/OR MOST APPROPRIATE AUTHORITY

Fed R. Civ. P. 56 Standard

1. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)

2. *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845 (6th Cir. 2002)

Religion Clause Claims

1. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012)

2. *Employment Div. v. Smith*, 494 U.S. 872 (1990)

3. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)

4. *Larson v. Valente*, 456 U.S. 228 (1982)

5. *Harkness v. Secretary of Navy*, 858 F.3d 437 (6th Cir. 2017)

Speech, Association, and Assembly Claims

1. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)

2. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011)

State Constitutional Claims

1. *Scalise v. Boy Scouts of America*, 692 N.W.2d 858 (Mich. Ct. App. 2005)

2. *In re Contempt of Dudzinski*, 667 N.W.2d 68 (2003)

Fourteenth Amendment Claims

1. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)

2. *Chandler v. Vill. of Chagrin Falls*, 296 F. App'x 463 (6th Cir. 2008)

Elliott-Larsen Retaliation Claim (MCL 37.2701)

1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

Qualified Immunity

1. *Pearson v. Callahan*, 555 U.S. 223 (2009).

I. INTRODUCTION

Wayne State University ("WSU") provides students the opportunity to create registered student organizations. Students can, and in fact do, organize themselves around a wide array of common interests: there are roughly 550 registered student organizations at WSU. In exchange for certain benefits, registered student organizations agree to abide by WSU policies, including the Non-Discrimination Policy. This policy prohibits an organization from discriminating in its membership or leadership criteria on the basis of specified characteristics.

InterVarsity-Wayne sought to register as a student organization, despite limiting its leadership to only those students who embrace the organization's religious mission. At the time, WSU declined to register the organization, applying the Non-Discrimination Policy as it does to any organization that seeks to impermissibly limit leadership or membership. Plaintiffs now challenge WSU's RSO Policy and its decision to apply it, claiming under a number of constitutional and statutory theories that the university discriminated against Plaintiffs on the basis of their faith.

The undisputed facts tell a different story, establishing as a matter of law that WSU applied a facially neutral policy to Plaintiffs' registration without regard for Plaintiffs' religious viewpoint. Indeed, the uncontested facts conclusively establish that WSU did nothing but apply its policy in the same manner it did to

every other similarly situated student organization. These facts entitle Defendants to judgment under each of the myriad of constitutional and statutory theories asserted by Plaintiffs.

II. PROCEDURAL HISTORY

Plaintiffs filed suit on March 6, 2018, alleging 20 counts under the state and federal constitutions, the Elliott-Larsen Civil Rights Act, and the Higher Education Act.[1] The parties filed cross dispositive motions. On September 20, 2019, the Court denied Plaintiffs' motion for partial judgment but granted in part and denied in part Defendants' Motion to Dismiss, dismissing Counts 11, 12, and 14. (ECF No. 26.)

III. LEGAL STANDARD

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) "The moving party has the 'initial responsibility of informing the district court of the basis for its motion, and identifying those portions' of the record showing an absence of a genuine issue of fact." *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)).

[1] Plaintiffs voluntarily dismissed the Higher Education Act claim. (ECF No. 25.)

IV. ARGUMENT

A. WSU's Policy at Issue

WSU's student organization registration policy (the "RSO Policy") is central to each claim. The RSO Policy consists of written policies, policy interpretations, and institutional practices. *Cf. United Food & Comm. Workers Union, Local 1099 v. Sw. Ohio Regional Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (requiring implicit limits in a law "be made more explicit by textual incorporation, binding judicial or administrative construction, or well-established practice"). We begin with a description of how the RSO Policy operates in fact.

The RSO Policy requires student organizations to register each year in order to qualify for privileges such as reserving free or discounted campus space, applying for Student Activities Board funding, and participating in certain events. (SOF ¶¶ 11-19.) To be approved, the registration must: (i) identify at least two current registered students who are members of the organization, (ii) acknowledge certain WSU policies, including the Non-Discrimination Policy and the Student Code of Conduct, and (iii) include a valid operating agreement. (SOF ¶ 20.) If an application does not meet these criteria, WSU, through Villarosa, provides the organization with an opportunity to correct the deficiency. (SOF ¶ 22.)

Pursuant to the Non-Discrimination Policy and the student code of conduct, the registration request must comply with the Non-Discrimination Policy in the

selection of leaders and members, subject to two exemptions that Title IX permits. (SOF ¶ 30.) First, social Greek organizations may limit membership and leadership by gender identity in accordance with each organization's national charter, a practice generally followed by other colleges and universities that have social Greek organizations. (SOF ¶ 26.) Second, club sports may limit membership and leadership by gender identity. (SOF ¶ 28.) This limitation is necessary so that club teams can join leagues to compete with teams at other universities. (SOF ¶ 29.)

B. Defendants Are Entitled to Judgment on Plaintiffs' Claims under the Religion Clauses of the First Amendment

Plaintiffs assert five claims under the Religion Clauses of the First Amendment. Defendants are entitled to judgment on each and every such claim.

1. Courts Do Not Recognize Cognizable Claims for the Ministerial Exception or Internal Autonomy (Counts 1 and 2)

In Counts 1 and 2, Plaintiffs allege claims under both the Free Exercise and Establishment Clause. These claims, labeled as the "Ministerial Exception" and "Internal Autonomy," allege Defendants interfered with InterVarsity's selection of its religious leaders by denying registration. Because the claims are identical, Defendants address Counts 1 and 2 together, and each claim fails.

The "Ministerial Exception" "operates as ***an affirmative defense*** to an otherwise cognizable claim . . . ." *Hosanna-Tabor Evangelical Lutheran Church*

and Sch. v. E.E.O.C., 565 U.S. 171, 195 n.4 (2012)[2]; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, -- U.S. --, 140 S. Ct. 2049, 2061 (2020) (describing the ministerial exception as the recognition that "the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations"); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) ("The ministerial exception is an affirmative defense that plaintiffs should first assert in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)."). Accordingly, courts have consistently rejected affirmative claims brought under the ministerial exception. *See, e.g., Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 904-905 (S.D. Iowa 2019) (dismissing identically styled claims).

In deciding Defendants' earlier motion to dismiss, this Court recognized that these claims were "novel." (ECF No. 26 at 9.) Nevertheless, the Court declined to dismiss the claims at that time on the basis that while "it was not clear" that Plaintiffs had stated a claim here "it was equally unclear" that it had not. (*Id.* 8.) The facts developed through discovery clarify why it would not make sense to apply the doctrine in this context.

In *Hosanna-Tabor*, a church terminated a "called teacher"—a religious position—after she was diagnosed with narcolepsy. *Hosanna-Tabor*, 565 U.S. at

[2] Footnotes, internal quotation marks and citations omitted, emphasis added throughout unless specifically noted.

177-79. The teacher filed a claim with the Equal Employment Opportunity Commission under the Americans with Disabilities Act, seeking reinstatement. *Id.* 179-80. The EEOC in turn sued the church. *Id.*

The Supreme Court held that the EEOC's suit had to be dismissed, adopting the "ministerial exception" to employment discrimination statutes. In doing so, the Court emphasized that the suit threatened the organization's religious freedom by replacing government decisions for ecclesiastical ones:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-89. In sum, *Hosanna-Tabor* offers a defense to a lawsuit that seeks to compel a church to "retain an unwanted minister" or "punish[] a church for failing to do so."

Hosanna-Tabor exists to address a circumstance that is not present here, as the undisputed facts show. In *Hosanna-Tabor*, the claim brought by the EEOC threatened to trap the defendant into accepting religious leadership that it did not want. If the court there ruled against the defendant, then the organization would

have to "retain an unwanted minister," period, full stop. It would have no options.

The uncontested facts in this case are completely different. WSU did not sue Plaintiffs in pursuit of a court order to force them to accept any unwanted leader or member. Nor did it threaten to do so. Plaintiffs were never at risk of having a court force upon it a religious leader to which it was opposed. At all times, InterVarsity-Wayne remained completely free to choose its leadership and its membership. (SOF ¶ 47 (testifying that WSU never told InterVarsity-Wayne that it must accept a particular person as leader)).

It is, of course, true that WSU conditioned the receipt of a governmental benefit on compliance with its Non-Discrimination Policy. But those facts are completely different from those at issue in *Hosanna-Tabor*. If those facts give rise to a claim, then they do so because of some law or doctrine that exists apart from that decision. This Court should respectfully decline Plaintiffs' invitation to engage in the sort of judicial activism that would transform a narrow defensive doctrine into a broad offensive federal claim—on facts that have nothing to do with the "precedent" cited.[3]

This Court should grant summary judgment on Counts 1 and 2.

[3] Indeed, it is impossible to discern where a "*Hosanna-Tabor* claim" would come from or what it would mean. *Hosanna-Tabor* did not, and could not, add anything to the Free Exercise Clause or the Establishment Clause. Plaintiffs either do, or do not, have claims under those provisions, regardless of *Hosanna-Tabor*.

2. Defendants Are Entitled to Judgment on the Free Exercise Claims

In Counts 3 and 4, Plaintiffs allege violations of the Free Exercise Clause.[4] Plaintiffs first contend that Defendants impermissibly targeted InterVarsity's religious beliefs to control its expression. Plaintiffs further allege that the RSO Policy is not generally applicable and fails under strict scrutiny. Each theory fails.

Although the First Amendment guarantees the right of free exercise of religion, the right does not relieve an individual or organization from the obligation to comply with a valid and neutral law of general applicability. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). A neutral and generally applicable law need not be justified by a compelling government interest, even if the law has the incidental effect of burdening a particular religious practice. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986). But if a policy "appears neutral and generally applicable on its face, but in practice is riddled with exemptions or worse

[4] Plaintiffs plead Counts 1 and 2 under both the Free Exercise and Establishment Clauses. As explained *supra*, Counts 1 and 2 do not state causes of action and must be dismissed. The Free Exercise analysis herein applies equally to Counts 1 and 2 and is incorporated as further justification for judgment in favor of Defendants.

is a veiled cover for targeting a belief or faith-based practice," the policy must satisfy strict scrutiny. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

The RSO Policy is facially neutral and generally applicable. It governs all similarly situated student organizations, distinguishing only those (like Greek organizations and club sports) that federal law recognizes as deserving differential treatment. *Supra*. Accordingly, as a facially neutral law, WSU need only satisfy rational basis review. *See Lukumi*, *supra*. Facially neutral antidiscrimination laws are consistently upheld as rationally related to the legitimate public interest in eliminating discrimination. *See, e.g., McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982) (stating that Title VII has the "clearly secular purpose" of eliminating employment discrimination).

Plaintiffs cannot justify the application of strict scrutiny under any theory. Discovery is now complete, and there is absolutely *no* record evidence that WSU, in denying InterVarsity's registration, targeted a belief or faith-based practice. To the contrary, the record reveals even-handed application of the policy to religious and non-religious organizations. (SOF ¶ 31-38.) Furthermore, Villarosa testified that the sincerity of Plaintiffs' beliefs played no role in his thinking while determining InterVarsity's registration. (SOF ¶ 60.) Plaintiff cannot possibly bear

their burden of proving that WSU harbored an intent to discriminate or target InterVarsity for its religious beliefs.[5]

Moreover, Plaintiffs cannot establish a "substantial burden" so as to trigger strict scrutiny. Generally, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity." *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003). The undisputed facts make clear that, as a result of application of the policy, InterVarsity only lost access to certain government provided privileges. (SOF ¶¶ 12-16.) In addition, the "burden" on InterVarsity was minimal: during the period it was not registered, InterVarsity-Wayne did not suffer a noticeable decrease in membership and did not substantially alter its meeting practices. (SOF ¶¶ 64-68.) By its own admissions, the organization remained active on campus. (*Id.*) Nor, as noted above, did WSU's actions force InterVarsity-Wayne to accept a leader whose views conflicted with the organizations so as to alter its beliefs or practices. (SOF ¶ 47.) In short, WSU's application of the policy did not penalize Plaintiffs at all. Rational basis review, not strict scrutiny, applies, and WSU is entitled to judgment on the claims under the Free Exercise Clause.

[5] *Celotex*, 477 U.S. 323 ("The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.")

3. Defendants Are Entitled to Judgment on Plaintiffs' Claim for Denominational Discrimination under the Establishment Clause

In Count 5, Plaintiffs allege a violation of the Establishment Clause for "Denominational Discrimination." (Compl. at p.28.) Plaintiffs contend that WSU has "penalized" InterVarsity—but not other religious groups—resulting in a "preference for some religious beliefs and leadership selection practices over InterVarsity's religious beliefs and leadership selection practices." (*Id.* ¶¶ 166-68.) Defendants are entitled to judgment on this claim as well.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Applying *Larson* to claims of alleged denominational preference, the Sixth Circuit has articulated a two-step analysis: First, "if the challenged government practice prefers one religion over another, [the court must] apply strict scrutiny in adjudging its constitutionality." *Harkness v. Secretary of Navy*, 858 F.3d 437, 447 (6th Cir. 2017). Second, "if the challenged practice does not differentiate among religions, [the court must] apply the three-pronged test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)." Because the undisputed facts establish a government practice that does not prefer one religion over another, strict scrutiny does not apply, and WSU's conduct satisfies *Lemon*.[6]

[6] In this Court's September 20, 2019 Order, the Court questioned the validity of the *Lemon* test. (ECF No. 26 at 11 n.2.) Defendants acknowledge that *Lemon* has been

a) The Policy Does Not Facially Differentiate Among Religions

The initial inquiry considers the RSO Policy on its face. *Larson* "teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law ***facially*** differentiates among religions." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989); *see also Gillette v. United States*, 401 U.S. 437, 450 (1971) ("The critical weakness of petitioners' establishment claim arises from the fact that [the statute], on its face, simply does not discriminate on the basis of religious affiliation."); *Harkness*, 858 F.3d at 447 (collecting cases requiring facial discrimination).

In *Harkness*, the Sixth Circuit considered a challenge to the regulation governing naval chaplain-promotion decisions. *Id.* at 446-47. The regulation required nominations without regard to religious affiliation and obligated the promotion board to recommend only those officers it "considers best qualified for promotion." The Sixth Circuit held that "because the promotion procedures do not facially prefer one religion over another, we apply the *Lemon* test."

Here, like in *Harkness*, there can be no dispute that the Non-Discrimination Policy applies equally to all religions, as it "embraces ***all persons regardless*** of . . .

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questioned and modified, but it has never been explicitly overruled. Controlling Sixth Circuit precedent, specifically *Harkness*, stands for the proposition that *Lemon* governs in claims of denominational preference.

religion . . . ." (SOF ¶ 3.) The Non-Discrimination Policy does not differentiate between religions or sects. Strict scrutiny does not apply.[7]

b) The Policy Withstands the Lemon *Test*

Under prevailing Sixth Circuit jurisprudence, where strict scrutiny does not apply, the Court must "apply the three-pronged test laid out in *Lemon v. Kurtzman*." *Harkness*, 858 F.3d at 447. The *Lemon* test, as applied by the Sixth Circuit based on subsequent Supreme Court refinement, requires the court to ask:

> (1) whether the government's predominant purpose was secular; (2) whether the government action has the purpose or effect of endorsing religion, and (3) whether the action fosters an excessive entanglement with religion. If [the Court] cannot answer "yes" to the first question and "no" to the second two, the challenged action violates the Establishment Clause.

Satawa v. Macomb Cty. Road Com'n, 689 F.3d 506, 526 (6th Cir. 2012); *see also Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015). Based on the undisputed facts, the Non-Discrimination Policy satisfies *Lemon*.[8]

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[7] Even assuming *arguendo* that strict scrutiny can be triggered by a law that, solely in its application, demonstrates a religious preference—it cannot, *see Larson*—the undisputed facts establish that WSU applies the policy without preference among religions. Religious organizations that adhere to the RSO Policy in the selection of leadership and membership may register as student organizations. (*See* SOF ¶¶ 40-41.) Religious organizations, including InterVarsity, that refuse to adhere to the policy may not. (SOF ¶ 38 (denying Christians on Campus registration).) The Policy, on its face or as applied, expresses no preference between religions, and strict scrutiny does not apply.

[8] The Supreme Court recently reiterated that *Lemon* is of little use where a historical approach governs. *See Town of Greece v. Galloway*, 572 U.S. 565 (2014). "[I]t is not necessary to define the precise boundary of the Establishment

First, in the predominant-purpose inquiry, the Court must "generally accept the government's stated rationale for its action." *Satawa*, 698 F.3d at 526. The Court must apply an objective standard to determine that "the secular purpose required [was] genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 526. The RSO Policy clearly has a genuine, secular purpose which predominates: the elimination of discrimination in all campus activities, including student organizations. *See supra* § IV.B.2. *Nothing* in the factual record reveals a religious purpose motivating the RSO Policy.

Second, "[t]he government violates the endorsement test if a reasonable observer would think that the activity is a governmental endorsement of religion." *Smith*, 788 F.3d at 590. Here, the undisputed facts make clear that no reasonable observer could think the RSO Policy endorses religion. There are 550 registered student organizations at WSU, embracing a variety of subject matters, including

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Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 577 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)). The Sixth Circuit has declined to engage this "pure historical approach" where it is of "limited utility" to the facts at issue. *Smith*, 788 F.3d at 588 (finding historical approach in applicable in public school context because public schools essentially did not exist at the founding).

Here, the historical approach cannot resolve the dispute: registered student organizations and their attendant privileges simply did not exist at the Founding. There is no "unbroken history of more than 200 years" that dictates a decision. *See Smith*, 788 F.3d 580. *Town of Greece* does not displace *Lemon*.

various religious organizations. (SOF ¶¶ 8, 40.) *No* record evidence shows that WSU endorses any religion.

Finally, the undisputed facts reveal no government entanglement with religion. Whether a governmental action amounts to "excessive entanglement" depends on "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Smith*, 788 F.3d at 593. Here, any "entanglement" is *de minimis* at most. Villarosa conducts a review of student organizations' applications for registration, including a review of membership and leadership criteria, and then grants the registration. (SOF 21.) There is no subsequent monitoring of student organizations—including religious organizations—for compliance with the policy so as to create a "resulting relationship between the government and religious authority," *see id.*, unless complaints are brought to the Dean of Students Office. (SOF ¶ 21.) And any "aid" to registered religious organizations—free room rental, Student Activity Board Funding, and others—"is offered to a broad range of groups of persons without regard to their religion." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). All student organizations receive equal access to the benefits of registration. (SOF ¶ 17.)

The undisputed facts show that the RSO Policy easily withstands all three "tests" under the Sixth Circuit's modified *Lemon* analysis. The Establishment

Clause claim fails.

4. Plaintiffs' Religion Claim under the Michigan Constitution Fails

In Count 15[9], Plaintiffs allege violation of Article I, § 4 of the Michigan Constitution of 1963. "[B]oth the state and federal provisions of the Establishment Clause and the Free Exercise Clause of the First Amendment of the United States Constitution, are subject to similar interpretation." *Scalise v. Boy Scouts of America*, 692 N.W.2d 858, 868 (Mich. Ct. App. 2005); *see also Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009). Accordingly, the above analysis applies equally under the Michigan Constitution, and Defendants are entitled to judgment on Count 15.

C. Defendants Are Entitled to Summary Judgment on Plaintiffs' Claims under the Speech and Assembly Clauses

Plaintiffs bring four counts under the speech and assembly clauses of the First Amendment. (Compl. ¶¶ 170-196 (Counts 6-9).) With discovery now completed, the undisputed facts show that Defendants are entitled to summary judgment on all of them.

1. Under a Limited Public Forum Analysis, the Policy Is Constitutional

Plaintiffs bring claims under the Free Speech Clause for "Expressive Association" (Count 6), "Compelled Speech" (Count 7), and "Viewpoint

[9] The Complaint contains two counts labeled "Count XIII". Defendants refer to the counts as if properly numbered; Count 15 begins on pg. 36, ¶¶ 232-239.

Discrimination" (Count 8), and under the Assembly Clause (Count 9). Each of these claims should be evaluated under the same limited public forum analysis.[10] *See Business Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 3d 885, 895-99 (S.D. Iowa 2019) (applying limited public forum analysis to claims for expressive association, compelled speech, and viewpoint discrimination); *cf. U.S. v. Winslow*, 116 Fed. App'x 703, 704-05 (6th Cir. 2004) (subjecting speech and assembly claims to same constitutional framework).

Where a state university creates a limited public forum for speech, it may not "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). A university program that grants student organizations registered status constitutes a limited public forum. *Christian Legal Society v. Martinez*, 561 U.S. 661, 683 (2010); *see also Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 797-98 (9th Cir. 2011)[11]. In a limited public forum, the government may impose restrictions that are "reasonable in light of the purpose served by the forum," so long as the

[10] Plaintiffs concede that a limited public forum analysis governs. (ECF 16 at pp. 14-20.)

[11] Defendants acknowledge that, in denying Defendants' motion to dismiss these claims, the Court stated, "*Martinez* and *Reed* do not persuade the court to dismiss InterVarsity's speech counts for failure to state a claim." (ECF No. 26 at p. 17.) The Court, however, did not reject the limited public forum framework as articulated in those cases. Thus, Defendants maintain *Martinez* and *Reed* state the proper test for considering Plaintiffs' speech claims.

government does not "discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (1995).

First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985). Public universities enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate," though the court makes the final decision on whether a public university has exceeded constitutional constraints. *Martinez*, 561 U.S. at 685-86. The reasonableness of the government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and the surrounding circumstances. *Cornelius*, 473 U.S. at 809. A restriction of access to the limited public forum it has created "need not be the most reasonable or the only reasonable limitation." *Id.* at 808.

Plaintiffs assert facial and as-applied challenges to the Policy. Both fail.

a) The Policy Is Facially Neutral and Thus Constitutional

Plaintiffs do not challenge the reasonableness of the Policy in light of the purpose of the forum. Rather, they contend the Policy is not viewpoint neutral. The undisputed facts establish the Policy is facially neutral as a matter of law.

Courts have upheld as facially neutral two types of policies in the context of registered student organizations. First, in *Martinez*, the Supreme Court upheld an

"all-comers" policy—that is, a policy that all student groups must accept all interested students—as "textbook" viewpoint neutral. *Martinez*, 561 U.S. at 695. The Court stated that the policy "is justified without reference to the content [or viewpoint] of the regulated speech." *Id*. at 696. "[The organization's] conduct—not its Christian perspective—is, from [the school's] perspective, what stands between the group and [recognized] status." *Id*.

Second, several courts have found non-discrimination policies that do not require the acceptance of all-comers to be facially viewpoint neutral. The Seventh Circuit, in a case pre-dating *Martinez*, found Southern Illinois University's School of Law's policy requiring student organizations to not discriminate based on specific enumerated characteristics to be facially viewpoint neutral. *Christian Legal Society v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006) ("There can be little doubt that SIU's Affirmative Action/EEO policy is viewpoint neutral on its face . . . .").[12] Then, in the only Circuit opinion since *Martinez* on the issue, the Ninth Circuit refused to distinguish *Martinez* when faced with a similar policy, which included an exception for organizations "explicitly exempted under federal law":

> Plaintiffs' argument, while seemingly compelling at first glance, does not survive closer scrutiny. We accept Plaintiffs' assertion that San Diego State's nondiscrimination policy incidentally burdens groups that wish to exclude others on the basis of religion, but does not burden groups that do not exclude or exclude on bases not prohibited

[12] For reasons not applicable here, the Seventh Circuit found the law school in *Walker* did not apply the policy in a neutral manner.

> by the policy. But this assertion is insufficient to prove viewpoint discrimination, because Plaintiffs have put forth no evidence that San Diego State implemented its nondiscrimination policy for the purpose of suppressing Plaintiffs' viewpoint, or indeed of restricting any sort of expression at all.

Reed, 648 F.3d at 801 (emphasis in original).

Relying on Supreme Court precedent holding that "antidiscrimination laws intended to ensure equal access to the benefits of society serve goals 'unrelated to the suppression of expression,'" *id*. at 801 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984) and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557, 572 (1995)), the Ninth Circuit upheld the policy on its face: "Like the laws challenged in *Roberts* and *Hurley*, [the university's] nondiscrimination policy does not 'target speech or discriminate on the basis of its content,' but instead serves to remove access barriers imposed against groups that have historically been excluded." *Id.*

Here, the undisputed facts reveal the RSO Policy is facially viewpoint neutral. The RSO Policy applies to all student groups, except social Greek organizations and club sports, consistent with a distinction recognized in federal law. (SOF ¶¶ 25-31.) Moreover, no facts reveal that Defendants instituted the RSO Policy "for the purpose" of suppressing expression based on its viewpoint. To the contrary, the policy promotes inclusion and student engagement. (SOF ¶¶ 3-10.) Like the policies consistently upheld by the Supreme Court in other contexts,

WSU's non-discrimination policy facially governs Plaintiffs' conduct—their ability to construct discriminatory barriers—not their speech and thus is constitutional.

In its ruling on defendants' motion to dismiss, this Court found on the limited record before it that the policy at issue in *Reed* differed from the policy at issue here. But discovery has revealed that this is not the case. At the motion to dismiss stage, Plaintiffs argued that it was not even clear that the Non-Discrimination Policy applied to student organizations because it did not expressly reference them. (ECF No. 26 at 16.) The undisputed facts, however, show that WSU does apply the policy to student organizations and has done so for decades. (SOF ¶¶ 1-5, 31-38.) In addition, the express language of the policy is certainly broad enough to reach student organizations. (SOF ¶¶ 3-5 (the policy applies "in hiring, terms of employment, tenure, promotion, placement and discharge of employees, admission, training and treatment of students, *extracurricular activities*, the use of University services, facilities, and the awarding of contracts").) Further, at the motion to dismiss stage, this Court noted that the policy did not expressly reference discrimination in leadership. Again, the undisputed facts show that WSU does apply the policy to leadership discriminations, (SOF ¶¶ 32-33, 36-39) and, again, the language is certainly sufficiently expansive to reach such discrimination, (SOF ¶ 5). *Cf. United Food &*

Comm. Workers Union, 163 F.3d at 359 (requiring implicit limits in a law "be made more explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.").

b) The Policy Is Neutral as Applied and Thus Constitutional

Plaintiffs contend that Defendants discriminatorily apply the Policy. "A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly." *Reed*, 648 F.3d at 803.

Here, the record evidence establishes neutral application of the RSO Policy. InterVarsity is one of many organizations whose registration has been denied for failure to comply with the RSO Policy, including non-religious organizations and other religious organizations seeking to impose religious criteria. (SOF ¶¶ 31-38.) In the Complaint, InterVarsity alleged uneven application of the policy based on public descriptions posted by various student organizations. (Compl. ¶¶ 99-110.) The undisputed facts reveal, however, that while these organizations state missions to advance the interests of a particular group—for example, to "bring Ahmadi Muslim youth together"—the groups do not violate the Policy in selecting members and leaders. (SOF ¶ 21.) On rare occasions, WSU has granted registration to student organizations with leadership or membership criteria that violate the RSO Policy. (SOF ¶ 39.) The record, however, is devoid of any evidence that these registrations were intentionally granted or motivated by animus. To the contrary,

one registration is undisputedly attributable to an oversight, while the other conforms with WSU's affirmative action policy to promote the interests of veterans on campus. (SOF ¶ 39.) Defendants apply the policy neutrally, without regard for viewpoint, and the claims fail.

2. Plaintiffs Cannot Establish Any Compelled Association or Speech

Plaintiffs contend, in Counts 6 and 7, that the RSO Policy compels Plaintiffs to convey a message at odds with their intended message. A content-neutral antidiscrimination law may violate the First Amendment when used to force a private group to accept members who interfere with the message the group desires to express. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *Hurley*, 515 U.S. at 567. In *Martinez*, however, the Supreme Court declined to apply these cases to student organization programs because the university did not force student groups to accept unwanted members but merely conditioned certain benefits on compliance with the non-discrimination policy. *Martinez*, 561 U.S. at 682-83 ("[The Constitution draws a distinction] between policies that require action and those that withhold benefits."); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 602-604 (1983).

The same reasoning applies here. Plaintiffs' claims fail because Defendants have not compelled InterVarsity to accept any members or alter its message in any way. To the contrary, InterVarsity admitted that WSU did not attempt to force the

organization to accept a leader who refused to affirm InterVarsity's religious pledge or otherwise disagreed with InterVarsity's viewpoint. (SOF ¶ 47.)

Nor does *Healy v. James*, 408 U.S. 169 (1972) alter this analysis. In *Healy*, the university not only refused to confer "recognized" status on the Students for a Democratic Society chapter but also refused to allow the group to meet on campus, post on campus bulletin boards, or even sit together informally on campus. *Id.* at 181. The University excluded SDS from campus entirely. *Id.* Plaintiffs here did not face anything remotely close to total exclusion: to the contrary, Plaintiffs continued to operate on campus, seeing no loss in membership and no significant change in meeting practices. (SOF ¶¶ 64-67.) These claims accordingly fail as well.

3. Independently, the Facts Reveal No Restriction on Assembly

Plaintiffs claim that WSU has infringed their "right 'peaceably to assemble' to engage in otherwise lawful religious worship and speech activities with persons of their choosing."[13] (Compl. ¶ 193.) The undisputed facts belie this assertion: throughout the entire period InterVarsity-Wayne was not registered, it continued to "assemble" as a student organization, including holding regular meetings and tables. (SOF ¶¶ 64-65.) InterVarsity did not suffer any loss of membership.

[13] As set forth above, the assembly clause is governed by the same analysis as the speech claims. *See, e.g.*, *Ramsek v. Beshear*, No. 3:20-CV-00036-GFVT, 2020 WL 3446249, at *7 (E.D. Ky. June 24, 2020) ("Courts typically evaluate free speech, assembly and petition claims under the same analysis."). To the extent the Court analyzes the claim separately, it fails.

(SOF ¶ 67.) Defendants did not limit Plaintiffs' ability to assemble but rather imposed reasonable restrictions on Plaintiffs' receipt of government benefits. *Supra*. The claim under the assembly clause fails.

4. Plaintiffs' Speech Claims under the Michigan Constitution Fail

In Counts 16[14] through 19, Plaintiffs allege claims under the provisions of the Michigan Constitution protecting free speech and association. "The rights of free speech under the Michigan and federal constitutions are coterminous." *In re Contempt of Dudzinski*, 667 N.W.2d 68 (2003); *Zwick v. Regents of Univ. of Mich.*, No. CIV. 06-12639, 2008 WL 1902031, at *8 (E.D. Mich. Apr. 28, 2008) (citing *Dudzinski* and dismissing federal and state claims). Thus, the above analysis applies equally under the Michigan Constitution, and the claims fail.

D. Defendants Are Entitled to Judgment on the Equal Protection Claim

In Count 10, Plaintiffs claim a violation of the Equal Protection Clause. To prevail under the Equal Protection Clause, Plaintiffs must establish that they were treated differently from similarly situated groups. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Plaintiffs must further prove that defendants acted with the intent or purpose to discriminate based upon membership in a protected class or exercise of a fundamental right. *See Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (collecting cases); *see also Washington v. Davis*, 426

[14] Plaintiffs mistakenly label Count 16 as "COUNT XIV." (Compl. at p.37-38.) For the sake of clarity, Defendants refer to the count as if properly numbered.

U.S. 229, 239–42 (1976). Where the policy is facially neutral, Plaintiffs must demonstrate that any disproportionate impact tends to show that an invidious or discriminatory purpose underlies the policy. *See Copeland v. Machulis*, 57 F.3d 476, 480 (6th Cir.1995); *see also Hernandez v. New York*, 500 U.S. 352, 360 (1991) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group."). On the undisputed material facts, Defendants are entitled to judgment as a matter of law because Plaintiffs cannot prove differential treatment or discriminatory intent.

As a threshold matter, the undisputed facts belie Plaintiffs' claim of disparate treatment vis a vis any similarly situated groups. There are roughly 550 registered student organizations on campus. (SOF ¶ 8.) Each organization, when applying for registered status, is subject to the same application process, including a review of the organization's membership and leadership criteria to ensure compliance with the RSO Policy. (SOF ¶¶ 20-21.) Student organizations, including religious student organizations, whose membership and leadership criteria discriminate on the basis of a protected class are not registered. (SOF ¶¶ 31-38 (collecting examples of denied registrations).) This includes fraternities, sororities, and club sports who attempt to limit membership and leadership for reasons other

than gender identity, as expressly permitted by the RSO Policy and federal law. (SOF ¶¶ 27, 29.) This also includes organizations previously identified by Plaintiffs as allegedly violating the policy based solely on public facing data, (Dkt. 26, Order at 12 ("InterVarsity proceeds to enumerate more than ten student groups that plausibly violate the relevant WSU policies but also appear to retain their favored group status, in spite of so doing."): these student organizations adhere to the RSO Policy in setting membership and leadership criteria. (SOF ¶ 21.) The undisputed facts demonstrate that InterVarsity was not subject to disparate treatment but simply held to the same standard as every other student organization.

The *de minimis* organizations granted registration despite leadership or membership criteria in violation of the policy does not alter the analysis: in light of the consistent application, these rare instances do not reveal discriminatory intent or animus sufficient to establish that InterVarsity was treated differently ***because of*** its religion. *See Weberg*, 229 F.3d at 522 ("mere disparate impact" is not enough to state an Equal Protection claim). To the contrary, the undisputed facts reveal that WSU registered Ratio Christi at Wayne inadvertently, due to oversight (SOF ¶ 39a) and that WSU registered the WSU Student Veterans Organization in accordance with WSU's affirmative action policy (SOF ¶ 39b). Despite engaging in substantial discovery, there is simply no record evidence to support allegations of discriminatory intent or animus.

Moreover, InterVarsity cannot establish religious animus or discriminatory intent. In fact, Villarosa made clear that not once did he consider or question the sincerity of InterVarsity's belief in making the determination. (SOF ¶ 60.) Instead, he applied the policy as he does in reviewing any organization's application. (SOF ¶¶ 21-24.) The factual record contains no facts demonstrating animus.

In short, the undisputed facts reveal a reality dramatically different than the scenario portrayed by Plaintiffs: WSU expects and requires all organizations, religious or otherwise, to adhere to the RSO Policy. InterVarsity chose not to, crafting leadership criteria that discriminates against those who refuse to share InterVarsity's beliefs, yet InterVarsity claims the rules should not apply to it. That is not equal treatment, that is preferential treatment, and it is not required by the Equal Protection Clause. Count 10 fails.

E. Defendants Did Not Violate the Due Process Clause

InterVarsity alleges that WSU violated its due process rights by failing to provide InterVarsity a hearing before denying its application. Because InterVarsity was not deprived of any protected interest, Count 20 fails.

To establish a procedural due process claim, InterVarsity must prove three elements: "(1) that [it] has a life, liberty, or property interest protected by the Due Process Clause; (2) that [it] was deprived of this protected interest within the meaning of the Due Process Clause; and (3) that the state did not afford [it]

adequate procedural rights prior to depriving [it] of [its] protected interest." *Chandler v. Vill. of Chagrin Falls*, 296 F. App'x 463, 469 (6th Cir. 2008).

This Court previously held that Intervarsity has a liberty interest "insofar as InterVarsity invokes its right to expressive association." (ECF No. 26 at 19-20.) Thus, Defendants' argument focuses on the second element—whether WSU deprived InterVarsity of any protected interest.

InterVarsity has not been deprived of its right to associate. *Supra* §§ IV.C.1-2. In *Iota XI Chapter of the Sigma CHI Fraternity v. Patterson*, 538 F. Supp. 2d 915 (E.D. Va. 2008), a case cited by this Court for the proposition that a student organization had a liberty interest in expressive association, the court found the withdrawal of recognition did not deprive the fraternity of the right to associate:

> Nothing in the University's sanction prevents the Chapter from continuing to exist. It may recruit . . . students as members, schedule meetings, and host social events. The withdrawal of official recognition simply removes the imprimatur of the University from the Chapter's activities and denies the Chapter use of the University's name, resources, and property. Although the Chapter may become a less attractive organization as a result of losing official recognition, the University's action does not deprive Chapter members of their constitutional right to associate with each other.

Id. at 923-24.[15] The undisputed facts here are indistinguishable: InterVarsity continued to meet, host events, and recruit students. (SOF ¶¶ 64-65.) InterVarsity

[15] The *Patterson* court nonetheless found the university deprived members of the right to expressive association by imposing other sanctions, including a prohibition

merely lost access to certain benefits. (SOF ¶¶ 11-16, 64-65.) Because there has been no deprivation of a liberty interest, the due process claim fails.

F. Defendants Are Entitled to Judgment on the ELCRA Retaliation Claim

The record is clear that Defendants did not retaliate against InterVarsity. As there is no issue of material fact, this Court should dismiss Count 13.

The Elliott-Larsen Civil Rights Act ("ELCRA") provides that a person shall not "[r]etaliate or discriminate against a person because . . . the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701. Courts examine retaliation claims supported by circumstantial evidence using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). InterVarsity must first establish a prima facie case of retaliation by showing: (1) it engaged in protected activity, (2) Defendants knew of the protected activity, (3) it suffered an adverse action, and (4) a causal connection exists between the protected activity and the adverse action. *Gordon v. Traverse City Area Public* Sch., 686 F. App'x 315, 320 (6th Cir. 2017). Upon such a showing, a presumption of unlawful retaliation arises, and the burden of proof shifts to Defendants to rebut the presumption by articulating a legitimate, nondiscriminatory reason for their actions. *McDonnell Douglas*, 411 U.S. at 802. The burden then shifts back to

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on joining other organizations. *Id.* at 924. The record here does not establish any similar sanction, rendering this portion of *Patterson* distinguishable and irrelevant.

InterVarsity to undermine Defendants' proffered reason as pretextual. *Id.* Here, the Court need look no further than the first stage of the *McDonnell Douglas* framework: Intervarsity cannot establish a prima facie case of retaliation.

InterVarsity claims retaliation as follows: it engaged in protected activity—complaining that the Non-Discrimination Policy was discriminatory—and as a result was denied registration. The undisputed facts establish a timeline that renders InterVarsity's theory plainly implausible: InterVarsity only complained *after* Defendants denied InterVarsity's registration twice.

The record shows that the denial of InterVarsity-Wayne's registration resulted not from any "protected act" but from InterVarsity's registration violating the RSO Policy. In the spring of 2017, InterVarsity applied to be a registered organization, but because the application contained leadership criteria that violated the RSO Policy, Villarosa declined to register the organization and sent InterVarsity a message regarding its non-compliance. (SOF ¶¶ 48-50.) InterVarsity did not respond. (SOF ¶ 51.) When InterVarsity tried to register for the 2017-2018 school year with the same criteria, its registration was again not approved. (SOF ¶¶ 53-58.) This second failure to register caused InterVarsity to complain, and for WSU to elevate the registration decision to its office of general counsel. (SOF ¶ 59.) There can be no retaliation because the purported adverse action occurred prior to InterVarsity's complaint. Count 13 fails.

G. Strauss and Villarosa Are Entitled to Qualified Immunity

Moreover, should this Court ultimately determine that a constitutional violation occurred, Strauss and Villarosa are entitled to qualified immunity.[16] Under the doctrine of qualified immunity, a government official whose conduct has not "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known" are not liable for civil damages. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "The analysis involves a two-step inquiry: (1) whether, viewing the record in the light most favorable to Plaintiff, a constitutional right has been violated; and (2) whether the right at issue was 'clearly established' at the time." *Meeks v. City of Detroit, 220 F. Supp. 3d 832*, 838 (E.D. Mich. 2016) (Cleland, J.), *aff'd sub nom. Meeks v. City of Detroit*, Michigan, 727 F. App'x 171 (6th Cir. 2018). If the law was not clearly established, a defendant cannot be expected to "anticipate subsequent legal developments" or "'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Whether a right is clearly established "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). "[C]learly established law" should not be defined "at a high level of generality." *Ashcroft v. al–Kidd*, 563 U.S. 731, 742

[16] Strauss and Villarosa are the only Defendants sued in their individual capacities. (Compl. ¶¶ 24-34.)

(2011). The courts "do not require a case directly on point' before concluding that the law is clearly established, but existing precedent must have placed the statutory or constitutional question beyond debate." *Stanton v. Sims*, 571 U.S. 3, 5 (2013). The clearly established law must be "particularized" to the facts of the case. *Anderson*, 483 U.S. at 640. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity … into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* at 639. Notably, "educators are rarely denied immunity from liability arising out of First-Amendment disputes. The rare exceptions involve scenarios in which a factually analogous precedent clearly established the disputed conduct as unconstitutional." *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014).

Thus, the constitutional issue must first be framed. The question before the Court is whether WSU's requirement that a student group adhere to its RSO Policy in order to register as a student organization and be eligible for the benefits associated with that status violates the group's First and Fourteenth Amendment Rights when that group's sincerely held religious beliefs conflict with that policy. Properly framed as such, the law was not clearly established.

Here, as set forth fully above, this constitutional issue is well-settled i*n favor of Defendants*, and Strauss and Villarosa have not violated any constitutional right. Summary judgment should issue on the merits of each claim, and because there has

been no violation, Strauss and Villarosa are also entitled to immunity.

Assuming only for the sake of argument that a constitutional violation occurred, Strauss and Villarosa are nevertheless entitled to qualified immunity because the law is not so clearly settled against Defendants as to preclude qualified immunity. The cases that exist in this sphere have not put this constitutional issue "beyond debate." Indeed, the debate continues. In *Martinez*, the Supreme Court found no constitutional violation, emphasizing the importance of the policy's neutrality, but expressly declining to address the impact a narrower policy would have on its analysis. In *Reed*, the parties voluntarily dismissed the case after remand and never reached the issue of why certain groups appeared to be exempted from the university's nondiscrimination policy. *Walker* only considered the district court's denial of a preliminary injunction and did not have a complete record before it, nor did it have the benefit of the Supreme Court's guidance in *Martinez*. Indeed, as the Southern District of Iowa noted last year when considering the issue of qualified immunity, "these authorities still only set out the legal principles applicable to this case" and "[a]t the same time, the facts that are factually most like this matter fail to offer clear conclusions as to the selective application of a nondiscrimination policy." *BlinC*, 360 F. Supp. 3d at 908.[17]

[17] *BLinC* and *InterVarsity* do not resolve the issue for several reasons: (1) the decisions came out ***after*** WSU declined InterVarsity's registration; (2) they

Against this background, Strauss and Villarosa made a principled decision, one which did not violate any law, let alone "clearly established law." They are entitled to qualified immunity and as such cannot be liable for money damages.

V. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court grant summary judgment in their favor and dismiss this case in its entirety.

Respectfully submitted,

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Dated: October 22, 2020

involve a policy that differs from the RSO Policy, both on its face and as applied; and (3) they have no precedential effect on this Court.

CERTIFICATE OF SERVICE

This is to certify that on October 22, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all attorneys of record.

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