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

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

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INTRODUCTION

This motion seeks to make permanent what Wayne State has already done preliminarily: ensure that InterVarsity's First Amendment rights are protected. InterVarsity is a Christian student group that has been active at Wayne State University for over 75 years. Despite InterVarsity's long history of serving the campus community, this school year Wayne State chose to violate InterVarsity's rights by denying it equal access and equal treatment on campus, for no reason other than InterVarsity's religious criteria for selecting religious leaders. As a result of the University's actions, InterVarsity lost its status as a registered student organization, meaning it lost equal access to the campus and campus resources and missed important outreach opportunities to students. Despite repeated formal requests since October 2017 to return InterVarsity to the same status it had held for decades, Wayne State refused, even after the filing of this lawsuit in March 2018. It relented only after it became aware that it would soon face a motion for a temporary restraining order.

Wayne State's belated decision to reverse course is an admission that it was wrong to single out InterVarsity, and that it had no good reason—much less a compelling one—to justify its actions. Wayne State could not justify the arbitrary and discriminatory application of its university code. The University broadly prohibits many forms of discrimination, and just as broadly makes exceptions. Wayne State allows more than 90 student groups to select leaders and even members based upon ideology or prohibited categories. Wayne State even engages in violations of the code itself with regard to athletic teams and University programs—and yet it punished InterVarsity for InterVarsity's constitutionally-protected policy that its leaders share its beliefs. If there is room at Wayne State for single-sex clubs and ideology- and identity-driven student groups of every stripe, there must also room for a Christian student group that wants its leaders to be Christians. The First Amendment demands no less. Wayne State has temporarily ceased its unconstitutional conduct,

and now InterVarsity asks this court for an order prohibiting Wayne State from resuming this unlawful and unconstitutional practice in the future.[1]

UNDISPUTED FACTS

InterVarsity at Wayne State. InterVarsity Christian Fellowship is a religious student group that has served students at Wayne State for more than 75 years.[2] Its members meet for weekly religious services and Bible study, engage in outreach and prayer vigils on campus, host campus conferences on religion, and organize service projects to serve both Wayne State and the local community. Garza Decl. ¶¶ 3-6. InterVarsity is part of InterVarsity Christian Fellowship/USA, a national ministry that has chapters on over 600 campuses across the country. Garza Decl. ¶ 2. InterVarsity's purpose "is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord[.]" InterVarsity Christian Fellowship/USA (2018), *Our Purpose*, https://intervarsity.org/about-us/our-purpose.

While membership in the InterVarsity group at Wayne State is open to everyone, students who want to fill a leadership role are required to affirm the organization's religious beliefs and values. Garza Decl. ¶¶ 8, 11-13 & Ex. 1 (InterVarsity Constitution). This is because those roles—identified in InterVarsity's constitution as "Christian Leaders"—necessarily "involve[] significant spiritual commitment," with InterVarsity's leaders being responsible for leading the group's Bible study, prayer, worship, and acts of service. *Id*. Those in leadership roles are expected to "exemplify Christ-like character, conduct and leadership," and, in applying for leadership, are asked to describe their Christian faith. *Id*. They also receive religious training to help perform their duties.

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[1] On this motion, Plaintiffs are seeking relief against the Wayne State Defendants in their official capacity only and not Defendants Snyder, Schuette, and Arbulu.

[2] Garza Decl. ¶¶ 3, 48; *see also* Wayne State Univ. Student Org. Rosters 1937-1949, 27, https://reuther.wayne.edu/files/Student_Organization_Rosters_1937-1949.pdf (listing Wayne Christian Fellowship as a recognized student organization in 1940).

Garza Decl. ¶¶ 14-17; LaRowe Decl. ¶¶ 5-9.

Student Organization Recognition. Wayne State encourages students to form their own groups around any other interests they might wish to pursue. Currently, Wayne State recognizes over 400 student groups, where students engage in a range of activities from celebrating distinct cultures to promoting political causes, pursuing unique hobbies, worshiping together, serving the community, pursuing academic excellence, and much more. *See* Dean of Students Office, *Start a student organization* (2018), https://doso.wayne.edu/org-services/start. Wayne State emphasizes that such organizations allow students to "[p]ursue [their] interests, participate in diverse programming and make the most of [their] [Wayne State] experience." Dean of Students Office, *Welcome*, https://doso.wayne.edu/. And Wayne State encourages students to participate: "[i]f you don't see a student organization that meets your interest, it's really easy to start your own." Wayne State, *Green & Gold Guide: 2017-18 Academic Year* 51, http://bit.ly/2G79BzT.

Despite its stated policy that recognized organizations may not "discriminate" on a variety of grounds,[3] Wayne State permits many organizations to include limitations in their constitutions or in practice. For example, Wayne State says it bans sex and gender identity discrimination, but it allows recognized sports-club teams to make distinctions regarding sex and gender identity in their constitutions.[4] Wayne State also recognizes numerous single-sex fraternities and sororities as student associations. Windham Decl. Ex. 1. Wayne State says it bans racial discrimination, but recognizes organizations which hold themselves out as being limited to or catering to a particular

[3] Wayne State's code reads: "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[.]" Board of Governors-Code Annotated, 2.28.01 Non-Discrimination/Affirmative Action Policy, § 2.28.01.020 (2017), https://bog.wayne.edu/code/2-28-01 ("Wayne State Code").

[4] *See* Wayne State University, *Sample Constitution*, https://rfc.wayne.edu/adventure/sample_constitution.pdf.

racial or ethnic group. Windham Decl. Ex. 1. Wayne State says it bans ethnic and national origin discrimination, but recognizes clubs that hold themselves out as limiting membership based upon ethnicity or national origin. Windham Decl. Ex. 1. Nor can Wayne State claim ignorance of these limitations, since it publishes them on its own website. Windham Decl. Ex. 1.

Wayne State recognizes numerous religious organizations which are led by ordained clergy or hold themselves out as limited to a particular religious group. Windham Decl. Ex. 1. Wayne State even recognizes a church that meets on campus, New Life Church, as a student organization. *See* New Life Church, https://orgsync.com/148175/chapter. And Wayne State itself employs limitations—despite its supposed flat bans on sex, weight, and height discrimination, it runs multiple sports teams which appear to select members based upon height, weight, and sex.[5]

All recognized student organizations receive significant benefits for being recognized, including the ability to reserve free meeting space on campus; reserve free tables in public spaces to promote causes and reach out to students; participate in Wayne State's two primary student organization recruiting events, FestiFall and WinterFest; appear on the Wayne State webpage where students can learn more about student organizations; apply for student organization funds; and use the OrgSync system to connect with students and schedule events; as well as other benefits and privileges. Garza Decl. ¶ 26-27, 29, 42.

InterVarsity loses recognition. In early 2017, Wayne State instituted a new online system for student organization approval. Garza Decl. ¶ 22. Cristina Garza, InterVarsity's chapter president, submitted the group's constitution through the automated system. Garza Decl. ¶ 22. That

[5] *See, e.g.*, Wayne State University, *2018 Football Roster* (2018), http://wsuathletics.com/roster.aspx? roster=308&path=football (identifying players by height and weight); Wayne State University, *2017-18 Men's Basketball Roster* (2018), http://wsuathletics.com/roster.aspx?path=mbball (same).

constitution was identical, except for proper names, to the constitutions used by InterVarsity chapters at other universities in Michigan such as the University of Michigan and Michigan State University. Garza Decl. ¶ 22, 24. The constitution makes clear that InterVarsity welcomes all students, regardless of religious beliefs, as members, but asks that InterVarsity's student leadership embrace the organization's statement of faith. *Id*. ¶¶ 12-13 & Ex. 1.

On March 30, Ms. Garza received a message stating that the application had been completed and that her position as president had been accepted. But the following day, she received a message from Ricardo Villarosa, the Coordinator of Student Life and Student Organization Services, stating: "Neither membership, nor officer requirements may violate the university anti-discrimination policy--please amend the officer requirements accordingly and resubmit." Garza Decl. Ex. 2. Garza did not amend the leadership policies, and on April 3, Villarosa denied the application. *Id*. Nevertheless, InterVarsity continued to be treated as a recognized student organization in spring 2017 and into the start of the fall semester. *Id*. ¶¶ 25-26.

In September 2017, Garza re-submitted the application, and once again, the application was denied. *Id*. ¶¶ 30-32; Ex. 2. Garza then spoke with Villarosa, who informed her that InterVarsity's requirement that its leaders affirm its statement of faith was inconsistent with the school's policies for student organizations. *Id*. ¶ 32. Garza protested that many campus groups, like fraternities and sororities, were allowed to place restrictions on leadership and membership. *Id.* ¶ 33-34. Villarosa indicated that those groups submitted compliant constitutions, even if they openly disregarded the rules in practice. *Id*. Garza asked for clarification. Sarah Luke in the General Counsel's office responded by saying that Wayne State's actions were permissible because "the policy is viewpoint neutral and is applied equally to all organizations seeking recognition." *Id*. ¶ 38-39, Ex. 3. Then, on October 26, Wayne State derecognized InterVarsity and cancelled all of its scheduled room

reservations. *Id.* ¶ 40. InterVarsity immediately suffered the loss of recognized-status benefits, which dramatically injured its recruitment efforts and ability to participate in campus life. Garza Decl. ¶¶ 42-43, 47; LaRowe Decl. ¶¶ 19-25.

Tom Lin, the president of InterVarsity USA, then sent a letter to Wayne State's president. Windham Decl. Ex. 2. Lin explained that InterVarsity had lost its recognition due to its religious leadership selection and that Wayne State's actions violated clearly established law. *Id.* Wayne State's General Counsel responded and initially signaled willingness to work with InterVarsity, but suggested that a resolution could take several months and threatened that Wayne State may feel "compelled to take aggressive measures" against InterVarsity. *Id.* at Ex. 3 InterVarsity requested provisional reinstatement so that it could participate fully in campus life pending the discussions. *Id.* at Ex. 4. Wayne State refused. *Id.* at Ex. 5.

InterVarsity was shut out of the ballroom at WinterFest, where recognized student organizations reached out to students. Garza Decl. ¶ 44. Having no other choice, InterVarsity paid to rent a table on the floor below. *Id.* At the time the lawsuit was filed, InterVarsity continued to pay rent like an outside vendor in order to reach students and host Bible studies on campus. *Id.* ¶ 43. Due to the derecognition, InterVarsity missed many meetings that it would normally have held. LaRowe Decl. ¶ 24. Moreover, students had difficulty finding InterVarsity because it was not on OrgSync and asked whether InterVarsity is a real student group. *Id.* ¶ 21. InterVarsity could not reserve free space or advertise to students as it had in the past. LaRowe Decl. ¶¶ 19-25. Given the derecognition and Wayne State's confirmation that InterVarsity did not qualify for registered status, InterVarsity filed this lawsuit on March 6, 2018.

Wayne State's response to the lawsuit. On March 7, in response to the lawsuit, Wayne State issued a statement reiterating its decision to derecognize:

> Wayne State University took action to decertify the student organization InterVarsity because it is in violation of the university's non-discrimination policy, which is consistent with the United States Constitution. Every student organization that applies for organizational status must agree to this policy before being certified. Leaders of this group read and agreed to the policy during the application process.
>
> The university is obliged and committed to protecting the constitutional and religious rights of everyone on our campus. Attaining official student organization status is a privilege rather than a right, and is conditional on compliance with our policy of nondiscrimination and equal opportunity.
>
> We have taken every step possible to minimize the impact of the decertification on the group, and we approached InterVarsity last December with an offer to work on a resolution to this matter. Our offer still stands. Any such solution will be guided by our desire to reinstate the group's organization status while adhering to our nondiscrimination policy.[6]

The following day, InterVarsity informed the Court and the Defendants that it would be moving for a temporary restraining order reinstating Intervarsity. Windham Decl ¶ 8. That afternoon, Wayne State changed its position, stating that it would allow InterVarsity back on campus. It issued the following statement justifying its change of heart:

> Wayne State University values student groups as an integral part of campus life and co-curricular learning. We strive to foster student groups that are inclusive, diverse, and expand student experiences. After a review of the situation and communicating with the InterVarsity Christian Fellowship organization, Wayne State has decided to recertify the group as an official student organization.
>
> The InterVarsity student group is committed to welcoming and including all students, and the university will not intervene in the group's leadership selection.[7]

After this statement was issued, InterVarsity re-applied for recognized status, and that status was granted. LaRowe Decl. ¶ 27. InterVarsity is currently a recognized student organization at Wayne State, but that recognition is not permanent. Wayne State has not issued any official policy with regard to student organizations' leadership requirements, and InterVarsity must reapply for

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[6] Alexandra Fluegel, *WSU Christian Group Reinstated After Suing for Discrimination*, Detroit Metro Times (Mar. 9, 2018), https://goo.gl/KVY5X2.

[7] Ann Zeniewski, *Wayne State University re-certifies Christian student group InterVarsity*, Detroit Free Press (Mar. 8, 2018), https://on.freep.com/2q3JlQa.

recognized status every academic year. LaRowe Decl. ¶ 28.

ARGUMENT

InterVarsity moves for partial summary judgment, seeking relief on its Free Exercise and Establishment Clause claims (Counts I and II) and its First Amendment expressive association and viewpoint discrimination claims (Counts VI and VIII). Summary judgment is appropriate where, as here, "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); *see also His Healing Hands Church v. Lansing Hous. Comm'n*, 233 F. Supp. 3d 590, 594 (W.D. Mich. 2017). With regard to InterVarsity's ministerial exception claim, "whether the exception attaches at all is a pure question of law." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015). The remaining claims at issue on this motion concern questions of law. There are no material disputes of fact, since Wayne State cannot dispute its policies nor what happened. And there is no reason to drag out this proceeding when Wayne State has conceded that InterVarsity should not have been removed from campus. Partial summary judgment is therefore appropriate.

I. Wayne State Violated the First Amendment by Attempting to Exclude InterVarsity.

A. The Religion Clauses prohibit Wayne State from punishing InterVarsity for requiring its religious leaders to share its religious beliefs.

The First Amendment's protection against government entanglement in religious affairs demands that "the government cannot dictate to a religious organization who its spiritual leaders would be." *InterVarsity*, 777 F.3d at 835-36. But that is what Wayne State did: Wayne State derecognized InterVarsity because of its selection of religious leaders. Wayne State's belated change of heart acknowledges this error, stating that "the university will not intervene in the group's leadership selection." *See supra* at 7. All that remains is to ensure that InterVarsity's rights are protected and not subject to revocation at will or with each annual renewal.

Religious groups have long enjoyed an "unquestioned" right to create and govern "voluntary

religious associations to assist in the expression and dissemination of any religious doctrine." *Hutchison v. Thomas*, 789 F.2d 392, 394 (6th Cir. 1986) (quotation omitted). This right is rooted in Anglo-American law stretching back to the Magna Carta and is reflected in caselaw forbidding governmental interference with the internal decisions of religious bodies. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182-88 (2012). The Supreme Court unanimously ruled in 2012 that part of the right protects the selection of religious leaders: "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184. The Sixth Circuit recently explained that this protection—known as the ministerial exception—is a "structural limitation imposed on the government" that "categorically prohibits federal and state governments from becoming involved in religious leadership" decisions. *InterVarsity*, 777 F.3d at 836. That prohibition is mutually beneficial to both church and state: it ensures the freedom of religious groups to decide their internal affairs and protects government from entanglement in such affairs.

The ministerial exception applies where (1) a "religious group" (2) is selecting "one of the group's ministers" and (3) the government is "interfering with the freedom of [the] religious group[] to select [its] own" ministers. *Hosanna-Tabor*, 565 U.S. at 177, 184; *accord InterVarsity*, 777 F.3d at 833. This case presents a quintessential example: InterVarsity's Wayne State chapter is a purely religious group that has existed as a distinct religious ministry of InterVarsity Christian Fellowship/USA for over 75 years, and its leadership roles are wholly dedicated to ministry—indeed, as volunteer roles, there is no other incentive to accept them. Moreover, Wayne State is not merely interfering in InterVarsity's leadership selection, but wholly banning InterVarsity from ensuring its leaders share its faith, which "would lead to the total subversion" of InterVarsity as a

"religious bod[y]" and violate both the ministerial exception and broader church autonomy principles. *Hutchison*, 789 F.2d at 394 (quotation omitted). There "can be no clearer example of an intrusion into the internal structure or affairs" of a religious student group than forcing it to accept leaders who do not share its faith, since that "would cause the group as it currently identifies itself to cease to exist." *Christian Legal Society v. Walker*, 453 F.3d 853, 861, 863 (7th Cir. 2006) (protecting religious student group's leadership policy).

1. InterVarsity is a religious organization.

A religious group qualifies for the protection of the ministerial exception if its "mission is marked by clear or obvious religious characteristics." *InterVarsity*, 777 F.3d at 834 (quotation omitted). In fact, InterVarsity's national organization—"InterVarsity *Christian Fellowship*"—was found to "clearly" qualify as a religious organization in light of "not only its Christian name, but [also] its mission of Christian ministry and teaching." *Id.* at 834 (emphasis in original). The same is true for the InterVarsity chapter that meets at Wayne State. It shares the same name, mission, ministry, and teaching as the national ministry. The local ministry does not just *share* national InterVarsity's religious purpose, it embodies that purpose. Garza Decl. ¶ 3. For over 75 years, the chapter has functioned as a distinct religious ministry of InterVarsity, *id.* ¶¶ 1, 48, and has expressed its faith to fellow students via "Hymn sings, Prayer times, Bible studies, Socials, [and] Missions seminar[s], and other means" Dkt. 1 (Complaint) ¶ 45 (1957 yearbook entry).

2. InterVarsity's religious leadership roles are ministerial.

The Religion Clauses ensure that a religious group may "select and control" those who "minister to the faithful" and "personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188, 194-195. Thus, the First Amendment "protects more than just 'ministers.'" *Rweyemamu v. Cote*, 520 F.3d 198, 206-07 (2nd Cir. 2008) (noting the doctrine's application to a "press secretary," "staff of [a] Jewish nursing home," and an "organist/music director"). Its protection "clearly applies" to a

religious group's ministry roles that perform "important religious functions" and have a "religious leadership title." *InterVarsity*, 777 F.3d at 834-35. This protection applies to roles where the "primary duties consist of teaching, spreading the faith, . . . or supervision or participation in religious ritual and worship." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017) ("'courts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'") (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring)). In their *Hosanna-Tabor* concurrence, Justices Alito and Kagan identified this general rule as the "functional consensus" among the courts of appeals. 565 U.S. at 203. Thus, courts have held that "religious function alone" can "provide[] the decisional pathway." *Ciurleo v. St. Regis Parish*, 214 F. Supp. 3d 647, 652 (E.D. Mich. 2016); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (relying solely on function).

Here, the Religion Clauses protect InterVarsity's leadership selection because its leaders perform important religious functions. And that protection "*clearly* applies" because, in addition to religious functions, InterVarsity's "Christian Leaders" also have religiously significant titles. *InterVarsity*, 777 F.3d at 835 (emphasis supplied). Finally, other supporting considerations—such as how the role is held out to the community, conduct requirements, and religious training—also show that the protection applies here.

First and most importantly, the leadership roles are indisputably meant to perform functions crucial to "further[ing] the mission of the [ministry] and help[ing] convey its message." *Cannata*, 700 F.3d at 177 (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., joined by Kagan, J., concurring)). InterVarsity leaders are "responsible" for "all meetings, activities, and events" of the group, and are charged to "guide" their group in "follow[ing] Jesus as Savior and Lord" and in

"growing in love for God, God's Word, God's people of every ethnicity and culture[,] and God's purposes in the world." Garza Decl. Ex. 1. (Constitution Art. II and Art. V(1)-(2)). They engage in a variety of religious functions, including leading prayer, religious services, and Bible study; engaging in outreach and prayer vigils on campus; hosting campus conferences on religion; organizing service projects to serve the local community; and evaluating the religious qualifications and commitment of leadership applicants. *Id.* ¶ 9.

Every leader must agree to a set of "commitments" and "standards" for "Christian Leaders"—including the same biblical belief and conduct standards that are prescribed by scripture for pastors, bishops, and deacons of a church. Garza Decl. Ex. 1 (Constitution Art. XI(II)(1)-(2), citing *I Peter* 5:1-7 and *I Timothy* 3:1-13). All leaders must likewise affirm that they agree with both InterVarsity's religious purpose and its religious doctrine, including its eschatology, ecclesiology, soteriology, Trinitarian theology, and its beliefs in the virgin birth, sinless life, sacrificial death, and miraculous resurrection of Jesus Christ. *Id.* (Constitution Art. II & III). All applicants to be Christian Leaders are informed that they are undertaking "serious spiritual responsibilities" and "will be expected to exemplify Christ-like character, conduct, and leadership" both "publicly and privately." *Id.* (Constitution Art. XI). Finally, current leaders are required to evaluate and select candidates for future Christian Leader positions. Garza Decl. ¶ 9. Thus, InterVarsity's Christian Leader roles unquestionably perform the requisite "ministerial function[s]." *InterVarsity*, 777 F.3d at 835. That is sufficient in this case to find that the roles are protected by the First Amendment from Wayne State's efforts to completely undermine their religious function. *See, e.g.*, *Ciurleo*, 214 F. Supp. at 652 (applying exception based solely on religious teaching and leading prayers).

Second, InterVarsity's Christian Leaders have titles that indicate their spiritual role. As *Hosanna-Tabor* explained, the purpose of this title-related consideration is to show that a position

has a "role distinct from that of most of [the ministry's] members." 565 U.S. at 191. That distinct role is apparent here. First, while the title of the *group* of leaders itself was flexible, the specific role of leader is identified in leadership applications as a "Christian Leader." Garza Decl. Ex. 1 (Constitution Art. XI(II)(1)-(2)). That wording alone is sufficient, since it "conveys a religious—as opposed to secular—meaning." *InterVarsity*, 777 F.3d at 834-35. Christian Leaders held a "role distinct" from all of the group's members. *Hosanna-Tabor*, 565 U.S. at 191. Only leaders must affirm the group's purpose and beliefs and agree to personally follow those beliefs.

Third, InterVarsity holds out its leadership roles as ministerial, requires its leaders to conduct themselves in accordance with its beliefs, and trains its leaders for ministry. *Compare Hosanna-Tabor*, 565 U.S. at 181, 192, 193 (considering those factors) *with* Garza Decl. ¶¶ 19-21 (leaders held out as having distinct role), *id.* Ex. 1, Art. XI (conduct requirements); *id.* Ex. 1, Art. XI(I) (applicants must show their "training . . . to develop [their] Christian life and leadership"); *see also id.* at ¶¶ 14-17 (Garza's training included a six-week ministerial leadership program, multiple weekend and week-long training conferences, and weekly meetings with InterVarsity staff); LaRowe Decl. ¶¶ 6-9 (training included six-week program and weekly meetings, plus a one-week leadership program and a seven-week ministry program). InterVarsity's Christian Leaders are therefore ministers whose selection is protected by the First Amendment.

3. By interfering with InterVarsity's religious leadership decisions, Wayne State violated the Religion Clauses.

By denying InterVarsity recognition, Wayne State penalized InterVarsity for its selection of religious leaders. This is precisely the evil prohibited by the Religion Clauses. *Hosanna-Tabor*, 565 U.S. at 188 (forbidding "punishing a church" for its leadership decisions). Just as the civil courts—up to and including the Supreme Court—may not second-guess a church's leadership selection, so too state actors may not penalize religious groups for their leadership selection.

Hosanna-Tabor, 777 F.3d at 836-37 (finding that no "arm of the . . . government" can interfere with "religious leadership" decisions, and applying this principle to Michigan law); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 776 (6th Cir. 2015) ("WSU is an arm of the State of Michigan."). Wayne State's complete ban on InterVarsity's religious leadership requirement "interfere[d] with the internal governance" of InterVarsity, deprived it of "control over the selection of those who will personify its beliefs," and undermined its ability to "shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188; *cf. Walker*, 453 F.3d at 861 (First Amendment prevents state university from "intrusion into the internal structure or affairs" of a religious student group). None of that is permissible.

In sum, InterVarsity is a religious group, its Christian Leaders are "ministers" for purposes of the ministerial exception, and Wayne State impermissibly interfered with InterVarsity's ability to control its faith and mission through its ministerial appointments. Wayne State thus violated the Religion Clauses' rule that the government "cannot dictate to a religious organization who its spiritual leaders would be." *InterVarsity*, 777 F.3d at 835-36. Because the ministerial exception is a structural limitation imposed on the government, there is no strict scrutiny affirmative defense, and this Court can grant summary judgment in InterVarsity's favor on its Religion Clause claims without reaching the other issues.

B. The Free Speech Clause prohibits Wayne State from derecognizing InterVarsity.

1. Wayne State cannot exclude InterVarsity from a limited public forum due to its religious practices and teachings.

Wayne State has violated the Free Speech Clause by opening a limited public forum for student speech and then excluding InterVarsity from that forum based upon its religious speech and association. In response to this suit, Wayne State claimed that "[a]ttaining official student organization status is a privilege rather than a right, and is conditional on compliance with our policy of nondiscrimination and equal opportunity." *Supra* at 6-7. But when universities create "a

forum generally open for use by student groups," universities cannot exclude groups based on the content of their speech or viewpoints. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *see also Healy v. James*, 408 U.S. 169, 181 (1972) (universities cannot "den[y] official recognition . . . to college organizations" on the basis of their identity or views). In this regime, religious groups are not second-class citizens—they enjoy at least the same protection as everyone else. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001). Indeed, under the First Amendment, religious organizations receive "special solicitude." *Hosanna-Tabor*, 565 U.S. at 189. Restrictions of the type found here are subject to strict scrutiny.

The Supreme Court and the Sixth Circuit have repeatedly held that a public university violates the First Amendment when it denies official recognition to a student group because of that group's views or beliefs. In *Healy v. James*, a state college in Connecticut denied recognition to students forming a local chapter of Students for a Democratic Society, barring them from "plac[ing] announcements . . . in the student newspaper," "from using various campus bulletin boards," and "from using campus facilities for holding meetings." 408 U.S. at 176. The college feared "violent and disruptive activities" by the chapter, which refused to disavow such actions. *Id*. at 178, 173. The Supreme Court rejected these arguments, stating that—as an "instrumentality of the State"—a public school can never "deny[] rights and privileges solely because of a citizen's association with an unpopular organization" or "because [the school] finds the views expressed by any group to be abhorrent." *Id*. at 186-89. "[T]he College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities" given to other groups. *Id.* at 176, 184. The Court conceded that student groups may "be bound by reasonable school rules governing conduct," *id*. at 191, but emphasized that this referred to "reasonable" time, place, and

manner regulations that "in no sense infringe[]" the "freedom to speak out, to assemble, or to petition for changes in school rules." *Id*. at 192-93.

Similarly, in *Widmar v. Vincent*, the Court emphasized that any restrictions on student conduct must be both content- and viewpoint-neutral. There the Court held that a state university that "makes its facilities generally available" to registered student groups could not "close its facilities" to a "group desiring to the use the facilities for religious worship and religious discussion." 454 U.S. at 264-65. Because the restriction was based on the "content of a group's intended speech," it could only be justified if the regulation were "necessary to serve a compelling state interest" and were "narrowly drawn to achieve that end." *Id*. at 270. The university claimed an "interest in maintaining strict separation of church and State." *Id*. But the Court denied the interest as insufficient because neutral treatment of "over 100 recognized student groups" would "not confer any imprimatur of state approval." *Id*. at 274; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("a generally available benefit" may not be withheld "solely on account of religious identity").

Finally, in *Rosenberger*, the university denied reimbursement to a Christian club from the student activities fund. 515 U.S. at 826-27. The Supreme Court found viewpoint discrimination because "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id*. at 831. Because the university chose to fund publications presenting a secular point of view, it could not deny funds to those addressing the same issues from a religious perspective. *Id.* at 829.

The Sixth Circuit has likewise long held that a public university cannot restrict student speech or assembly simply because it disagrees with the message or viewpoints presented. In *Kincaid v. Gibson*, Kentucky State University officials confiscated copies of a student-published yearbook

because they disagreed with the yearbook's design, theme and content. 236 F.3d 342 (6th Cir. 2001) (*en banc*). The *en banc* Court ruled in favor of the students, finding that the University had created a limited public forum by opening up the yearbook for expressive activity. The school had left the yearbook in the hands of student editors, had never before attempted to control its content, and had guaranteed that the yearbook would "exist in an atmosphere of free and responsible discussion and of intellectual exploration." *Id.* at 352. In light of those guarantees of freedom, the school could not regulate the yearbook based on its content without passing strict scrutiny.

Even outside the limited public forum context, strict scrutiny applies to viewpoint discrimination by a public university. In the context of a university's ability to define its curriculum (an area where student rights are more limited), the Sixth Circuit emphasized that "the singling out of one student for discipline based on hostility to her speech" is impermissible. *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012). In that case, a university sought to compel a religious counseling student to counsel LGBT clients on their intimate relationships. The student had offered to refer those clients to another counselor, but the university refused. The Court emphasized that while the university could enforce norms to protect diversity and prevent discrimination, it could not do so by targeting a particular viewpoint or perspective. The Court noted that the university would never "require a Muslim counselor to tell a Jewish client that his religious beliefs are correct . . . [or] require an atheist counselor to tell a person of faith that there is a God." *Id.* at 735. Likewise, it could not force the student to compromise her values. As the Court explained, "Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." *Id.*[8]

[8] These principles apply to student organizations just as they do to individual students. *See Walker*, 453 F.3d at 864 (losing "access to private university facilities for meetings" violated student group's First Amendment rights); *Gerlich v. Leath*, 861 F.3d 697, 704-05 (8th Cir. 2017) (once university "create[d] a limited public forum for speech," it could not single out a group for disfavored treatment because of its viewpoint).

These cases establish unequivocally that Wayne State's derecognition of InterVarsity violated InterVarsity's freedom of speech. Wayne State created precisely the type of forum that triggers full constitutional protections. It encourages students to form and join student organizations in order to "[p]ursue [their] interests, participate in diverse programming and make the most of [their] [Wayne State] experience." Dean of Students Office, *Welcome*, https://doso.wayne.edu/. It invites as few as two students to start a new student organization. Dean of Students Office, *Start a student organization*, https://doso.wayne.edu/org-services/start. Like the student yearbook in *Kincaid*, such student organizations are intended to "exist in an atmosphere of free and responsible discussion and of intellectual exploration," 236 F.3d at 352. Aside from a registration process that does not evaluate the quality of a student organization's message, Wayne State leaves the operation of student groups largely in the hands of the students. Having created a limited public forum for student expression and association, Wayne State's refusal to recognize a group because of its religious beliefs and leadership standards violates the Free Speech Clause. *Rosenberger*, 515 U.S. at 835 (universities "may not silence the expression of selected viewpoints").

Wayne State's public statements demonstrate that InterVarsity's religious beliefs and standards—its viewpoint—were the reason for the exclusion. As Wayne State publicly stated, it "took action to decertify the student organization InterVarsity because it [was] in violation of the university's non-discrimination policy." *Supra* at 6. That determination was made based upon InterVarsity's constitution, which lays out religious criteria for leaders. Wayne State reviewed that constitution and determined that "currently written officer requirements violate the University Non-discrimination policy." Garza Decl. Ex. 2. But Wayne State permits other groups to use other "discriminatory" criteria to select members and leaders. This shows that Wayne State engaged in viewpoint discrimination.

It also sets InterVarsity's free speech and association claims apart from those in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). There, the parties agreed that the law school had a policy "requiring *all* student groups to accept *all* comers." *Id.* at 694. That policy was considered viewpoint neutral "[i]n contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for disfavored treatment because of their points of view." *Id.* at 694. But Wayne State has no "all comers" policy. Wayne State's second public statement about this case acknowledged that it "would not intervene in the group's leadership selection." *Supra* at 7. Nothing in its code requires all groups to accept all students as members; it makes restrictions based only upon certain protected categories. Wayne State Code 2.28.01.020. And even that rule is often disregarded in practice: Greek organizations are permitted to restrict membership by sex, minority and affinity organizations hold themselves out as limited by race or national origin, and other religious groups state that they serve those of their faith. Windham Decl. Ex. 1. This is a far cry from *Martinez*, where even "the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." *Martinez*, 561 U.S. at 675.[9]

Wayne State also allows many organizations to use mission-based restrictions to screen their members. BAMN asks students to take a lengthy pledge to fight for "immigrant rights," to "restore affirmative action," and for "dignity, equality, respect and justice."[10] Students for a Democratic Society—the group that was the plaintiff in *Healy*—uses a model constitution which offers

[9] *See* Wayne State Code 2.28.01.020 (no mention of political affiliation); *see also* WSU College Democrats, *About*, http://wsudems.com/about/ ("The WSU College Democrats pledge to support the philosophies, principles, and candidates of the Democratic Party"); Windham Decl. Ex A.

[10] Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), *BAMN Pledge*, http://www.bamn.com/bamn-pledge-2. Wayne State BAMN Chapter, https://orgsync.com/147971/chapter.

membership and leadership only to those "in support of radical egalitarian politics."[11] But these groups remain recognized student organizations. Permitting dozens of campus groups to select members and leaders based upon their beliefs, but penalizing InterVarsity for doing the same, is impermissible viewpoint discrimination.

2. Wayne State cannot restrict InterVarsity's expressive association.

Just as Wayne State cannot discriminate against InterVarsity due to its religious viewpoint, it also cannot discriminate against it based upon its expressive association. The Supreme Court has determined that groups cannot be penalized for selecting their speakers or leaders in a manner calculated to further their expressive goals. In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, for example, the private organization running a large St. Patrick's Day parade was sued under Massachusetts' antidiscrimination law for excluding a LGBT group that wanted to march "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." 515 U.S. 557, 570 (1995). The Supreme Court held that the state's nondiscrimination law could not override the parade organizer's First Amendment right to set its own limits on the parade's message. *Id*. at 570, 572. Similarly, in *Boy Scouts of America v. Dale*, the Supreme Court held that New Jersey's antidiscrimination law could not override the Boy Scouts' right to exclude openly gay scout leaders, since that would "surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." 530 U.S. 640, 654 (2000).

Here, InterVarsity clearly qualifies as an expressive association because it seeks to promote a core set of religious beliefs and doctrines. InterVarsity's student leaders are charged with not only leading the organization, but also teaching Bible studies and leading prayers and other religious services. Being forced to accept as leaders individuals who refuse to ascribe to the group's religious

[11] Windham Decl., Ex. 6. (SDS model constitution); Students for a Democratic Society, https://orgsync.com/148467/chapter.

beliefs and doctrines would force InterVarsity "to propound a point of view contrary to its beliefs," *id.*, which is an impermissible restriction on its expressive association.

C. Wayne State's actions violated the Free Exercise Clause.

Wayne State separately violated the Free Exercise Clause by singling InterVarsity's religious practices out for censure while allowing numerous other groups to engage in similar religious and secular practices unscathed. Even in the case of government programs, the Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws" that disfavor religion. *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542-43 (1993)). Thus, "[l]aws burdening religious practice must be of general applicability." *Lukumi*, 508 U.S. at 542. A law is not generally applicable if it burdens religiously motivated conduct while exempting similar non-religious conduct. *See id.* at 543.

Wayne State's policy is not generally applicable because, as discussed above, it is not enforced equally against either Wayne State itself or other student groups. *Lukumi*, 508 U.S. at 545-46 (regulation that "'society is prepared to impose upon [religious groups] but not upon itself'" is the "precise evil . . . the requirement of general applicability is designed to prevent"). Such a policy must be subject to "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Lukumi*, 508 U.S. at 542-43). Wayne State cannot meet that scrutiny.

D. Wayne State's discrimination against InterVarsity fails strict scrutiny.

Because Wayne State has engaged in impermissible viewpoint discrimination, restrictions on expressive association, and discrimination against religious activities, Wayne State's actions must survive strict scrutiny to withstand summary judgment. "No state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest." *Bible Believers v. Wayne*

Cty., 805 F.3d 228, 248 (6th Cir. 2015). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Wayne State has relied upon its non-discrimination code to justify denying InterVarsity equal access. But the code provides no defense.[12]

1. Wayne State has no compelling interest in penalizing InterVarsity.

First, Wayne State's application of the code to InterVarsity is inconsistent with the text and historical application of the code. The code extends to "extracurricular activities," but does not specify whether this term applies to private organizations, or only to activities run by Wayne State. Wayne State Code 2.28.01.020. Wayne State's historical disregard of this policy with regard to other student organizations, and its decision to permit InterVarsity to use religious criteria to select leaders, but not members, suggests that it does not understand this code to apply as written to private student organizations. Wayne State's application of the code to InterVarsity cannot be compelling when it is at odds with both its text and enforcement history.

Second, Wayne State arbitrarily applies that policy. When an allegedly compelling interest is unevenly enforced, that "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). Here, Wayne State has fatally undermined its ability to prove that excluding InterVarsity serves a compelling interest by reversing its position in response to this lawsuit. If its interest were "of the highest order," Wayne State could not have backed down within 48 hours of being sued. The ease with which Wayne State forfeited the policy that it had repeatedly defended over several months proves that Wayne State's interest cannot be compelling.

[12] Strict scrutiny is an affirmative defense; Plaintiffs assume Wayne State will raise it here.

Even prior to its *volte-face*, Wayne State's arbitrary and inconsistent application of its non-discrimination policy demonstrated that it has no compelling interest here. To take an obvious example, the code forbids differential treatment on the basis of "sex." But Wayne State's sports program divides teams by sex and does not offer the same programs for both sexes. Wayne State Athletics, https://wayne.edu/athletics/ (no women's football team, no men's track team). Nor does the men's basketball team follow the code's supposed ban on height discrimination, or the football team's offensive line appear to follow a weight discrimination ban. *See supra* at 4. And Wayne State runs programs directed towards "young men" and "women of color," respectively.[13]

Wayne State also permits other student organizations to violate the code. The most obvious example is Wayne State's many large fraternities and sororities. *See* Windham Decl. Ex. 1 (chart listing over 90 student organizations violating non-discrimination policy or selecting members according to viewpoint). And Wayne State expressly permits club sports teams to strike out "sex (including gender identity)" from the school's non-discrimination statement. *See supra* at 3. Wayne State recognizes The Man Cave Society, whose national affiliate states it is "created ONLY for men," and the Goddess Experience, whose website states it is "a way for women to awaken to the greatness they carry within."[14] Further, many campus groups describe themselves as limiting membership or leadership to their co-religionists, yet still retain recognized status. As discussed above, Wayne State recognizes New Life Church, which runs Sunday morning worship services on campus, as a recognized student organization. It also hosts the Newman Catholic Center, which is run by a Catholic clergy member and states: "We are a Catholic community of students helping

[13] Office of Multicultural Student Engagement (2018), https://omse.wayne.edu/ (describing The Network, "a learning community for young men aimed to support what they are learning inside the classroom" and RISE, an effort to "provide a safe space for self-identified women of color").

[14] The Man Cave Society (2018), https://mancave.ning.com/about; The Goddess Experience, https://orgsync.com/162968/chapter.

each other to grow in our faith." Newman Catholic Center, https://orgsync.com/147945/chapter. Both of these groups are listed on Wayne State's student organization website, along with multiple other groups which describe themselves as members of a particular faith. *See supra* at 4; *see also* Windham Decl., Ex. 1. To be clear, Plaintiffs have no objection to the existence of these other groups. But Wayne State cannot claim a compelling interest in enforcing a non-discrimination rule when it does not follow such a rule itself and allows other groups to violate the supposed rule and advertise that fact on Wayne State's own website. *See Lukumi*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (citation and internal quotation marks omitted)).

2. Wayne State has not employed the least restrictive means available.

Even if Wayne State could show that it has a compelling interest in punishing InterVarsity for its speech, complete derecognition is not narrowly tailored to accomplishing that interest. The least restrictive means requirement is "exceptionally demanding." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2780 (2014) (citing *City of Boerne*, 521 U.S. at 532). If a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added). Wayne State cannot satisfy this requirement. It has managed to accommodate its own mission and InterVarsity for 75 years, and again today, demonstrating that both diversity and freedom of speech can coexist.

II. InterVarsity is Entitled to a Permanent Injunction.

Since InterVarsity is entitled to summary judgment on its First Amendment claims, it is also entitled to a permanent injunction. "A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *His Healing Hands*, 233 F. Supp. 3d at 598.

Irreparable Injury. Wayne State's violation of InterVarsity's First Amendment rights suffices

to show irreparable injury, since "[e]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Id.* at 598 (quoting *United Food & Comm'l Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998). When InterVarsity was not a recognized student organization, it was unable to access the benefits of recognized student groups, recruit new student members on an equal basis with other student groups, or otherwise participate equally in campus life. *See Walker*, 453 F.3d at 864 (being "denied university money and access to private university facilities for meetings" constituted irreparable harm). Since Wayne State persisted in that unconstitutional action for months after InterVarsity warned it that its actions were contrary to law, defended its actions after this lawsuit was filed, and reversed its position only in the face of a TRO motion, an injunction is necessary to prevent those injuries from recurring.

No adequate remedy. InterVarsity is seeking prospective relief—equal treatment and the ability to continue to be a valuable part of the campus community, as it has for over 75 years. Injunctive relief is necessary to secure InterVarsity's constitutional rights.

CONCLUSION

For all the foregoing reasons, InterVarsity respectfully urges the Court to grant this motion for partial summary judgment and enter a permanent injunction.

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Respectfully submitted,

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