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

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

Plaintiffs,

v.

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

Defendants.

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

Hon. Paul L. Maloney

ORAL ARGUMENT REQUESTED

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THE WAYNE STATE DEFENDANTS' MOTION TO DISMISS – ORAL ARGUMENT REQUESTED

For the reasons set forth in their brief in support, Defendants Board of Governors of Wayne State University, Roy Wilson, Sandra Hughes O'Brien, David A. Nicholson, Michael Busuito, Diane Dunaskiss, Mark Gaffney, Marilyn Kelly, Dana Thompson, Kim Trent, David Strauss, and Ricardo Villarosa, by and through their attorneys, Honigman Miller Schwartz and Cohn LLP, hereby move this Court pursuant to Fed. R. Civ. P. 12(b)(6) for an order dismissing Plaintiffs' Complaint in its entirety and with prejudice.

On May 4, 2018, Counsel for the Wayne State Defendants requested concurrence in this motion from counsel for Plaintiffs but concurrence was not obtained.

Dated: May 7, 2018

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

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I. INTRODUCTION

In order to promote intellectual growth and an enriched campus experience, Wayne State University ("Wayne State") recognizes and makes available resources to assist certain student organizations. By completing a simple application, any group of two or more like-minded students can seek to create a recognized student organization. This has led to a richly diverse array of groups on campus. *See* Wayne State University, List of student organizations, https://doso.wayne.edu/org-services/listing.

Wayne State's procedures do not afford students an absolute right to create an officially recognized organization. The Dean of Students Office reviews submissions in order to ensure that applicants pledge to abide by certain university policies, including its non-discrimination policy. That policy prohibits an organization from discriminating in its membership or leadership criteria on the basis of race, color, sex (including gender identity), national origin, religion, age, sexual orientation, familial status, marital status, height, weight, disability, or veteran status. Student organizations that agree to do so may be "recognized," and so are eligible to apply for limited funds for certain activities and for rent-free meeting space in the Student Center Building. Those student organizations that are not "recognized" may still participate in student life on campus, but do not receive the privileges that accompany recognition.

Plaintiff InterVarsity Christian Fellowship Wayne State University Chapter ("InterVarsity-Wayne" and, with InterVarsity USA, "Plaintiffs") sought Wayne State's approval—and the privileges that come with it—to enforce an openly discriminatory leadership requirement in clear violation of the school's non-discrimination policy. Specifically, InterVarsity-Wayne submitted an application to renew its recognized student organization status, stating that its leaders must embrace the organization's Christian, religious mission. Because this requirement plainly violated the non-discrimination policy, Wayne State denied the application. Wayne State made this

decision based solely on a straightforward application of its policy; Plaintiffs allege no facts suggesting that Wayne State had any hostility toward them. To the contrary, the Complaint recites the long history of InterVarsity-Wayne's uncontroversial history on campus. *See* Complaint ¶¶ 40-56.

Plaintiffs filed suit, raising a panoply of claims against roughly a dozen defendants. Although Wayne State had no legal obligation to do so, in a good faith effort to resolve this dispute the university elected to grant InterVarsity-Wayne recognized organization status and reimbursed the expenses it claimed to have lost during the brief period of its de-recognition. Having made InterVarsity-Wayne whole, Wayne State assumed this case would simply go away. Instead, Plaintiffs publicly trumpeted that Wayne State had "relented"[1] and decided to persist in this litigation, necessitating the filing of this motion.

Plaintiffs' various claims boil down to the same theory, rich in its irony. In sum, Plaintiffs argue that Wayne State engaged in discrimination by refusing to subsidize Plaintiffs in discriminating. The Supreme Court has made clear, however, that universities need not provide privileges to student groups that seek to discriminate on the basis of religion or otherwise in violation of school policy. Indeed, although Plaintiffs' Complaint cites thirteen cases in its numerous paragraphs, it nowhere alludes to this leading and controlling precedent, *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010).

Plaintiffs' decision to continue this litigation is particularly regrettable because their claims not only fail to cite controlling authority or to advance a single claim of merit; they assert claims

[1]*See* Becket, *InterVarsity Christian Fellowship v. Wayne State University – Case Detail*, https://www.becketlaw.org/case/intervarsity%E2%80%AFchristian%E2%80%AFfellowship%E2%80%AFv-wayne-state-university/.

that are frivolous. They raise claims that are not claims at all, but affirmative defenses; claims as to which the law recognizes no private right of action; claims that cannot be brought by entities rather than individuals: and claims as to which they have no standing. Again, the irony is conspicuous. While Wayne State's willingness to resolve this dispute voluntarily has served InterVarsity-Wayne well, this baseless and unnecessary litigation advances Plaintiffs' organizational and reputational interests not at all.

For the reasons set forth in this brief, Defendants Board of Governors of Wayne State University, Roy Wilson, Sandra Hughes O'Brien, David A. Nicholson, Michael Busuito, Diane Dunaskiss, Mark Gaffney, Marilyn Kelly, Dana Thompson, Kim Trent, David Strauss, and Ricardo Villarosa (the "Wayne State Defendants") therefore respectfully request that this Court dismiss the Complaint in its entirety and with prejudice.

II. FACTUAL BACKGROUND[2]

A. Wayne State University's Non-Discrimination Policy

Under the Michigan Constitution, the Board of Governors of Wayne State University has "general supervision over the institution and the control and direction of all expenditures." Mich. Const. of 1963 Article 8, §5. Pursuant to such authority, Wayne State has adopted a non-discrimination policy that governs "all of its operations, employment opportunities, educational programs, and related activities":

> This policy embraces all persons regardless of race, color, sex (including gender identity), national origin, religion, age, sexual orientation, familial status, marital status, height, weight, disability, or veteran status, and expressly forbids sexual harassment and discrimination in hiring, terms of employment, tenure, promotion, placement and discharge of employees, admission, training and

[2] Citations to the Complaint indicate only that the Wayne State Defendants assume these facts to be true for purposes of this motion. They do not represent admissions or concessions on the part of the Wayne State Defendants.

> treatment of students, extra-curricular activities, the use of University services, facilities, and the awarding of contracts.

Compl. ¶ 62; *See also* Wayne State University Non-Discrimination/Affirmative Action Policy, *available at* https://oeo.wayne.edu/pdf/affrm_actn_policy.pdf. The non-discrimination policy applies to recognized student organizations, such as InterVarsity-Wayne. Compl. ¶ 63.

B. Student Organizations at Wayne State

Wayne State has over 400 recognized student organizations. *See* WSU, *Start a Student Organization*, https://doso.wayne.edu/org-services/start; Compl. ¶ 86 (quoting same). To qualify for recognition, an organization must have "a minimum of two currently registered Wayne State students." Compl. ¶ 87. The students applying for recognition must sign up via Wayne State's online registration system. *Id.* ¶ 57. The online application requests certain basic information about the organization, such as its name, a description, contact information, and anticipated meeting days. Ex. A, InterVarsity Application. The process requires acknowledgment of certain university policies, including the non-discrimination policy. The applicant must also provide information regarding membership and leadership criteria.

Formal recognition by Wayne State carries with it certain privileges. Recognized student organizations may apply for and receive funding for events paid from the Student Activities Funding Board. Compl. ¶ 89. They may also reserve free meeting space in the student center, participate as a recognized student organization at certain recruiting events, utilize web resources to contact members and potential members with information, and advertise through campus bulletin boards. *Id.* ¶ 90. Student organizations that are not formally recognized may participate in student activities on campus, and may utilize student resources, but they cannot receive funding from the Student Activities Funding Board or take advantage of the privileges just discussed. *Id.* ¶ 89. They can, however, participate at recruitment events as a vendor and reserve meeting space

on campus for a fee. *Id.* ¶¶ 73-74, 83.

C. Denial of InterVarsity-Wayne's Registration

InterVarsity USA states that it is an organization with chapters at campuses nationwide. Compl. ¶¶ 36-38. The organization's stated mission "is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord." *Id.* ¶ 39. InterVarsity-Wayne is the chapter of InterVarsity USA located at the Wayne State campus and comprised of Wayne State students and community members. *Id.* ¶¶ 40-47.

InterVarsity-Wayne does not require its members to subscribe to Christian beliefs or otherwise limit its membership to those who agree with its mission. *Id.* ¶ 49. It does, however, require its *leaders* to "share its Christian faith." *Id.* ¶ 50. According to the chapter's constitution, leadership applicants "must be prepared to 'exemplify Christ-like character, conduct and leadership'" and are asked in their application "to describe their 'relationship with Jesus Christ' and their 'personal devotional life.'" *Id.* ¶ 51 (quoting InterVarsity Christian Fellowship/USA Model Constitution). Further, InterVarsity Wayne requires its leaders to "affirm InterVarsity USA's statement of faith." *Id.* ¶ 53.

In 2017, Cristina Garza, a Wayne State student and InterVarsity-Wayne's chapter president at the time, submitted an online application on behalf of InterVarsity-Wayne to become a recognized student organization and included the group's constitution, which requires leaders to "embrace the organization's religious mission." *Id.* ¶ 57. In the application, Ms. Garza provided the following description of the organization's leadership requirements:

> Leadership of the InterVarsity Christian Fellowship at Wayne State involves significant spiritual commitment. Chapter leaders are expected to indicate their agreement with InterVarsity's Doctrine and Purpose Statements and exemplify Christ-like character, conduct and leadership (c.f. the following relevant passages: 1 Peter 5:1-7; 1 Timothy 3:1-13; Galatians 5:19-26; and 1 Corinthians 6:7-11).

Ex. A. Shortly after submitting the application, Ms. Garza "received a message stating that the constitution that she had submitted did not meet the necessary requirements." Compl. ¶ 58. Discussion ensued and Wayne State initially declined to approve InterVarsity-Wayne's application because "the constitution's requirement that leaders share the chapter's faith was inconsistent with the school's non-discrimination code." Compl. ¶¶ 60-61.

For several months, the chapter continued to operate on campus although not as a recognized student organization. Compl. ¶¶ 69-85. As such, InterVarsity-Wayne had to pay to reserve meeting space and pay to participate as a vendor at a recruitment event. InterVarsity-Wayne was further restricted from utilizing the communication channels made available to recognized student organizations. *Id.* Although the General Counsel of Wayne State conveyed to InterVarsity-Wayne his view that this was a "solvable problem" that could be addressed through a "mutually amicable arrangement" (Compl. ¶ 80), the organization resisted every opportunity to enter into such discussions, and instead filed the instant lawsuit. As noted above, Wayne State subsequently recognized the organization and reimbursed it in a good faith attempt to resolve the dispute.

III. LEGAL STANDARD

The Wayne State Defendants bring this motion pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Plaintiffs' Complaint fails in its entirety under rule 12(b)(6). As will be discussed, it also fails as to certain parties and claims under rule 12(b)(1).

A complaint cannot survive a 12(b)(6) motion to dismiss unless it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (*citing Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not "show[n] that the pleader is entitled to relief" and should therefore be dismissed. *Id*. at 679 (citing Fed. Rule Civ. Proc. 8(a)(2)).[3]

Notably, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. at 678; *see also Twombly*, 550 U.S. at 555 ("courts are not bound to accept as true a legal conclusion couched as a factual allegation" (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986))). Therefore, a complaint that merely offers "labels and conclusions"; "a formulaic recitation of the elements of a cause of action"; or "naked assertion[s] devoid of further factual enhancement" is insufficient to survive a motion to dismiss. *Id*. (*citing Twombly*, 550 U.S. at 555, 557) (internal quotations omitted).

For a Rule 12(b)(6) motion, "[a] court is not bound to accept . . . unwarranted inferences, including allegedly inferable 'facts' or conclusions which contradict documentary evidence appended to, or referenced within, the plaintiff's complaint." *Mulbarger v. Royal All. Assocs. Inc.*, 10 F. App'x 333, 335 (6th Cir. 2001) (unpublished). This Court has similarly recognized that "[o]n a Rule 12(b)(6) motion, the Court is not bound to accept as true . . . allegations 'contradicted by public records and other evidentiary materials of which the Court may take judicial notice.'"

[3] A plaintiff fails to state a plausible claim where the facts alleged are equally consistent with liability and its absence. So, for example, in *Twombly* the plaintiff's antitrust claim rested on allegations of parallel conduct among competitors. Parallel conduct is consistent with anti-competitive activity—but also with competition. As a result, the Court held that plaintiff had failed to plead a plausible antitrust claim and dismissed the case under 12(b)(6). *See Twombly*, 550 U.S. at 564-70.

Marshall v. Nationstar Mortg., LLC, No. 1:12-CV-852, 2015 WL 1042197, at *3 (W.D. Mich. Mar. 10, 2015) (unpublished) (*citing McGee v. City of Cincinnati Police Dep't*, No. 1:06–CV–726, 2007 WL 1169374, at *2 (S.D. Ohio Apr. 18, 2007)); *see also Moon v. Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006). Instead, such properly considered documents and public records must prevail over any contradictory allegations. *Williams v. CitiMortgage, Inc.*, 498 F. App'x 532, 536 (6th Cir. 2012) (unpublished) (upholding dismissal where plaintiffs' claims were squarely contradicted by her mortgage's payoff statement); *see also Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013) (upholding dismissal of complaint alleging various torts based on plaintiff's inclusion in list of "2011 Dirtiest Hotels" because actual list undermined such claims).

Motions under Rule 12(b)(1) challenge the existence of subject matter jurisdiction. A motion under this rule attacks the claim of jurisdiction on its face, taking Plaintiff's jurisdictional assertions as true. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). Plaintiff has the burden of proving jurisdiction when challenged. *Giesse v. Sec'y of HHS*, 522 F.3d 697, 702 (6th Cir. 2008). Standing is a jurisdictional defense and is properly raised in a Rule 12(b)(1) Motion. *Ward v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 626 (6th Cir. 2001).

IV. ARGUMENT

A. Plaintiffs' Speech, Expressive-Association, and Assembly Claims Must Fail

Plaintiffs assert a number of claims arguing that Wayne State has violated their right to free speech, association, and assembly. *See* Compl. ¶¶ 170-196. These claims all fail.

1. Under a Limited Public Forum Analysis, Wayne State's Policy is Constitutional

When students or student organizations challenge the application of non-discrimination policies to student organizations on speech or related grounds, the Supreme Court's limited public forum analysis applies. *Christian Legal Society v. Martinez*, 561 U.S. 661, 683 (holding limited public forum analysis applied); *see also Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790,

797-98 (9th Cir. 2011) ("We see no material distinction between San Diego State's student organization program and the student organization program discussed in *Christian Legal Society* and, therefore, conclude that San Diego State's program is also a limited public forum.").

A government creates a limited public forum when it opens its property for use by "certain groups or dedicated solely to the discussion of certain subjects." *Martinez*, 561 U.S. at 679 n.11 (internal quotations and citations omitted). In a limited public forum, the government may impose restrictions that are "reasonable in light of the purpose served by the forum," so long as the government does not "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (internal quotation marks omitted). Wayne State created its program of officially recognized student organizations as a "public forum," and restricting that forum through the application of a nondiscrimination policy does not violate the First Amendment if that policy is reasonable in light of the purpose of the forum and is viewpoint neutral.[4]

Plaintiffs' Complaint purports to mount facial and as-applied challenges to the recognized student organization non-discrimination policy. Both fail on the face of the Complaint.

[4] Plaintiffs assert that Wayne State's actions essentially compel them to accept members who will interfere with the group's mission and compel them to convey messages with which the organization disagrees. It is true that antidiscrimination laws may amount to compelled speech or violate a group's right to expressive association when a private group is forced to accept members who interfere with the group's message. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). The Supreme Court has made clear, however, that the constitution draws a distinction "between policies that require action and those that withhold benefits." *Martinez*, 561 U.S. at 682-83. Just like in *Martinez*, Plaintiffs do not allege that Wayne State forces them to accept any members or leadership candidates; Wayne State merely conditions access to certain benefits on compliance with the nondiscrimination policy. Accordingly, limited public forum analysis is the only analysis the Court need apply on these claims.

a. Wayne State's Policy Is Constitutional on its Face

Plaintiffs apparently do not challenge the reasonableness of the non-discrimination policy in light of the purpose of the forum. Rather, they contend the policy is not viewpoint neutral. To the extent Plaintiffs contend the policy is not viewpoint neutral on its face, they have failed to state a claim. This is clear from the controlling Supreme Court precedent they fail to cite: *Martinez.*

In *Martinez*, the Supreme Court upheld an "all-comers" policy—that is, a policy that all student groups must accept all interested students—as "textbook" viewpoint neutral. *Martinez*, 561 U.S. at 695. The organization in *Martinez*, like InterVarsity-Wayne, wished to exclude some students from full participation in the group. The Court upheld the school's enforcement of the all-comers policy, noting that the policy did not relate to the group's viewpoint but to its conduct in refusing to accept all interested students. The Court stated that the policy "is justified without reference to the content [or viewpoint] of the regulated speech." *Id.* at 696 (internal citation and quotation marks omitted). The policy at issue "aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior. . . . [The organization's] conduct—not its Christian perspective—is, from [the school's] perspective, what stands between the group and [recognized] status." *Id.* (emphasis in original).

In the only Circuit opinion considering the issue, the Ninth Circuit applied *Martinez* to a university non-discrimination policy that, like the policy at issue here, was not an all-comers policy. *See Reed*, 648 F.3d 790. The policy at issue in *Reed* thus technically differed from that in *Martinez* because it only prohibited discrimination based on certain categories, like race, gender, or religion. The policy allowed groups to discriminate on other bases: for example, the college Republicans could exclude Democrats because the policy did not prohibit discrimination based on political belief. *Id.* at 800. The plaintiffs in *Reed* claimed that this rendered *Martinez* distinguishable and the policy unconstitutional.

The Ninth Circuit disagreed:

> Plaintiffs' argument, while seemingly compelling at first glance, does not survive closer scrutiny. We accept Plaintiffs' assertion that San Diego State's nondiscrimination policy incidentally burdens groups that wish to exclude others on the basis of religion, but does not burden groups that do not exclude or exclude on bases not prohibited by the policy. But this assertion is insufficient to prove viewpoint discrimination, because Plaintiffs have put forth no evidence that San Diego State implemented its nondiscrimination policy for the *purpose* of suppressing Plaintiffs' viewpoint, or indeed of restricting any sort of expression at all.

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

The reasoning of *Martinez* and *Reed* applies with equal force here. Plaintiffs have not pleaded facts indicating that Wayne State instituted the non-discrimination policy "for the purpose" of suppressing expression based on its viewpoint—nor could they do so consistent with Rule 11. They accordingly have failed to state a claim for facial viewpoint discrimination. Like the policies consistently upheld by the Supreme Court in other contexts, Wayne State's non-discrimination policy facially governs Plaintiffs' *conduct*—their ability to construct discriminatory barriers against certain students serving as leaders—not their speech.

b. Wayne State's Policy Is Constitutional as Applied

Plaintiffs further challenge the policy as applied, alleging that Wayne State is

"discriminatorily applying its non-discrimination policy to penalize InterVarsity because of its religious opinions and perspectives." Compl. ¶ 189. Despite this conclusory allegation, which this Court need not accept as true under *Twombly*, Plaintiffs do not provide a single factual allegation to support the claim that Wayne State seeks to sanction InterVarsity for its religious views or has any motivation to do so. Instead, Plaintiffs point to a series of "examples" that purportedly establish differential treatment in the application of the policy. These "examples," which fall into a few discrete categories, do not assist Plaintiffs in stating a claim for a variety of reasons.

First, Plaintiffs allege that certain university policies permit discrimination outside of the context of recognized student organizations. For example, Plaintiffs allege that "Wayne State sponsors football and basketball teams, among other collegiate sports . . . [that] are permitted to discriminate and do discriminate according to sex, height, weight, and disability, despite Wayne State's code." Compl. ¶ 111. Plaintiffs further allege that "Wayne State also sponsors programs which discriminate," including an all-female floor in one of its dormitories, participation in scholarship programs aimed at certain groups (such as the Upward Bound program for veterans), and student engagement events targeting students by gender. *Id.* ¶ 112. Plaintiffs ignore the obvious: they have failed to allege that these are similarly situated student organizations, because they are not.[5]

Second, Plaintiffs list a number of recognized student organizations that purportedly demonstrate discriminatory enforcement of the non-discrimination policy. Some of these are club sports, although Plaintiffs admit that club sports are exempted from complying with all portions

[5] Of course, many of these programs discriminate based on patently rational bases: having single-sex sports teams—like single-sex dorm floors and locker rooms—promotes the health, safety, and welfare of the students.

of the policy and do not allege (because they cannot) that such an exemption is unreasonable.[6] Compl. ¶ 94. With respect to other organizations, Plaintiffs cite their public descriptions as evidence of violation of the policy. For example, Plaintiffs assert that the Ahmadiyya Muslim Students Association violates the policy because its "website states that its purpose is to 'bring Ahmadi Muslim youth together in university,' and that it is made up of 'regular young Muslims trying their best to practice and express their faith in university.'" *Id.* ¶ 99. Similarly, Plaintiffs assert that the Albanian Student Organization violates the policy because "the description of the organization on Wayne State's website says that it was founded 'to bring Albanians together.'" *Id.* ¶ 103. And Plaintiffs allege the Association of Latino Professionals for America violates the policy because it is described on the Wayne State website as an organization created to "develop[] the next generation of Latino professionals." *Id.* ¶ 109.

All these allegations suffer from the same fatal flaw: they do not show that any of these organizations limit membership or leadership in violation of the Wayne State non-discrimination policy. For example, an organization can have the goal of "bringing Albanians together" without discriminating against non-Albanian students. Under *Twombly* these allegations do not state a plausible claim because the facts alleged are consistent with an organization being in compliance with the non-discrimination policy. *See* footnote 3, *supra.*

Nor do the Plaintiffs allege any facts suggesting that—if any of these organizations have in fact violated the policy—Wayne State knew about it and decided not to enforce its non-discrimination policy, let alone did so for the purpose of suppressing InterVarsity's religious viewpoint. At most, Plaintiffs invite the Court to surmise that the organizations listed may have

[6] Once again, the health, safety, and welfare of the students engaging in club sports obviously justifies the exemption.

arrived at exclusive memberships as a matter of fact. Thus, the Association of Latino Professionals for America may tend to attract Latino and Latina students, but that does not mean it discriminates in violation of the policy. While Plaintiffs may be content to judge other student organizations based on the informal language used on their websites or a *de facto* tilt in their membership demographics, Wayne State is not willing to do so and has no legal obligation to do so.[7]

In sum, these allegations do not make out a plausible case that Wayne State has discriminatorily applied its policy to target InterVarsity's religious views.

2. Plaintiffs' Claims under the Parallel Clauses of the Michigan Constitution Fail for the Same Reasons

In Counts Sixteen[8] through Nineteen, Plaintiffs allege claims under Article I, § 5 and § 6 of the Michigan Constitution of 1963. Compl. ¶¶ 240-270. "The rights of free speech under the Michigan and federal constitutions are coterminous. Therefore, federal authority construing the First Amendment may be considered in interpreting Michigan's guarantee of free speech." *In re Contempt of Dudzinski*, 257 Mich. App. 96, 100; 667 N.W.2d 68 (2003) (citations omitted). Thus, the above analysis applies equally under the Michigan Constitution, and the claims fail for the

[7] Plaintiffs also allude to the presence of fraternities and sororities on campus as evidence of discriminatory application of the policy. This is wrong on multiple counts. First, the Department of Education has declared that membership exclusivity among social fraternities and sororities does not constitute discrimination within Title IX, a position that Wayne State can reasonably incorporate into its application and interpretation of its policy. *See* U.S. Dep't of Educ. / OCR website, Exemptions from Title IX, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html. Second, an exemption from the gender discrimination aspect of the policy for such organizations does not constitute hostility toward other organizations, let alone religiously-based viewpoint hostility directed specifically toward InterVarsity. Finally, if the exemption afforded to fraternities and sororities is impermissible then the remedy would appear to lie in requiring Wayne State to abandon that exemption, not in striking down an otherwise valid non-discrimination policy. That remedy has nothing to do with any relief sought by Plaintiffs here.

[8] Plaintiffs mistakenly label Count Sixteen as COUNT XIV in the Complaint. *See* Compl. at p.37. For the sake of clarity, the Wayne State Defendants refer to the count as if Plaintiffs had properly numbered it.

same reasons.

B. Plaintiffs' Claims under the Religion Clauses Fail

1. The Ministerial Exception Does Not Provide for a Cause of Action under Either Clause

In Count One, Plaintiffs assert a claim for violation of the Free Exercise and Establishment Clauses because of the "Ministerial Exception." Compl. ¶¶ 124-133. As the cases cited by Plaintiffs show, however, this claim fails because the "ministerial exception" is not a cause of action but an affirmative defense: "We conclude the exception operates as an affirmative defense to an otherwise cognizable claim . . . ." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012); *see also Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) ("The ministerial exception is an affirmative defense that plaintiffs should first assert in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)."). Count one thus summarily fails as a matter of law. The ensuing counts do not fare any better.

2. Plaintiffs' Establishment Clause Claims Fail

In Counts One, Two, and Five, Plaintiffs allege violations of the Establishment Clause. A court considering a challenge under the Establishment Clause must engage in a two-step analysis. First, "if the challenged government practice prefers one religion over another, [the court must] apply strict scrutiny in adjudging its constitutionality." *Harkness v. Secretary of Navy*, 858 F.3d 437, 447 (6th Cir. 2017) (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). Second, "if the challenged practice does not differentiate among religions, [the court must] apply the three-pronged test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)." Plaintiffs apparently believe that strict scrutiny should be applied under *Larson v. Valente*, Compl. ¶ 165, but they are mistaken.

Plaintiffs allege that Wayne State's policy advantages one religion over another because

"Wayne State has not penalized other religious groups on campus for their religious beliefs and leadership selection." Compl. ¶ 167. To trigger strict scrutiny, however, a plaintiff must allege a facial preference among religions. *See Harkness*, 858 F.3d at 447 (collecting cases); *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989) (noting that "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions"); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("The critical weakness of petitioners' establishment claim arises from the fact that [the statute], on its face, simply does not discriminate on the basis of religious affiliation."). Plaintiffs cannot plausibly allege facial discrimination here; on its face, the policy applies to all religions equally.[9]

Accordingly, the *Lemon* test applies to Plaintiffs Establishment Clause claims. A challenged government law or practice satisfies *Lemon* if it (1) has a "secular legislative purpose," (2) has a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) does not result in "excessive government entanglement with religion." The non-discrimination policy easily passes the *Lemon* test.

Non-discrimination policies like Wayne State's obviously serve legitimate secular purposes to prevent organizations from putting up barriers to academic participation. Further, the policy does nothing to advance or inhibit religion—it simply eliminates it as a basis for discriminatory treatment. Finally, the policy does not entangle Wayne State in religious matters; to the contrary, it provides a bright-line rule against discriminatory conduct, period. And, of course, if InterVarsity wanted to engage in religious discrimination then it was free do to so—but not as a recognized student organization with Wayne State's imprimatur. Plaintiffs' Establishment Clause

[9] Furthermore, Plaintiffs' allegations about these student religious organizations suffer from the same infirmities as their allegations regarding other student organizations—they do not plausibly allege actual discriminatory treatment of InterVarsity. *See* discussion *supra* at pp. 12-14.

claims thus fail for multiple reasons.

3. Plaintiffs' Free Exercise Claims Fail

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

Wayne State's policy does not impose any substantial burden on Plaintiffs' members' free exercise of religion but instead withholds certain privileges for non-compliance with the policy. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity." *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003). Plaintiffs do not allege that Wayne State has prevented their members from worshipping, meeting, or otherwise conducting their private religious lives as they choose. Wayne State merely chose not to subsidize—by way of access to support for organization events, free event space, and other privileges—Plaintiffs' decision to make second-class citizens of students who refuse to accept their religious pledge. This is not a penalty, and thus not a substantial burden, on free exercise.

Again, Plaintiffs cannot dispute the rational basis of a facially neutral antidiscrimination law. Courts have consistently upheld such laws as rationally related to the legitimate public interest

in eliminating discrimination, even if the law impacts religion. *See, e.g., McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982) (stating that Title VII has the "clearly secular purpose" of eliminating employment discrimination).

Plaintiffs' attempted claims under the Free Exercise Clause thus fail as well.

4. Plaintiffs' Claim under the Parallel Clauses of the Michigan Constitution Fail for the Same Reasons

In Count Fifteen[10], Plaintiffs allege violation of Article I, § 4 of the Michigan Constitution of 1963. The Michigan "Supreme Court has held that both the state and federal provisions of the Establishment Clause and the Free Exercise Clause of the First Amendment of the United States Constitution, are subject to similar interpretation." *Scalise v. Boy Scouts of America*, 692 N.W.2d 858, 868 (Mich. Ct. App. 2005) (citing *Advisory Opinion re Constitutionality of 1970 Pa. 100*, 180 N.W.2d 265 (Mich. 1970)). Accordingly, the above analysis applies equally under the Michigan Constitution, and the claim fails for the same reasons.

C. Plaintiffs Fail to State a Claim for Violation of the Equal Protection Clause

In Count Ten, Plaintiffs allege a violation of the Equal Protection Clause. To state a claim for violation of the Equal Protection Clause, Plaintiffs must establish that they were treated differently from similarly situated groups. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Plaintiffs must further prove that defendants acted with the intent or purpose to discriminate based upon membership in a protected class or exercise of a fundamental right. *See Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (collecting cases); *see also Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (holding that in order to prove an equal protection violation,

[10] Plaintiffs' Complaint contains two counts labeled "Count XIII". The Wayne State Defendants refer to the counts as if properly numbered; Count Fifteen begins on page 36 of the Complaint, paragraphs 232-239.

the plaintiff must demonstrate that the defendant acted with discriminatory intent). Where the policy is facially neutral, Plaintiffs must demonstrate that any disproportionate impact tends to show that an invidious or discriminatory purpose underlies the policy. *See Copeland v. Machulis*, 57 F.3d 476, 480 (6th Cir.1995); *see also Hernandez v. New York*, 500 U.S. 352, 360 (1991) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group.").

As described above, Plaintiffs have failed to allege facts sufficient to support the conclusion that they were treated differently from similarly situated groups. Indeed, compounding the ironies at work in this case, the heart of Plaintiffs' claim is not that they were treated differently, but that they were not: Plaintiffs seek the right to discriminate in a manner prohibited by all other recognized student organizations subject to the non-discrimination policy. Nor do Plaintiffs allege a single fact that would suggest anti-religious animus or discriminatory intent motivated the policy or its application. Accordingly, these allegations fail.

D. Plaintiffs Fail to State a Claim for Violation of Procedural Due Process

In Count Twenty, Plaintiffs claim Wayne State violated their due process rights by failing to provide a hearing prior to refusing to grant the application for recognized organization status. To advance a due process claim, however, Plaintiffs must first claim loss of a recognized liberty or property interest. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (describing the two step analysis in evaluating a due process claim: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient."). Here, Plaintiffs fail to do so. Plaintiffs cite no authority for the allegation that recognized student organization status is a recognized liberty or property interest. The cases cited in Plaintiffs' Complaint, involving

suspension or expulsion, have nothing to do with the facts at issue here. This claim fails, too.

E. There Is No Private Cause of Action to Enforce the Higher Education Act

In Count Eleven, Plaintiffs purport to state a claim for violation of Section 1011(a) of the Higher Education Act (the "HEA"). Compl. ¶¶ 203-208. This claim fails because, as a matter of law, no private cause of action exists to enforce any provision of the HEA. *See Thomas M. Cooley Law School v. American Bar Ass'n*, 459 F.3d 705, 710 (6th Cir. 2006) (holding that educational institution did not have private right of action to enforce HEA); *Negash v. DeVry Univ.*, No. 17-10256, 2018 WL 1570625, at *8 (E.D. Mich. Mar. 30, 2018) (citing *Thomas M. Cooley Law School* and holding that student could not enforce HEA). The HEA empowers only the Secretary of Education to enforce its provisions. *See id.* (quoting *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1123 (11th Cir. 2004)). This is true of all substantive provisions under the HEA, including the specific provision relied on by Plaintiffs. *See, e.g., Durham v. Suny Rockland Cmty. Coll.*, No. 14-CV-607 (TPG), 2016 WL 128214, at *6 (S.D.N.Y. Jan. 12, 2016) ("Defendants analyze this discrimination claim in terms of 20 U.S.C. § 1011 (2012), but that statute does not create a private right of action."). Count Eleven must be dismissed as a matter of law.

F. Plaintiffs Lack Standing to Sue Under the Elliott-Larsen Civil Rights Act

In Counts Twelve through Fourteen, Plaintiffs allege separate violations of the Elliott-Larsen Civil Rights Act. These claims fail for lack of standing because entities may not bring claims under ELCRA. *See Safiedine v. City of Ferndale*, 755 N.W.2d 659, 659 (Mich. 2008), *aff'g* 753 N.W.2d 260 (Mich. Ct. App. 2008) (finding that, as a matter of law, a corporate plaintiff cannot state a claim under § 37.2302). Though *Safiedine* only decided the issue as to one provision of ELCRA, the logic governs as to all ELCRA claims asserted by Plaintiffs: ELCRA protects "individuals", a term that does not include entities. *Id.* Accordingly, Plaintiffs lack standing to

bring these claims and they must be dismissed.[11]

G. InterVarsity USA Lacks Standing to Bring Any of the Claims Asserted

A plaintiff must establish standing to satisfy the case or controversy requirement of U.S. Const. art. III, § 2. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). To have standing, Plaintiffs must, among other things, demonstrate that they have suffered an "injury in fact," i.e., an invasion of a legally protected interest which is "concrete and particularized." *Id*. at 560. It must also be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." *Id*.; *see also Wall v. Michigan Rental*, 852 F.3d 492, 495 (6th Cir. 2017).

InterVarsity USA has not plausibly alleged an injury that affords it standing to sue. The only allegation in Plaintiffs' 275 paragraph Complaint even remotely related to an injury suffered by the national organization appears in paragraph 85: "Since InterVarsity[-Wayne] has been derecognized, and its constitution is identical in relevant respects to the constitutions used at Michigan State University, the University of Michigan, and other state university campuses, InterVarsity USA fears that the other chapters will be derecognized as well, particularly if WSU attempts to justify its actions on the basis of state law." Compl. ¶ 85. Even if true, this wildly speculative allegation does not identify a legally cognizable injury, and certainly not one fairly

[11] Alternatively, if Plaintiffs have standing to bring the claims under ELCRA, the arguments *supra* are incorporated here as demonstrating the inadequacy with which Plaintiffs pleaded discrimination. Moreover, Plaintiffs claim for retaliation fails as a matter of law, and Plaintiffs misstate their own allegations in attempting to create a retaliation claim. In Count Thirteen, Plaintiffs allege that "Wayne State fully derecognized InterVarsity only after it complained that Wayne State's actions were discriminatory under law. Prior to that time, InterVarsity enjoyed recognized student organization status even while its constitution was disputed." Compl. ¶ 220. Plaintiffs admit that, shortly after completing the online process, Ms. Garza, on behalf of Plaintiffs, "received a message stating that the constitution that she had submitted did not meet the necessary requirements." Compl. ¶ 58. The fact that Plaintiffs had conditional approval does not alter Plaintiffs' admission: that the adverse actions resulted directly from Plaintiffs' improper application and constitution, not the threat of legal action.

attributable to Wayne State. By Plaintiffs' own allegations, InterVarsity USA is thriving, with over 1,000 chapters on hundreds of campuses, including on eleven university campuses in Michigan. *Id.* ¶¶ 36-38. The Complaint contains no allegations that any of the universities in Michigan or elsewhere have actually threatened de-recognition or other adverse conduct. InterVarsity USA's alleged "fear" of hypothetical injury does not give it standing to sue.

V. CONCLUSION

Plaintiffs' Complaint, while long and "full of sound and fury," comes to nothing. For the reasons stated, the Wayne State Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety and with prejudice.

Dated: May 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of such filing to all attorneys of record. The foregoing paper was re-filed pursuant to Case Manager Deborah Tofil's instructions after the matter was transferred from the United States District Court for the Western District of Michigan to Judge Borman of the United States District Court for the Eastern District of Michigan.

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