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

INTERVARSITY CHRISTIAN FELLOWSHIP/USA, *et al*., *Plaintiffs*, v. BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-00231 **REPLY IN SUPPORT OF INTERVARSITY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND A PERMANENT INJUNCTION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

InterVarsity wants to continue its religious association on campus, as it has for 75 years. It has shown that Wayne State's abrupt actions to terminate that association violate the First Amendment. In response, Wayne State is once again heavy on the invective and light on the law. It relies upon inapplicable cases while struggling to explain the inexplicable: its decision to penalize InterVarsity's religious leadership decisions while ignoring the leadership and membership decisions of dozens of other groups. Wayne State's concessions, both in its summary judgment response and its motion to dismiss, make clear that its actions here must face strict scrutiny, which they cannot hope to pass. Wayne State wants this Court to dismiss the case and authorize Wayne State to interfere with InterVarsity's religious leadership selection in unconstitutional ways. But it is InterVarsity that is entitled to both summary judgment in its favor and an injunction permanently prohibiting Wayne State from resuming its unconstitutional behavior.[1]

I. InterVarsity is entitled to summary judgment on its Religion Clause claims.

Wayne State admits or does not contest all of the elements necessary to grant summary judgment to InterVarsity on Counts I and II. Under the Religion Clauses, government is forbidden from "interfer[ing] with the internal governance" of a religious organization, particularly by "dictat[ing] to a religious organization who its spiritual leaders would be." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 835-36 (2015). Accordingly, if (1) a "religious group," (2) is selecting "one of the group's ministers," (3) the government may not "interfer[e] with the freedom of [the] religious group[ ]" to make that selection. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 177, 184 (2012).

Here, the facts establishing the first two prongs are undisputed. Wayne State does not contest

[1] Wayne State asks to defer any decision on this motion and for oral argument on this and on its motion to dismiss. If the Court believes oral argument would be helpful, InterVarsity requests that both motions be considered and set for argument concurrently.

that InterVarsity has a "religious mission" to "establish and advance . . . witnessing communities of students and faculty who follow Jesus as Savior and Lord." Dkt. 21 at 4. Nor does it contest that InterVarsity's leaders must "exemplify Christ-like character, conduct, and leadership," affirm InterVarsity USA's statement of faith, perform "important religious functions," and have a "religious leadership title." *Id.*; Dkt. 16-1 at 11-13. It also does not contest the evidence showing that InterVarsity's leaders hold important religious roles and receive significant religious training. Dkt. 16-1 at 13. Together, these uncontested facts show that the ministerial exception "clearly applies" to protect InterVarsity's leadership selection. *InterVarsity*, 777 F.3d at 834-35.

And the last prong is conceded: Wayne State admits that it interprets its policy to "provide[] a bright-line rule" against InterVarsity asking its leaders to believe in the God they pray to. Dkt. 21 at 21. That absolute rule is the kind of interference in "religious leadership" decisions that the First Amendment "categorically prohibits." *InterVarsity*, 777 F.3d at 836. Nor could it be otherwise: Wayne State's bright-line "intrusion into the internal structure [and] affairs" of InterVarsity would, if allowed to stand, "cause the group . . . to cease to exist." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861, 863 (7th Cir. 2006).

Wayne State offers three defenses. First, that the Religion Clauses' protection for internal leadership selection decisions "operates *solely* as a defense." Dkt. 21 at 18. But that unprecedented and impoverished vision of the Religion Clauses is wrong, as InterVarsity explains in its Response to Wayne State's motion to dismiss. Dkt. 25 at 11-15.

Second, Wayne State worries that allowing religious groups to select their own leaders will raise Establishment Clause problems. Dkt. 21 at 20. But it is Wayne State's effort to entangle itself in leadership selection that raises such problems. Moreover, courts have enforced the right of religious groups to select their leaders for decades without violating the Establishment Clause.

And should Wayne State fear it cannot follow their nuanced example, it could always simply adopt as a general rule its recent commitment that it "will not intervene in [InterVarsity's] leadership selection." Dkt. 16-1 at 7. That worked well for the last 75 years.

Third, Wayne State argues that the ministerial exception's protections are limited to situations where a "government actor" takes over as a group's minister. Dkt. 21 at 19. But that misses the point. The ministerial exception is a complete structural bar on *any* government interference in ministerial selection, not just interference the government might consider substantial. Hence the Supreme Court's ruling that any "penalty" or "punish[ment]" on leadership selection is forbidden, since it would pressure a religious organization to select "an unwanted minister." *Hosanna-Tabor*, 565 U.S. at 194, 188. Thus, courts have protected religious groups from many different types of attempts to use governmental pressure to influence ministerial decisions. *See Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (listing anti-discrimination, contract, and tort claims). Rejecting such pressure, the First Amendment has "struck the balance" to protect a religious group's selection of "who will guide it on its way." *Hosanna-Tabor*, 565 U.S. at 196.

In sum, this Court can and should grant summary judgment to InterVarsity.

II. InterVarsity is entitled to summary judgment on its Free Exercise claims.

Wayne State has likewise conceded or failed to rebut all of the facts necessary to enter judgment for InterVarsity on its Free Exercise Claims, Counts III and IV. Some of this has been covered in InterVarsity's Response to Wayne State's motion to dismiss, Dkt. 25 at 15-20, but Wayne State's summary judgment response brief makes the Constitutional analysis even clearer.[2]

Wayne State admits that it has "exempt[ions] from the nondiscrimination policy" for categories

[2] Due to a scrivener's error, the Free Exercise Counts III and IV were not listed in the motion, but have been briefed by both parties. *See* Dkt. 16-1 at 21, Dkt. 21 at 20-22. Wayne State argues the court could grant it summary judgment on all counts. *Id.* at 6. Therefore the Court may grant summary judgment to InterVarsity on Counts III and IV.

of secular groups, exemptions that it does not allow to religious groups. Dkt. 21 at 12. When the government "creates a categorical exemption for individuals with a secular objection [to a policy] but not for individuals with a religious objection," that categorical distinction indicates an impermissible "value judgment" against religious motivations and "is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (1999). Courts have found that just one categorical exemption is sufficient. *Id.* at 366; *accord Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) (same). Wayne State admits to several. For instance, Wayne State admits that, "[a]s a matter of policy," it "does not apply the gender component of the nondiscrimination policy to club sports." Dkt. 21 at 3. Wayne State says that the reason for this is "obvious" and "based on . . . health, safety and welfare." *Id.* at 3, 12. But it is far from obvious that those concerns required granting an automatic, categorical exemption to clubs that might not even want it, such as Wayne State's two ping-pong clubs, its billiards club, or the Quidditch club. *See* Dean of Students Office, *List of student organizations*, https://doso.wayne.edu/org-services/listing (listing club sports). Wayne State also extends a categorical exemption from the sex-discrimination policy to its 46 fraternities and sororities, some of the largest groups on campus. Dkt. 21 at 12.

These broad, categorical exemptions are "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Fraternal Order of Police*, 170 F.3d at 365. But here, there is no need to rely on suggestion: Wayne State's anti-religious value judgment is explicit. Wayne State insists on maintaining categorical exemptions for large, popular secular groups so that those groups can select both leaders and members based on sex. But Wayne State then insists that it cannot possibly allow religious groups to select religious leaders because, just maybe, one day a *religious* group (unlike InterVarsity) might "hold[] as an article of religious faith that their leaders must be

. . . male." Dkt. 21 at 23-24. To Wayne State, actual secular sex discrimination is good while hypothetical religious sex discrimination is evil. But to the Supreme Court, a "rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness." *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, No. 16-111, slip op. 16, 584 U.S. __ (June 4, 2018). Thus, Wayne State "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* at 17.

Based on these concessions alone, Wayne State's religiously discriminatory policy must face "the strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). As established below, it cannot pass that scrutiny, and so judgment should be entered in favor of InterVarsity.

III. InterVarsity is entitled to summary judgment on its Free Speech claim.

InterVarsity demonstrated that Wayne State has violated its Free Speech rights. Dkt. 16-1 at 14-21. Wayne State once again relies upon *Martinez* and *Reed*. Dkt. 21 at 9-11. But the facts demonstrate that its policy is illusory, content-based, and arbitrarily applied.

A. Wayne State's policy is unconstitutional on its face.

Wayne State relies heavily on the Supreme Court's decision in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). But Wayne State's policy is distinguishable from the policy upheld in *Martinez* in three fundamental respects. First, the Court's decision in *Martinez* depended heavily on a university clearly setting "the lawful boundaries" of a limited public forum, and then "respect[ing] the lawful boundaries it has itself set." *Id.* at 685. But Wayne State has no written policy that addresses discrimination by student organizations. *See* Code 2.28.01.010-20 (no mention of student organizations). And Wayne State's own evidence shows that the University understands the nondiscrimination requirement to apply to student organization membership, but

not leadership. *See* Dkt. 21-2 at 6 (stating "Membership must be open to all currently registered WSU students (see Anti-Discrimination Policy)," but making no such leadership requirement).

Second, *Martinez* recognized that limitations on leadership selection raise unique constitutional problems. The majority said that groups remained free to refuse to elect officer candidates who are "at odds" with the group's mission. 561 U.S. at 692-93. And Justice Kennedy's concurrence found that even in the face of a true all-comers policy, a student group would have a "substantial case" if the policy was "used to . . . challenge [group] leadership." 561 U.S. at 706. As discussed above, the Court later unanimously agreed on this point, ruling that the government may not restrict religious groups' selection of religious leaders. *Hosanna-Tabor*, 565 U.S. 171.

Third, *Martinez* is inapplicable to Wayne State's policy, which it applies selectively only to certain types of expressive criteria. The deeply divided *Martinez* Court refused to address policies that "target solely those groups whose beliefs are based on religion . . . and leave other associations free to limit membership and leadership to individuals committed to the group's ideology." 561 U.S. at 675. And Justice Kennedy's concurrence emphasized that "the case likely should have a different outcome" if there was any evidence that if the school's policy was "content based either in its formulation or evident purpose." *Id.* at 703-04. Wayne State's policy is content-based in both its "formulation" and its "evident purpose." Student groups may select leaders based on a variety of secular viewpoints, such as political ideology. Dkt. 21 at 12 & n.3 (concession). But religious groups may not select their leaders based upon religious views. The policy is content-based.

Wayne State also relies heavily on the Ninth Circuit's decision in *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011). As discussed in InterVarsity's response to Wayne State's motion to dismiss, in *Reed* the university's policy survived a facial challenge (and only the facial challenge) because it had a clear policy which expressly applied to student organizations.

Dkt. 25 at 6-8. But Wayne State does not have a facial policy to review, since its Code does not expressly apply to student organizations and has never been understood to apply to them as written. *Id.* And the Ninth Circuit's ruling is merely persuasive authority whose persuasive power is called into question by *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2229 (2015).

In *Town of Gilbert*, the Supreme Court invalidated a sign code which treated political or ideological speech more favorably than religious speech, holding that such distinctions are subject to strict scrutiny because their application "depend[s] entirely on the communicative content." *Id.* at 2227. Wayne State's Code facially treats political association differently than religious association, as the university admits. Dkt. 21 at 12 & n. 3. *Town of Gilbert* also addresses situations where, as here, "the purpose and justification for the law are content based." 135 S. Ct. at 2228. Here, Wayne State admits that the purpose of the policy is to ensure that groups cannot "make second-class citizens of students who refuse to accept their religious pledge." Dkt. 18 at 17. Since the purpose and justification for the policy governing student organizations is content-based, it must face strict scrutiny.[3]

B. Wayne State cannot defend the arbitrary application of its policy here.

Wayne State's policy is also viewpoint discriminatory as applied. Dkt. 16-1 at 18-20. Wayne State acknowledges that its policy does not apply consistently to all groups, but claims it merely employs "a few limited exceptions." Dkt. 21 at 3. The record shows otherwise.

Wayne State concedes that it grants an "exemption from the gender discrimination aspect of the policy," Dkt. 18 at 14 n.7, to sports clubs and to fraternities and sororities. Its defense is that

[3] Wayne State also argues that its actions are constitutional because they govern conduct, not speech. Dkt. 21 at 11. But the selection of a group's speaker is an inherently expressive act. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 558, 570 (1995) ("[t]he election of contingents to make a parade" was expressive); *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) ("When it comes to the expression . . . of religious doctrine, there can be no doubt that . . . the content and credibility of a religion's message depend vitally upon" the messenger).

federal law has an exemption for fraternities and sororities in Title IX. Dkt. 21 at 12. But Title IX does not compel Wayne State to adopt that same exemption, which Wayne State admits. *Id.* Moreover, federal law also provides exemptions for religious organizations. *See, e.g.*, 42 U.S.C. § 2000bb. Wayne State offers an even flimsier justification for its exemption of club sports, relying solely on what it labels as "obvious reasons" of "health, safety and welfare." Dkt. 21 at 3, 12. This rationale based on sex-based stereotypes is constitutionally suspect. *See United States v. Virginia*, 518 U.S. 515, 541 (1996) (refusing to credit similar justifications offered in favor of single-gender military academies). These admissions alone are sufficient to trigger strict scrutiny.

InterVarsity also adduced evidence that Wayne State's policy is haphazardly conceived and unevenly applied. InterVarsity collected direct quotations from the websites of ninety student groups indicating that they discriminate in violation of the Code, or that they are permitted to discriminate according to ideology and identity. Dkt.16-2 Ex 1. Wayne State dismisses this evidence as attorney opinion, but it is a list of quotations and citations available on Wayne State's own website, and on the student organization sites linked from there. Wayne State's other argument for disregarding what is plain from its own website is that the student groups' constitutions are necessary to determine whether the groups are truly discriminating. Dkt. 21 at 12-13. But Wayne State's sweeping Code surely applies to discriminatory *actions*, not merely discriminatory *constitutions*. Wayne State's own website contains evidence that groups limit leadership and membership in prohibited ways. It cannot ignore that while penalizing InterVarsity.

IV. InterVarsity is entitled to summary judgment on its expressive association claim.

The University's actions also violate InterVarsity's right to expressive association.[4] Dkt. 16-1

[4] Relying on *Martinez*, Wayne State argues that only limited public forum analysis applies. Dkt. 21 at 8. In *Martinez*, CLS conceded its "expressive-association claim" was "auxiliary to speech's

at 20-21. Wayne State claims InterVarsity suffered no harm because the group could still meet on campus at its own expense, and simply accept the penalties of non-recognition. Dkt. 21 at 17. But in *Healy v. James*, the Supreme Court found that the student group's associational rights were harmed by "denial of access to the customary media for communication with the administration, faculty members, and other students," and even "more subtle governmental interference." 408 U.S. 169, 181-82 (1972). InterVarsity suffered the same penalties. Dkt. 16-1 at 6. The Supreme Court has since made clear that the denial of contracts, grants, and benefits based upon speech or religious character is just as unconstitutional as a direct penalty. *See* Dkt. 16-1 at 16; *see also CEF of Minn. v. Minneapolis Special Sch. Dist.*, 690 F.3d 996, 1001-02 (8th Cir. 2012). Wayne State's other argument—that no "non-Christians have attempted to take leadership roles," Dkt. 21 at 17—is unsupported and irrelevant. Wayne State is arguing for a catch-22: InterVarsity might have the right to reject a particular leadership candidate, but only if it first waives that right.

V. Wayne State's actions cannot survive strict scrutiny.

As discussed above, strict scrutiny applies to InterVarsity's freedom of speech, freedom of association, and free exercise claims.[5] Wayne State asserts that it "has a compelling interest in preventing discrimination on its campus." Dkt. 21 at 17-18. But it makes no attempt to bear its burden of proof to explain why it must penalize InterVarsity, but not others. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (strict scrutiny requires "scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants."). Wayne State also claims (without citation) that "A compelling interest allows the

starring role," and the Court treated the two analyses together because a blanket policy defining the scope of the forum, not individual application, was at issue. 561 U.S. at 680-81.

[5] Wayne State objects to InterVarsity's reference to strict scrutiny as an "affirmative defense." Dkt. 21 at 8 n.2. But Wayne State acknowledges that strict scrutiny "heightens the government's burden." *Id.* That is the point—this is an issue on which Defendants bear the burden of proof.

government to act—but does not require it." Dkt. 21 at 24-25. This is precisely backwards: "Where government . . . fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given . . . is not compelling." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). Wayne State has granted numerous exceptions to its nondiscrimination policy. *See supra* III.B. It cannot claim a compelling interest in excluding InterVarsity.

Even if Wayne State's interest in combating discrimination were compelling, it has not pursued that interest using the least restrictive means. The least-restrictive-means standard is "exceptionally demanding[.]" *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). This is particularly true where, as here, other exceptions exist: if the government's "proffered objectives are not pursued with respect to analogous nonreligious conduct," that suggests "those interests could be achieved by narrower [policies] that burdened religion to a far lesser degree." *Id.* at 866 (quoting *Lukumi*, 508 U.S. at 546); *accord McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475–76 (5th Cir. 2014). Wayne State has two less restrictive alternatives at hand: First, to do what it is doing today and recognize InterVarsity.[6] Second, it can do what its student organization application suggests: apply its policy to student organization membership, but not leadership. *See* Dkt. 21-2 at 6 (student organization application). Wayne State offers no proof that either option is unworkable.

CONCLUSION

For all these reasons, the Court should grant InterVarsity's motion for partial summary judgment and issue permanent injunctive relief protecting InterVarsity's constitutional rights.

[6] Wayne State cites no precedent supporting its argument that Federal Rule of Evidence 408 bars consideration of a decision Wayne State announced via the media. Rule 408 is intended to safeguard private negotiations, not press releases. *See, e.g.*, *Stryker Corp. v. XL Ins. Am., Inc.*, No. 1:05-cv-51, 2013 WL 3276408, at * 2 (W.D. Mich. June 27, 2013) (Rule 408 did not apply to a communication that "was not secret" because the party "had made [its] position known" publicly).

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Respectfully submitted,

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