

**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.

Civil Action No.:
3:19-cv-10375-RHC-SDD
Judge Robert H. Cleland

**MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE* OF
CHRISTIAN LEGAL SOCIETY,
CAMPUS CRUSADE FOR
CHRIST, INC., CHI ALPHA
MINISTRIES USA, CHRISTIAN
MEDICAL AND DENTAL
ASSOCIATIONS,
FELLOWSHIP OF CATHOLIC
UNIVERSITY STUDENTS,
RATIO CHRISTI, AND YOUNG
LIFE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Timothy W. Denney
Rickard, Denney, Garno,
Leichliter & Childers
1100 North Saginaw St., Ste. 1
Lapeer, MI 48446
(810) 664-0750 phone
(810) 664-7248 fax
tdenney@twdpclaw.com

Thomas C. Berg
Religious Liberty Appellate Clinic
University of St. Thomas
School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcborg@stthomas.edu

Kimberlee Wood Colby
Reed N. Smith
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
(703) 894-1087 phone
kcolby@clsnet.org
rsmith@clsnet.org

Counsel for Amici Curiae

Pursuant to E.D. Mich. LR 7.1, proposed *amici curiae* Christian Legal Society, Campus Crusade for Christ, Chi Alpha Campus Ministries USA, Christian Medical and Dental Associations, Fellowship of Catholic University Students, Ratio Christi, and Young Life (“Movants”) respectfully submit this Motion for Leave to File Brief *Amicus Curiae* of Christian Legal Society, Campus Crusade for Christ, Chi Alpha Campus Ministries USA, Christian Medical and Dental Associations, Fellowship of Catholic University Students, Ratio Christi, and Young Life in Support of Plaintiffs’ Motion for Summary Judgment, which is attached to this motion. A proposed order also accompanies this motion.

In support of this motion, Movants state as follows:

I. The Parties’ Consent to this Motion was Sought and Obtained from Plaintiffs’ Counsel; however, Defendants’ Counsel Did Not Consent.

Pursuant to E.D. Mich. LR 7.1(a), counsel for Movants certifies that it obtained the consent of Plaintiffs’ counsel to file the accompanying brief in this matter. Counsel for Movants sought the consent of Defendants’ counsel, and upon request, provided a near-final copy of the brief that accompanies this motion; however, consent was not given.

II. The Movants Have Significant Interests in the Outcome of This Matter.

Proposed *amici curiae* Christian Legal Society, Campus Crusade for Christ, Chi Alpha Campus Ministries USA, Christian Medical and Dental Associations,

Fellowship of Catholic University Students, Ratio Christi, and Young Life are religious organizations serving students on university and college campuses nationwide for many decades. In the aggregate, these religious organizations encompass over 2400 student groups. These groups welcome everyone to their meetings, activities, and events. But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs and, therefore, have a strong interest in the outcome of this case.

Proposed *amici curiae* Campus Crusade for Christ, Chi Alpha Campus Ministries USA, Christian Medical and Dental Associations, and Fellowship of Catholic University Students currently have student groups at Wayne State University that likely will be affected by the outcome in this case. Christian Legal Society previously has had a student chapter at Wayne State University Law School, but the chapter is not active this year.

Specific individual statements of interest for the proposed *amici curiae*, which are also found in the Appendix to the accompanying brief, are as follows:

Christian Legal Society (CLS) is an association of attorneys, law students, and law professors with approximately 90 student chapters on law school campuses nationwide. For over four decades, through its Center for Law and Religious Freedom, CLS has worked to ensure that religious student groups are allowed to

meet on their university campuses despite government officials' attempts to exclude them because of their religious speech and beliefs. In the past, CLS has had a student chapter meeting at Wayne State University Law School, although no CLS chapter is meeting this year.

Campus Crusade for Christ, Inc., operates in the United States under the name "Cru." Cru has established affiliated chapters—student organizations—on 1,439 American college campuses, with more than 106,000 students involved. These chapters, like many religious student organizations, require their leaders to be able to articulate Christian beliefs and live a Christian lifestyle. Cru's interest in this case is two-fold. First, Cru has a chapter at Wayne State University that will be affected by the university's interpretation of its policies. Second, Cru has an interest in upholding the religious, expressive, and associational interests of religious student organizations on college campuses across the nation.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. At each of its 320 university chapters across the country, it strives to reconcile diverse groups of students to Christ and to equip them through Spirit-filled communities of prayer, worship, fellowship, discipleship, service, and missions. Chi Alpha chapters, including its chapter at Wayne State University, welcome everyone to their meetings, activities, and events.

But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs.

Christian Medical & Dental Associations (CMDA) strives to educate, encourage, and equip Christian healthcare professionals to glorify God by serving with excellence and compassion, by caring for all people, and by advancing biblical principles of healthcare within the Church and throughout our world. The overarching vision of CMDA is bringing the hope and healing of Christ to the world through healthcare professionals and trainees. CMDA has 325 chapters at medical, dental, optometry, physician assistant, and undergraduate schools across the country. The Wayne State University School of Medicine chapter is an interdenominational fellowship of believers who consider themselves Christians first and medical students second. Members believe that Bible study, worship and fellowship are essentials that cannot be neglected during medical school. Everyone is welcome to attend their weekly meetings.

Fellowship of Catholic University Students (FOCUS) is a Catholic apostolate whose mission is to share the hope and joy of the Gospel. FOCUS missionaries encounter people in friendship, inviting them into a personal relationship with Christ and accompanying them as they pursue lives of virtue and excellence. Through Bible studies, outreach events, mission trips and discipleship, missionaries inspire and build up others in the faith, sending them out to live out

lifelong Catholic mission wherever they are. For the 2020–2021 academic year, nearly 800 FOCUS missionaries are serving on 171 campuses and nine parishes across the U.S. and Europe, including Wayne State University. Tens of thousands of students have been involved with FOCUS, who after graduation have the opportunity to move into parish life to continue their missionary work. An important blessing of a fruitful partnership between the local campus ministry and FOCUS has been the pursuit of religious vocations. Over the past 20 years, 959 people have entered the seminary or a religious house of formation after involvement with FOCUS on college campuses. FOCUS missionaries are typically recent college graduates who devote two or more years of their post-collegiate lives to reach out to peers on campus.

Ratio Christi campus apologetics alliance is a campus ministry on 125 campuses nationwide that seeks to share the hope and explore the truth claims of Christianity within a welcoming, loving, and intellectually engaging environment. Ratio Christi examines vital questions about faith, reason, and life through panel discussions, lectures, discussion groups, and debates. Ratio Christi trains students who want to discuss their beliefs in a rational manner, hosts events, and fosters dialogue on campus. Indeed, at many of its chapters, more non-Christians than Christians attend its events.

Young Life is a Christian youth ministry organization committed to sharing the Good News of Jesus Christ with adolescents. Through local clubs and destination camps, Young Life desires to provide fun, adventurous, life-changing, and skill-building experiences, preparing kids for a life-long relationship with Christ and a love for His word, His mission, and the local church. Young Life provides opportunities for thousands of college students to serve as volunteer leaders in local Young Life programs. These college students also form student groups on their college campuses to encourage personal spiritual development and create communities of fellowship and campus outreach. Involvement in a local Young Life club has been pivotal in the spiritual growth of countless college students throughout Young Life's eighty-year history. As a religious organization governed by a sincerely held statement of faith, Young Life believes it is critical and logical that its employees, volunteers, and student leaders share and support the organization's beliefs as they further the mission of the organization in a leadership role.

Proposed *amici curiae* have a profound interest in seeing that the free exercise of religion and free speech guaranteed by the federal Constitution to them and to the students who choose to associate with their organizations are respected by Wayne State University (WSU).

III. Because of Their Decades-Long Experience on Campuses Nationwide, Movants' Proposed Brief Provides Helpful, Additional Insights into the Free Exercise and Free Speech Claims Before The Court and Will Be Useful to Its Disposition of This Matter.

As proposed *amici curiae* explain in their brief, they are deeply concerned that WSU's Nondiscrimination Policy singles out religion as the one animating belief or ideology that a student group cannot adopt and demand that its leaders share. When the prohibition on considering religion in leadership selection is applied to religious groups, it violates the bedrock rule, under the Free Exercise Clause, that government may not impose special disabilities on the basis of religious status or views. Similarly, as proposed *amici curiae* explain in their brief, WSU has discriminated against religious viewpoints in violation of the Free Speech Clause. Such discrimination imposes serious burdens on religious student groups—burdens that the proposed *amici curiae* further detail from their own experiences. Those burdens include greatly increased rental costs, reduced access to students, and the stigma of being an unregistered or disapproved group.

As proposed *amici curiae* further explain in their brief, WSU has also discriminated against religion by refusing to exempt religious groups from the policy while exempting or registering numerous comparable student groups that also restrict leadership or membership based on otherwise prohibited grounds. These exceptions—most notably for social fraternities and sororities, but also for a variety

of other groups—show that WSU’s policy is neither neutral toward religion nor generally applicable and therefore violates the Free Exercise Clause.

Proposed *amici curiae* are represented by counsel with substantial experience in First Amendment law. Co-counsel on this amicus brief, the Religious Liberty Appellate Clinic at the University of St. Thomas School of Law (Minnesota), has also served as counsel for various amici in numerous cases, including *Our Lady of Guadalupe* when it was briefed in the United States Supreme Court this year. The Clinic’s director and co-counsel here, Professor Thomas C. Berg, is a leading First Amendment scholar, the author of *The State and Religion in a Nutshell* (West, 3d ed. 2016), and a co-author of the leading casebook in the field, *Religion and the Constitution* (Wolters Kluwer, 4th ed. 2016) (with Michael W. McConnell and Christopher Lund).

Because of their long experience on campuses nationwide stretching over many decades, proposed *amici curiae* are particularly equipped to provide relevant arguments regarding the legal issues before the Court and the practical impact the ruling will have on many students and religious organizations at Wayne State University, as well as nationwide.

IV. The Court has the Authority to Grant This Motion.

While Federal Rules of Civil Procedure and Local Civil Rules do not specifically address the subject of briefs *amicus curiae* in district court, “district

courts possess the inherent authority to appoint ‘friends of the court’ to assist in their proceedings.” *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006). The Sixth Circuit has held that district courts possess the discretion to permit the filing of amicus briefs. *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987).

V. Granting Leave to File Movants’ Timely Brief Will Not Prejudice Either Party.

Movants are submitting their proposed brief *amici curiae* well in advance of the hearing date on Plaintiffs’ Motion for Summary Judgment, which we understand is scheduled for January 13, 2021. Thus, there will be no prejudice to either party by allowing the accompanying brief.

VI. Conclusion

For the reasons given above, Movants respectfully request that this Court grant this motion and accept for filing the attached Brief *Amicus Curiae* of Christian Legal Society, Campus Crusade for Christ, Chi Alpha Campus Ministries USA, Christian Medical and Dental Associations, Fellowship of Catholic University Students, Ratio Christi, and Young Life in Support of Plaintiffs’ Motion for Summary Judgment.

Respectfully submitted.

Timothy W. Denney
Rickard, Denney, Garno,
Leichliter & Childers
1100 North Saginaw St., Ste. 1
Lapeer, MI 48446
(810) 664-0750 phone
(810) 664-7248 fax
tdenney@twdpclaw.com

Thomas C. Berg
Religious Liberty Appellate Clinic
University of St. Thomas
School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcborg@stthomas.edu

Kimberlee Wood Colby
Reed N. Smith
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
(703) 894-1087 phone
kcolby@clsnet.org
rsmith@clsnet.org

Counsel for Amici Curiae

December 1, 2020

CERTIFICATE OF SERVICE

I, Timothy W. Denney, certify that the forgoing document was filed and served via the Court's electronic case filing and noticing system (ECF) this 1st day of December, 2020, which will automatically send notification of such filing to all attorneys and parties of record registered electronically.

/s/ Timothy W. Denney

Timothy W. Denney

**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.

Civil Action No.:
3:19-cv-10375-RHC-SDD
Judge Robert H. Cleland

**BRIEF *AMICUS CURIAE* OF
CHRISTIAN LEGAL SOCIETY,
CAMPUS CRUSADE FOR
CHRIST, INC., CHI ALPHA
MINISTRIES USA, CHRISTIAN
MEDICAL AND DENTAL
ASSOCIATIONS,
FELLOWSHIP OF CATHOLIC
UNIVERSITY STUDENTS,
RATIO CHRISTI, AND YOUNG
LIFE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Timothy W. Denney
Rickard, Denney, Garno,
Leichliter & Childers
1100 North Saginaw St., Ste. 1
Lapeer, MI 48446
(810) 664-0750 phone
(810) 664-7248 fax
tdenney@twdpclaw.com

Thomas C. Berg
Religious Liberty Appellate Clinic
University of St. Thomas
School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcborg@stthomas.edu

Kimberlee Wood Colby
Reed N. Smith
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
(703) 894-1087 phone
kcolby@clsnet.org
rsmith@clsnet.org

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. WSU’s Non-Discrimination Policy Discriminates Against Religion, in Violation of the Free Exercise and Free Speech Clauses, by Barring Religious Student Groups, and Only Those Groups, from Setting Criteria for Leadership Based on Group Ideology.....	3
A. WSU’s Policy Violates Free Exercise by Discriminating Against Religion.	4
B. WSU’s Policy Violates Free Speech by Discriminating Against Religious Viewpoints.	8
C. Discrimination Against Religion is Sufficient to Trigger Strict Scrutiny.....	11
D. Independently, Denial of Registration Seriously Burdens Student Religious Groups.	12
1. Burdening a Group’s Ability to Select Leaders is a Serious Harm.	12
2. Derecognition of a Group Seriously Burdens It.	13
II. WSU Devalues Religious Exercise, in Violation of the Free Exercise Clause, by Permitting Multiple Groups—in Particular, Single-Sex Fraternities and Sororities—to Discriminate Based on Prohibited Characteristics.....	16
A. Selective Exemptions Violate the Free Exercise Clause Requirement of Neutrality and General Applicability.....	17
B. WSU Has Devalued Religion, Violating Neutrality and General Applicability, by Exempting Multiple Other Groups from the Policy.....	18

1. Social Fraternities and Sororities.....18

2. Other Groups.....22

CONCLUSION24

CERTIFICATE OF SERVICE26

APPENDIX: Detailed Individual Statements for *Amici Curiae*..... A-1

TABLE OF AUTHORITIES

Cases:

<i>Alpha Delta Chi-Delta Chapter v. Reed</i> , 648 F.3d 790 (9th Cir. 2011)	6, 7
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000).....	13
<i>Calvary Chapel of Dayton Valley v. Sisolak</i> , 140 S. Ct. 2603 (2020).....	21-22
<i>Christian Legal Society v. Martinez</i> , 561 U.S. 661 (2010).....	5
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993).....	3, 5, 7-8, 11
<i>Cottonwood Christian Center v. Cypress Redevelopment Agency</i> , 218 F. Supp. 2d 1203 (D.C. Cal. 2002)	22
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990).....	4-5
<i>Espinoza v. Montana Dept. of Revenue</i> , 140 S. Ct. 2246 (2020).....	3, 5, 11-12
<i>Fraternal Order of Police v. City of Newark</i> , 170 F.3d 359 (3d Cir. 1999)	17-18, 20, 22
<i>Good News Club v. Milford Central School</i> , 533 U.S. 98 (2001).....	3, 8, 9, 10, 12
<i>Hartmann v. Stone</i> , 68 F.3d 973 (6th Cir. 1995)	17
<i>Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC</i> , 565 U.S. 171 (2012).....	12-13, 20-21

<i>Midrash Sephardi v. Town of Surfside</i> , 366 F.3d 1214 (11th Cir. 2004)	22
<i>Lamb’s Chapel v. Center Moriches School Dist.</i> , 508 U.S. 384 (1993).....	3, 8, 9-10
<i>Our Lady of Guadalupe School v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020).....	13, 21, 23
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 2020 WL 6948354 (U.S. Nov. 25, 2020)	5, 18
<i>Roberts v. Neace</i> , 958 F.3d 409 (6 th Cir. 2020)	17
<i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995).....	3, 8, 10
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	10-11
<i>Trinity Lutheran Church v. Comer</i> , 137 S. Ct. 2012 (2017).....	3, 5, 11-12
<i>Ward v. Polite</i> , 667 F.3d 727 (6th Cir. 2012)	17
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	10, 12

Constitutional Provisions and Statutes:

U.S. Const., Amend. 1	<i>passim</i>
Title IX, 20 U.S.C. §§ 1681-1688.....	20
Title IX, 20 U.S.C. § 1681(a)(6)(A)	20

Other Authorities:

Cru, Written Comment on Department of Education’s Proposed Rulemaking of January 17, 2020, 85 FR 3190, Docket ID ED-2019-OPE-0080-0001 (Feb. 18, 2020).....15

Dean of Students Office: Fraternity and Sorority Life, *Organizations*, <https://doso.wayne.edu/fsl/organizations>.....18

Dean of Students Office: Fraternity and Sorority Life, *Promotion and marketing*, <https://doso.wayne.edu/fsl/promotion>.....19

Dean of Students Office: Fraternity and Sorority Life, *Quick facts*, <https://doso.wayne.edu/fsl/quick-facts>.....19

First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives, 114th Cong. (2015).14-19

John Hechinger, *True Gentlemen: The Broken Pledge of America’s Fraternities* (2017).25

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889 (2009)6

Peter Jacobs, *Why Fraternities Will Never Disappear from American College Life*, Business Insider (Dec. 3, 2014).19

Wayne State University Nondiscrimination Policy*passim*

INTEREST OF *AMICI CURIAE*

Amici curiae Christian Legal Society, Campus Crusade for Christ, Chi Alpha Campus Ministries USA, Christian Medical and Dental Associations, Fellowship of Catholic University Students, Ratio Christi, and Young Life are religious organizations serving students on university and college campuses nationwide for many decades. In the aggregate, these religious organizations encompass over 2400 student groups, including several student groups at Wayne State University. These groups welcome everyone to their meetings, activities, and events. But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs and, therefore, have a strong interest in the outcome of this case. Detailed individual statements of interest are found in the Appendix.

SUMMARY OF ARGUMENT

Wayne State University (WSU) denied InterVarsity Christian Fellowship (IVCF) status as a registered student group, thus imposing significant disabilities on it, on the basis that IVCF engages in “religious discrimination” when it asks its student leaders to sign a statement of faith: that is, to commit to the beliefs that animate IVCF as an organization. This decision—penalizing a group for taking the sensible step of asking its leaders to share its beliefs—is illogical, unreasonable, and in

multiple ways, unconstitutionally discriminatory. *Amici* here focus on two forms of invalid discrimination.¹

I. WSU's Nondiscrimination Policy singles out religion as the one animating belief or ideology that a student group cannot adopt and demand that its leaders share. This singling out occurs on the policy's face and by its inherent operation, since among the various prohibited grounds for a group's selection of leaders—race, sex, gender, religion, veteran's status, and others—"religion" is the only prohibited ground that is a belief. Therefore, when the prohibition on considering religion in leadership selection is applied to religious groups, it violates the bedrock rule, under the Free Exercise Clause, that government may not impose special disabilities on the basis of religious status or views. For the same reason, WSU has discriminated against religious viewpoints in violation of the Free Speech Clause. Such discrimination against religion triggers strict scrutiny in itself. It also imposes serious burdens on religious student groups—burdens that IVCF has demonstrated and that *amici* further detail from their own experiences. Those burdens include greatly increased rental costs, reduced access to students, and the stigma of being an unregistered or disapproved group.

¹ Although *amici* focus on these two fundamental forms of discrimination here, we agree with IVCF that WSU's actions are discriminatory and non-neutral for multiple reasons, including selective enforcement and "impermissibl[e] favoring [of] certain religious denominations over others." IVCF Br. at 2 (ECF No. 47, PageID.1126).

II. WSU has also discriminated against religion by refusing to exempt religious groups from the policy while exempting or registering numerous comparable student groups that also restrict leadership or membership based on otherwise prohibited grounds. These exceptions—most notably for social fraternities and sororities, but also for a variety of other groups—show that WSU’s policy is neither neutral toward religion nor generally applicable and therefore violates the Free Exercise Clause. WSU has unconstitutionally devalued IVCF’s religious reasons for “discriminating”—that is, setting criteria for its leaders—by judging them to be of lesser import than other organizations’ reasons.

ARGUMENT

I. WSU’s Non-Discrimination Policy Discriminates Against Religion, in Violation of the Free Exercise and Free Speech Clauses, by Barring Religious Student Groups, and Only Those Groups, from Setting Criteria for Leadership Based on Group Ideology.

Government discrimination against religion violates the Free Exercise Clause. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020). Government discrimination against religious viewpoints violates the Free Speech Clause. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993). WSU’s Nondiscrimination Policy, when applied to bar religious groups from

requiring that their leaders adhere to the group's religion, violates both clauses. By its terms, structure, and operation, it singles out religious groups as the only groups that cannot set their animating beliefs as criteria for the selection of student leaders.

A. WSU's Policy Violates Free Exercise by Discriminating Against Religion.

WSU refused registration to IVCF based on the university's Nondiscrimination Policy, which prohibits discrimination based on enumerated "characteristics": "race, color, sex (including gender identity), national origin, religion, age, sexual orientation, familial status, marital status, height, weight, disability, or veteran status." WSU SOMF ¶3 (ECF No. 45, PageID.702) (quotation omitted). Assuming that the policy applies to student groups' selection of leaders and members, it covers only those listed characteristics; "student organizations may limit membership and leadership based on characteristics not protected by the Non-Discrimination Policy." ECF No. 45, ¶42, PageID.716. As WSU admits, the policy allows groups to require that their leaders and members affirm the beliefs or ideologies animating the group. WSU Opp. C-SOMF ¶66 (ECF No. 53, PageID.2392).

There is one exception, however: religion. It is the only category of ideology or belief that student groups at WSU may not require their leaders to affirm. This is because religion as a "characteristic" under the Policy is not just a status like race, sex, age, or being a military veteran. Religion is a *belief*. See *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and

foremost, the right to believe and profess whatever religious doctrine one desires.”). And thus WSU denied IVCF registration in 2017 (and asserts it could still do so) on the ground that IVCF committed religious discrimination by “requir[ing] its leaders to accept a statement of faith.” ECF No. 45, ¶46, PageID.721. But the statement of faith constitutes IVCF’s animating beliefs and ideology. Therefore, WSU penalized IVCF, singling it out—as a religious group—as the one kind of group that cannot require its leaders to commit to its animating beliefs or ideology.²

This violates the Free Exercise Clause, which forbids government to “impose special disabilities on the basis of religious views or religious status.” *Smith*, 494 U.S. at 877 (citation omitted); accord *Lukumi*, 508 U.S. at 533. The Supreme Court has strongly reaffirmed the rule against “‘impos[ing] special disabilities,’” including denial of benefits, “‘on the basis of religious status.’” *Espinoza*, 140 S. Ct. at 2254 (brackets in original) (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). See also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 6948354, at *1 (U.S. Nov. 25, 2020) (per curiam) (public-health restrictions were likely to be found non-neutral “because they single out houses of worship for especially harsh treatment”).

² Because WSU does not require all student groups to accept leaders and members without regard to their status or beliefs, this case does not involve an “all-comers” policy as in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). WSU is thus incorrect to assert that any presumption of neutrality from *Martinez* applies to its policy. WSU Opp. at 16-18 (ECF No. 53, PageID.2424-26).

Prohibiting religious discrimination in the selection of leaders makes sense as to student groups that are not organized around religious beliefs. The Chess Club has no legitimate interest in asking leaders to sign a statement of Christian faith. And prohibiting religious discrimination poses no meaningful restriction to nonreligious groups; the policy leaves them free to discriminate based on their nonreligious animating views. For example, WSU confirms that “International Youth and Students for Social Equality” (IYSSE) is free to require that its leaders “‘be in full agreement with [its] principles,’” which are simply “political or ethical principles,” not religious beliefs. ECF No. 53, PageID.2392-93; see ECF No. 53, PageID.2419 (same for College Democrats, PETA, and other groups). But as applied to groups organized around religious beliefs, the prohibition on considering religious beliefs makes no sense, and it “singles out religion as belief for uniquely unfavorable treatment.” Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 916 (2009). Judge Ripple has described the inevitable operation of a policy like WSU’s: “[T]hose who espouse other causes [besides religion] may control their membership and come together for mutual support,” while “those [groups] exercising one of our most fundamental liberties—the right to free exercise of one’s religion—cannot, at least on equal terms.” *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 806 (9th Cir. 2011) (Ripple, J., concurring).

WSU claims that its policy is neutral because it has allowed various groups that “state missions to advance the interests of a particular group,” but “the groups do not violate the Policy,” that is, they do not actually discriminate on a prohibited ground. ECF No. 45, PageID.753. But that is the point: such groups can limit leadership to those who share their beliefs. For example, LGBTQ groups “could limit their membership [or leadership] to all individuals dedicated to achieving equal political and social recognition of gay, lesbian and transgender persons” and thereby “couch their membership [or leadership] requirements in terms of [permissible] shared beliefs, as opposed to [prohibited] shared status.” *Reed*, 648 F.3d at 805-06 (Ripple, J., concurring). Religious groups cannot do the same, however, because “their shared beliefs coincide with their shared status. They cannot otherwise define themselves” by mission rather than protected characteristic so as to satisfy the nondiscrimination policy. *Id.* at 806.

WSU wrongly asserts that its policy is “facially neutral and generally applicable” because “[i]t governs all similarly situated organizations.” ECF No. 45, PageID.740. The assertion fails by its own terms: the policy facially names “religion” as the one animating belief to which an organization cannot demand adherence, and for the reasons already given, religious groups are not “similarly situated” to other groups with respect to the interest in demanding commitment to religious beliefs. See *supra* pp. 3-5. Moreover, the Supreme Court has made clear that “[f]acial neutrality is not

determinative”; the Free Exercise Clause “forbids subtle departures from neutrality” too. *Lukumi*, 508 U.S. at 534. “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *Id.* *Lukumi* held that ordinances prohibiting the ritual sacrifice of animals were neither neutral nor generally applicable, not just because of their text but because of their “real operation” in conjunction with other laws: they prohibited Santeria sacrifices while leaving unpunished “killings that are no more necessary or humane in almost all other circumstances.” *Id.* at 535-36. Similarly, in its “real operation” WSU’s policy targets religious student groups, barring them from requiring that their leaders adhere to the group’s beliefs but allowing “almost all other” groups to do so.

B. WSU’s Policy Violates Free Speech by Discriminating Against Religious Viewpoints.

For similar reasons, applying WSU’s policy to IVCF discriminates against religious viewpoints in violation of the Free Speech Clause. When a public university opens a limited public forum, such as here, it “may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ ... nor may it discriminate against speech on the basis of its viewpoint.” *Rosenberger*, 515 U.S. at 829 (citations omitted); accord *Lamb’s Chapel*, 508 U.S. at 392-93; *Good News Club*, 533 U.S. at 106-07. *Amici* agree with IVCF that forbidding religious groups from requiring commitments from their leaders is

“unreasonable in light of the forum’s purpose.” IVCF Br. at 10-12 (ECF No. 47, PageID.1134-36). We write to address WSU’s viewpoint discrimination.

As already shown, WSU’s policy singles out religion as the one category of beliefs that organizations may not apply in choosing members and leaders, since “religion” is the only belief WSU bars as a prohibited “characteristic” in its policy. See *supra* part I-A. A “[r]eligion is [itself] [a] viewpoint from which ideas are conveyed.” *Good News Club*, 533 U.S. at 112 n.4. The policy therefore denies only religious groups the ability to preserve their animating beliefs and viewpoints.

WSU claims its rule against religious discrimination in leadership and membership is “facially viewpoint neutral ... because it applies to all student organizations, except social Greek organizations and club sports.” WSU Br. at 20 (ECF No. 45, PageID.751). But in cases from *Lamb’s Chapel* through *Good News Club*, the Supreme Court looked beyond a policy’s face and a school’s characterization and found that its application to a religious group was unconstitutionally viewpoint discriminatory. For example, in *Lamb’s Chapel*, the school district described its rule as forbidding any group to use facilities “for religious purposes” (which covered all organizations and arguably did not facially single out speech). 508 U.S. at 387, 393. But the Court determined that the policy was being used to exclude a film on child-rearing, an otherwise allowable subject,

because of its religious perspective; the policy thus “was unconstitutionally applied in this case.” *Id.* at 393-94.

In each of the Supreme Court’s decisions protecting religious student organizations—*Lamb’s Chapel*, *Rosenberger*, *Good News Club*, and *Widmar v. Vincent*, 454 U.S. 263 (1981)—the schools might have argued that their policies were neutral because they prohibited “all organizations,” not just religious ones, from engaging in religious language, activity, or purposes. Of course, the Supreme Court would—and did—reject that utterly artificial argument as discriminatory against religious viewpoints. But the notion that a religious group should ignore religion in choosing its leaders, because nonreligious groups must ignore it, is just as incongruous as the notion that a religious group should pursue nonreligious language or purposes because nonreligious groups do so.

Nor is WSU’s rule viewpoint neutral because “it facially governs Plaintiffs’ conduct ... not their speech.” ECF No. 45, PageID.751-52. A regulation can govern conduct and still be viewpoint discriminatory. The government could not forbid racial discrimination only when groups espousing religious beliefs engage in it: that would be viewpoint discrimination. The Supreme Court held in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that even categories of unprotected activity may not “be made the vehicles for content discrimination unrelated to their distinctively proscribable content.” *Id.* at 383-84. When the present case is viewed in the relevant

perspective—an expressive group’s selection of the leaders and members who express its beliefs and determine its course—WSU’s exclusion of IVCF is exactly the kind of selective restriction that *R.A.V.* condemns. Even if discrimination is generally unprotected conduct, WSU’s policy prohibits an expressive group from discriminating based on its animating viewpoint in one case only: where the viewpoint is religious.

C. Discrimination Against Religion is Sufficient to Trigger Strict Scrutiny.

Because WSU’s policy singles out religious groups in its very structure and operation, WSU’s application of the policy to religious groups must satisfy strict scrutiny. WSU contends that “Plaintiffs cannot establish a ‘substantial burden’ so as to trigger strict scrutiny.” WSU Br. at 10 (ECF No. 45, PageID.741). This misstates the law. When discrimination against religion coerces groups to choose between their religious nature and a government benefit, it “imposes a penalty on the free exercise of religion that must be subjected to the ‘most rigorous’ scrutiny.” *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting *Lukumi*, 508 U.S. at 546). When the government singles out religion for discrimination, it does not matter that the consequences of denying the benefit are less than “dramatic”: for example, a “few extra scraped knees,” as the Court described the consequences in *Trinity Lutheran*, 137 S. Ct. at 2024-25. A denial based on discrimination against religion is “‘odious

to our Constitution all the same.’” *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity*, 137 S. Ct. at 2025).

So too with respect to WSU’s singling out of religious viewpoints under the Free Speech Clause: the viewpoint discrimination itself triggers strict scrutiny. In none of the decisions involving exclusion of religious groups from a limited public forum—from *Widmar* through *Good News Club*—did the Court inquire whether the exclusion imposed large burdens on such groups. Whatever the size of the burden, “[t]o justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech,” the government “must show that its regulation [satisfies strict scrutiny].” *Widmar*, 454 U.S. at 269-70.

D. Independently, Denial of Registration Seriously Burdens Student Religious Groups.

In any event, WSU’s discrimination against religious groups like IVCF significantly burdens their rights of religious exercise, speech, and association. To remain registered, IVCF must forego its fundamental right to select its leaders according to its religious beliefs. And if it is deregistered for exercising that right, it suffers multiple harms.

1. Burdening a Group’s Ability to Select Leaders is a Serious Harm.

Burdens on a religious group’s ability to choose and control its leaders cause it serious harm. The Supreme Court has repeatedly affirmed that a religious group must have “control over the selection of those who will personify its beliefs.”

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 188-89 (2012). Without such autonomy, a religious group could not “shape its own faith and mission,” *id.*: “a wayward [leader]’s preaching, teaching, and counseling could contradict the [group’s] tenets and lead the congregation away from the faith.” *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). As with all expressive groups, “[f]orcing a [religious] group to accept certain members [or leaders] may impair the ability of the group to express those views, and only those views, that it intends to express.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). These interests apply to IVCF’s student leaders, who are “‘primary means’ through which it ‘ministers on campus’”: “lead[ing] Bible studies, shar[ing] IVCF’s beliefs with others, and follow[ing] IVCF’s doctrine and purpose statements.” IVCF SOMF ¶¶ 6, 8 (ECF No. 47, PageID.1110) (quotations omitted).

2. Derecognition of a Group Seriously Burdens It.

WSU does not dispute that IVCF and other religious groups have significant interests in choosing their leaders. Instead it claims, as noted above, that denial of registered status imposes no “substantial burden” on a student religious group. ECF No. 45, PageID.741; see also WSU Opp. at 6 (ECF No. 53, PageID.2414) (trying to distinguish *Hosanna-Tabor* on the ground that WSU merely “conditioned the receipt of the benefits of registered status on compliance with the RSO Policy”).

That contention is meritless. Deregistration causes religious groups and their student members significant material and non-material harms. IVCF documented such harms here. And the harms are typical, as is shown by letters that former college students submitted to a House of Representatives subcommittee in connection with a 2015 hearing.³ To give only a few examples:

Rental costs. Because of deregistration, IVCF lost its free meeting rooms, had to “spend thousands of dollars to rent smaller, less accessible rooms,” and had to “cut back its on-campus activities because it could not afford to hold as many meetings as usual.” IVCF SOMF ¶¶76, 77 (ECF No. 47, PageID.1121) (citations omitted). These costs are typical when universities derecognize student groups. For example:

- The California State University system told a small Christian group, with mostly African-American members, that because of its religious requirements for leadership, it would no longer receive free meeting space but must begin paying \$200 a week to use a previously free classroom.⁴ Unable to afford that

³ These letters were submitted in conjunction with Christian Legal Society’s testimony at the hearing *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114th Cong. 39-58 (June 2, 2015) (testimony of Kimberlee Wood Colby, Director, Center for Law and Religious Freedom, Christian Legal Society). The letters are found in the supplemental hearing record at <http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf> (hereinafter “Supp. Hrg. Rec.”).

⁴ Letter from Cinnamon McCellen to Chairman Trent Franks (June 10, 2015) (Supp. Hrg. Rec. at 48-49, Attachment G).

charge, the group “reluctantly” left campus.⁵ Such policies in the Cal State system “resulted in many religious student organizations being without official status for a full year, many experiencing loss of members and high financial costs in trying to continue meeting on campus during that time.”⁶

- At Texas A&M University, which likewise pressured a religious group to remove its religious requirements for leaders and voting members, one Christian student reported that “non-recognized student groups are required to pay \$100 per instance for each room reservation. It would have cost our group up to \$7,000 per academic year to continue to operate on campus. This is far too great a hardship for a small student group like [ours] to maintain.”⁷

Lack of access to students. After it was deregistered, IVCF “constantly ha[d] to switch locations after being forced to the back of the room-rental line.” ECF No. 47, ¶76, PageID.1121. It “was neither listed on nor able to communicate through OrgSync (where students normally find RSOs) and could not advertise its meetings or set up tables to meet students.” *Id.* ¶78 (citations omitted).

⁵ *Id.*

⁶ Written Comment of Cru on Department of Education’s Proposed Rulemaking of January 17, 2020, 85 FR 3190, Docket ID ED-2019-OPE-0080-0001 (Feb. 18, 2020), at 4.

⁷ Letter from Dr. Ra’sheedah Richardson to Chairman Trent Franks (June 10, 2015) (Supp. Hrg. Rec. at 58-59, Attachment I).

Stigma. Deregistration also stigmatized IVCF and its members. Students asked whether IVCF was even a “real” student group. ECF No. 47, ¶79 (quoting Ex. F at 63:1-2); see also IVCF Opp. at 18 (ECF No. 55, PageID.2561) (detailing reputational and other harms to IVCF, its students, and its staff). Again, such harm is common when student religious groups try to choose committed leaders in an atmosphere of hostility to that right. For example, at the Ohio State University Moritz College of Law, after a student complained that the CLS chapter was requiring that leaders and voting members hold its Christian beliefs, the chapter’s student president faced “a hostile education environment in which he was ‘often the subject of namecalling, gossip, and rumor-mongering,’ was ‘verbally admonished’ by classmates for his religious beliefs, and was ‘warned by upperclassmen not to take courses by certain professors who were not likely to give [him] fair evaluations.’”⁸

II. WSU Devalues Religious Exercise, in Violation of the Free Exercise Clause, by Permitting Multiple Groups—In Particular, Single-Sex Fraternities and Sororities—to Discriminate Based on Prohibited Characteristics.

WSU’s discrimination against religious groups is not limited to denying them the right, enjoyed by all other groups, to demand commitments of belief from their leaders. WSU has also discriminated against religion by exempting or registering numerous other student groups that restrict leadership or membership based on

⁸ Letter from Michael Berry to Chairman Trent Franks (June 5, 2015) (Supp. Hrg. Rec. at 62-64, Attachment J).

otherwise prohibited grounds, while refusing to provide the same protection to religious groups. Therefore, WSU's policy is neither neutral toward religion nor generally applicable; it violates the Free Exercise Clause.

A. Selective Exemptions Violate the Free Exercise Clause Requirement of Neutrality and General Applicability.

As the Sixth Circuit has recognized, “[f]aith-based discrimination can come in many forms.” *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020). “A law might be motivated by animus toward [religion]” or “single out religious activity alone for regulation.” *Id.* (citing *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995)). But a law may also “appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities.” *Id.* (citing both *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012); and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365–67 (3d Cir. 1999)). “An exemption ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Id.* at 413 (citation omitted).

In *Fraternal Order of Police*, cited with approval by the Sixth Circuit in *Roberts*, the police department in question forbade officers to wear beards but gave an exception for officers with a medical reason for wearing beards. 170 F.3d at 360-61. The Third Circuit, in an opinion by then-Judge Alito, held that the department discriminated against religion when it refused an analogous exception to Muslim

officers who wore beards as a command of their faith. The court agreed that the department had “unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons.” *Id.* at 365. Likewise, WSU has allowed multiple organizations to set leadership or membership criteria on grounds otherwise prohibited by its policy but has refused to recognize IVCF’s religious reason for doing so. WSU has therefore violated neutrality and general applicability: it has “unconstitutionally devalued [IVCF’s] religious reasons for [setting criteria] by judging them to be of lesser import than [other organizations’] reasons.” *Id.* See also *Diocese of Brooklyn*, 2020 WL 6948354, at *2 (finding public-health orders discriminatory when they restricted numbers in houses of worship more than a long list of businesses deemed “essential”).

B. WSU Has Devalued Religion, Violating Neutrality and General Applicability, by Exempting Multiple Other Groups from the Policy.

1. Social Fraternities and Sororities.

Most significantly, WSU provides an unwritten categorical exception allowing Greek social fraternities and sororities to discriminate based on sex in their leadership and membership. WSU Opp. C-SOMF ¶22 (ECF No. 53, PageID.2366). This exception creates a significant hole in the Nondiscrimination Policy. WSU recognizes 27 social fraternities and sororities. See Dean of Students Office: Fraternity and Sorority Life, *Organizations*, <https://doso.wayne.edu/fsl/organizations>. Together these organizations (and any

others WSU recognizes in the future) are permitted to deny students of one sex or the other dozens of leadership offices, and hundreds of membership places. See Dean of Students Office: Fraternity and Sorority Life, *Quick facts*, <https://doso.wayne.edu/fsl/quick-facts> (WSU social Greek organizations had 550 members in Winter Semester 2019). WSU not only allows these organizations; it actively assists them in “promotion and marketing.” Dean of Students Office: Fraternity and Sorority Life, *Promotion and marketing*, <https://doso.wayne.edu/fsl/promotion>. Looking beyond these significant numbers, this Court can take judicial notice that at many colleges, Greek organizations pervasively affect campus social life and culture. Peter Jacobs, *Why Fraternities Will Never Disappear from American College Life*, Business Insider (Dec. 3, 2014, 11:30 AM), <https://www.businessinsider.com/why-fraternities-will-never-disappear-from-american-college-life-2014-12>. By allowing—even encouraging—this gaping exception to its Nondiscrimination Policy but refusing a religious exception, WSU violates neutrality and general applicability and devalues religious groups’ interests.

WSU’s defenses for its selective policy merely highlight that it devalues religion. It asserts that Greek organizations’ discrimination based on sex is not “the kind of invidious discrimination that [its] policies seek to prevent.” ECF No. 53, PageID.2409-10. But when religious groups set criteria for leadership based on their religious beliefs, WSU calls that invidious. Its exceptions thus reflect WSU’s

impermissible “value judgment” favoring other interests, while disfavoring religious interests, in setting leadership criteria. *Fraternal Order of Police*, 170 F.3d at 366.

WSU claims that it recognizes the Greek organizations “consistent with the manner in which the federal government has interpreted Title IX.” WSU SOMF ¶30 (ECF No. 45, PageID.710). But that artfully hedged phrasing should not mislead this Court. Nothing in Title IX, 20 U.S.C. §§ 1681-1688, requires university officials to exempt fraternities and sororities from nondiscrimination policies. Therefore, Title IX provides no justification for exempting fraternities and sororities while refusing to exempt religious groups. Title IX exempts fraternities and sororities only from Title IX itself (*id.* § 1681(a)(6)(A))—not from state or local nondiscrimination laws or policies, including a university’s own policy. When WSU exempts Greek social organizations but refuses to exempt religious groups, that is solely WSU’s choice.

WSU also claims, without explanation, that its exemption “is rooted in history and the treatment of social Greek organizations at institutions of higher learning throughout the country.” WSU Opp. C-SOMF ¶22 (ECF No. 53, PageID.2366). But history does not distinguish Greek organizations from IVCF or other religious groups. IVCF has operated on WSU’s campus for 75 years. IVCF SOMF ¶2 (ECF no. 47, PageID.1109). And the right of religious organizations to set criteria for their leaders is even more deeply rooted. When the Supreme Court unanimously affirmed that First Amendment right in *Hosanna-Tabor*, it traced its roots in both England

(back to Magna Carta) and in colonial and founding-era America, and it concluded “against this background” that both clauses of the First Amendment forbade the government from “interfering with the freedom of religious groups to select their own [ministers and leaders].” 565 U.S. at 183-84; see also *Our Lady*, 140 S. Ct. at 2061 (reiterating that *Hosanna-Tabor* “‘looked to the ‘background’ against which ‘the First Amendment was adopted’”) (quoting *Hosanna-Tabor*, 565 U.S. at 183).

In short, single-sex social Greek organizations undercut WSU’s asserted non-discrimination interests as much as or more than student religious groups do. WSU exempts Greek organizations because it values them more than it values religious organizations. The discrimination may have an economic motivation. This Court can take judicial notice that “[f]raternity and sorority alumni are more likely to give to their colleges and are larger lifetime donors than other graduates. Especially at cash-strapped public universities, colleges rely on their housing as quasi-official dorms and would have to come up with an expensive alternative.” John Hechinger, *True Gentlemen: The Broken Pledge of America’s Fraternities* 112 (2017). But economic self-interest is no excuse for devaluing and disfavoring the constitutionally protected activity of religious exercise. If WSU wishes to accept the significant hole in its Nondiscrimination Policy created by its exception for Greek organizations, it must take the simple and reasonable step of allowing religious groups an exception so they can ensure their leaders adhere to the group’s beliefs. Cf. *Calvary Chapel of*

Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (“[N]o precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide.”); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (rejecting argument that revenue generation is a compelling interest justifying discrimination against religious organizations).

A single secular exception as substantial as the exception for Greek organizations can suffice to show that a policy is non-neutral, non-generally applicable, and devalues religion. See *Fraternal Order of Police*, 170 F.3d 359; accord *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004). But WSU has recognized other exceptions.

2. Other Groups.

a. WSU allows multiple single-sex sports teams and club sports teams, exempting them from the Nondiscrimination Policy. ECF No. 47, ¶43, PageID.1116. It defends this exemption, based on the testimony of Dean Strauss, on the ground that it “is necessary to ‘permit[] [club sports teams] to compete in competitions with other teams at other universities.’” WSU Opp. C-SOMF ¶42 (ECF No. 53, PageID.2378) (brackets in original; quotation omitted). In other words, WSU creates an exception allowing discrimination because it is necessary so that men’s and women’s teams

can compete in leagues. But WSU refuses to recognize an exception for religious groups setting belief criteria, even though the Supreme Court has found that it is necessary so that religious organizations can exercise freedom and independence. Such freedom “requires the authority to select, supervise, and if necessary, remove a minister [i.e., religious leader] without interference by secular authorities.” *Our Lady*, 140 S. Ct. at 2060; see *supra* pp. 12-13. Again, WSU values the interests of secular groups but not the similar interests of religious groups.

b. As part of “affirmative action measures which are designed to achieve full equity for minorities and women,” WSU reserves a discretionary right to recognize groups that would otherwise violate its policy. WSU SOMF ¶4 (ECF No. 45, PageID.703). For example, even though “veteran status” is a protected characteristic, WSU recognizes a campus veterans’ group that limits leadership and membership based on veteran status. WSU defended this on the ground that it “considers the promotion of certain minority interests, including those of veterans, to be an [permitted] affirmative action program.” ECF No. 53, PageID.2383-84. *Amici* agree with IVCF that what qualifies as a “minority” interest under this exemption is left to WSU’s unfettered discretion. ECF No. 55, PageID.2554-55. WSU devalues religion, treating the distinctive needs of “certain minority” groups like veterans’ groups as reason to exempt them from nondiscrimination rules, but ignoring the distinctive need of religious groups to choose leaders based on their religious beliefs.

c. WSU registered other student groups with leadership or membership criteria clearly based on prohibited grounds. For example, WSU registered the Iraqi Student Organization, which required every leader to be a “dedicated Iraqi student”; Anakh Sherniyan Di, whose registration submission stated that it was an “all girls” group; and Queer WSU Students of Color, which stated a facial leadership *preference* (whether or not an absolute requirement) for “a QPOC” (queer person of color). See, e.g., WSU Opp. ¶¶50-52 (ECF No. 53, PageID.2382-83).

d. Moreover, WSU registered several groups despite indications that their criteria extended beyond adherence to mission or ideology and encompassed prohibited grounds of discrimination. For example, the Association of Black Social Workers at WSU was registered even when it declared that it “is comprised of people of African ancestry.” IVCF Opp. C-SOMF ¶43 (ECF No. 55, Page ID.2526) (citation omitted). The Association of Latino Professionals for America stated as its purpose “[t]o connect passionate Latino leaders,” and the membership requirements do not disclaim any bases of discrimination.” *Id.* (brackets in original; quotations omitted).

CONCLUSION

The Court should grant IVCF’s motion for summary judgment and deny WSU’s motion for summary judgment.

Respectfully submitted.

Timothy W. Denney
Rickard, Denney, Garno,
Leichliter & Childers
1100 North Saginaw St., Ste. 1
Lapeer, MI 48446
(810) 664-0750 phone
(810) 664-7248 fax
tdenney@twdpclaw.com

Thomas C. Berg
Religious Liberty Appellate Clinic
University of St. Thomas
School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcborg@stthomas.edu

Kimberlee Wood Colby
Reed N. Smith
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
(703) 894-1087 phone
kcolby@clsnet.org
rsmith@clsnet.org

Counsel for Amici Curiae

December 1, 2020

CERTIFICATE OF SERVICE

I, Timothy W. Denney, certify that the forgoing document was filed and served via the Court's electronic case filing and noticing system (ECF) this 1st day of December, 2020, which will automatically send notification of such filing to all attorneys and parties of record registered electronically.

/s/ Timothy W. Denney

Timothy W. Denney

APPENDIX
DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

Christian Legal Society (CLS) is an association of attorneys, law students, and law professors with approximately 90 student chapters on law school campuses nationwide. For over four decades, through its Center for Law and Religious Freedom, CLS has worked to ensure that religious student groups are allowed to meet on their university campuses despite government officials’ attempts to exclude them because of their religious speech and beliefs. In the past, CLS has had a student chapter meeting at Wayne State University Law School, although no CLS chapter is meeting this year.

Campus Crusade for Christ, Inc., operates in the United States under the name “Cru.” Cru has established affiliated chapters—student organizations—on 1,439 American college campuses, with more than 106,000 students involved. These chapters, like many religious student organizations, require their leaders to be able to articulate Christian beliefs and live a Christian lifestyle. Cru’s interest in this case is two-fold. First, Cru has a chapter at Wayne State University that will be affected by the university’s interpretation of its policies. Second, Cru has an interest in upholding the religious, expressive, and associational interests of religious student organizations on college campuses across the nation.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. At each of its 320 university chapters across the country, it strives to reconcile diverse groups of students to Christ and to equip them through Spirit-filled communities of prayer, worship, fellowship, discipleship, service, and missions. Chi Alpha chapters, including its chapter at Wayne State University, welcome everyone to their meetings, activities, and events. But they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs.

Christian Medical & Dental Associations (CMDA) strives to educate, encourage, and equip Christian healthcare professionals to glorify God by serving with excellence and compassion, by caring for all people, and by advancing biblical principles of healthcare within the Church and throughout our world. The overarching vision of CMDA is bringing the hope and healing of Christ to the world through healthcare professionals and trainees. CMDA has 325 chapters at medical, dental, optometry, physician assistant, and undergraduate schools across the country. The Wayne State University School of Medicine chapter is an interdenominational fellowship of believers who consider themselves Christians first and medical students second. Members believe that Bible study, worship and fellowship are essentials that cannot be neglected during medical school. Everyone is welcome to attend their weekly meetings.

Fellowship of Catholic University Students (FOCUS) is a Catholic apostolate whose mission is to share the hope and joy of the Gospel. FOCUS missionaries encounter people in friendship, inviting them into a personal relationship with Christ and accompanying them as they pursue lives of virtue and excellence. Through Bible studies, outreach events, mission trips and discipleship, missionaries inspire and build up others in the faith, sending them out to live out lifelong Catholic mission wherever they are. For the 2020 – 2021 academic year, nearly 800 FOCUS missionaries are serving on 171 campuses and nine parishes across the U.S. and Europe, including Wayne State University. Tens of thousands of students have been involved with FOCUS, who after graduation have the opportunity to move into parish life to continue their missionary work. An important blessing of a fruitful partnership between the local campus ministry and FOCUS has been the pursuit of religious vocations. Over the past 20 years, 959 people have entered the seminary or a religious house of formation after involvement with FOCUS on college campuses. FOCUS missionaries are typically recent college graduates who devote two or more years of their post-collegiate lives to reach out to peers on campus.

Ratio Christi campus apologetics alliance is a campus ministry on 125 campuses nationwide that seeks to share the hope and explore the truth claims of Christianity within a welcoming, loving, and intellectually engaging environment.

Ratio Christi examines vital questions about faith, reason, and life through panel discussions, lectures, discussion groups, and debates. Ratio Christi trains students who want to discuss their beliefs in a rational manner, hosts events, and fosters dialogue on campus. Indeed, at many of its chapters, more non-Christians than Christians attend its events.

Young Life is a Christian youth ministry organization committed to sharing the Good News of Jesus Christ with adolescents. Through local clubs and destination camps, Young Life desires to provide fun, adventurous, life-changing, and skill-building experiences, preparing kids for a life-long relationship with Christ and a love for His word, His mission, and the local church. Young Life provides opportunities for thousands of college students to serve as volunteer leaders in local Young Life programs. These college students also form student groups on their college campuses to encourage personal spiritual development and create communities of fellowship and campus outreach. Involvement in a local Young Life club has been pivotal in the spiritual growth of countless college students throughout Young Life's eighty-year history. As a religious organization governed by a sincerely held statement of faith, Young Life believes it is critical and logical that its employees, volunteers, and student leaders share and support the organization's beliefs as they further the mission of the organization in a leadership role.