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

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

Plaintiffs,

v.

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

Defendants.

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

/

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Plaintiffs' claims under the Religion Clauses fail.

1. The ministerial exception and internal autonomy "claims" fail.

Plaintiffs devote more than six pages of their response brief to Counts 1 and 2, which purportedly bring claims titled the ministerial exception and internal autonomy. (ECF No. 55, PageID.2544-2551.) Nowhere in these six pages do Plaintiffs cite a ***single case*** applying these doctrines as claims, not defenses. (*Id.*) Undeterred, Plaintiffs claim WSU's "argument was dealt a fatal blow" by the Supreme Court's holding in *Our Lady of Guadalupe School v. Morrissey Berru*, 140 S. Ct. 2049 (2020). (*Id.* PageID.2546.) But the Court in *Our Lady of Guadalupe* described the ministerial exception as the recognition that "the Religion Clauses ***foreclose certain employment discrimination claims*** brought against religious organizations." *Id.* at 2061.[1] In other words, far from recognizing a novel claim, the Supreme Court affirmed that the ministerial exception is an affirmative defense.

Plaintiffs' remaining arguments fare no better. Plaintiffs fail to cite a single case applying the ministerial exception to a case like this, where there is no live dispute between an unwanted leader or member and the religious organization. (*See* ECF No. 45, PageID.738.) Instead, Plaintiffs make up facts from whole cloth, claiming now for the first time that Plaintiffs' student leaders faced expulsion for

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

violating the RSO Policy. (ECF No. 55, PageID.2550.) This is pure speculation: there is not a single fact in the record that supports this claim, and Plaintiffs point to no policy that would permit expulsion for failing to register a student organization. Nor is it relevant here. Plaintiffs concede that no students who reject InterVarsity's beliefs have ever even attempted to lead the organization. (*Id.* PageID.2531 at ¶ 47.) WSU simply has made no attempt to dictate or influence Plaintiffs' leadership.

The religion clauses of the First Amendment provide rights that may be enforced under § 1983, but to do so, Plaintiffs must satisfy the applicable tests governing such claims—which they cannot do, as sort forth below. The Court should grant Defendants judgment on Counts 1 and 2.

2. Defendants are entitled to judgment on the Free Exercise claims.[2]

As has been briefed at great length, the RSO Policy is facially neutral and generally applicable and thus not subject to strict scrutiny, absent proof of religious animus or a substantial burden on religion. (ECF No. 45, PageID.739-741.) Plaintiffs attempt to prove religious animus by pointing to a single word in Defendants' Brief—"deserving." (ECF No. 55, PageID.2564.) In doing so, Plaintiffs rip this word out of context: The point is not, as Plaintiffs argue, that ***WSU*** has determined that

[2] Plaintiffs also seek judgment on Count 15 for violation of the Michigan Constitution. As set forth in Defendants' Response, Plaintiffs rely on the wrong legal standard. (ECF No. 53, PageID.2439-2441.) Regardless, because Plaintiffs cannot establish a cognizable burden on religion, the state law claim fails. (*Id.*)

certain student groups (Greek organizations and club sports) deserve an exemption from non-discrimination laws; to the contrary, no record evidence supports such a proposition. Rather, the point is that ***federal law*** recognizes that these organizations deserve these exemptions. (ECF No. 45, PageID.740.) For Plaintiffs to characterize this argument as an admission of "devaluation" of religious belief is specious.

To purportedly demonstrate a substantial burden caused by WSU's actions, Plaintiffs string together random quotations from cases with little to no bearing here. For example, Plaintiffs cite *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonvill*e, 508 U.S. 656, 666 (1993), which discusses the injury-in-fact necessary to support standing in an equal protection case, to somehow support their Free Exercise Claim. (ECF No. 55, PageID.2565.) Similarly, Plaintiffs pull language from *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), regarding the denial of public benefits without acknowledging that *Espinoza* involved a challenge to a statute that on its face prohibited access to the benefit to religious organizations—the statute even contained a section headed "Aid prohibited to ***sectarian*** schools." *Espinoza*, and the other cases cited, provides no guidance here.

In short, because the RSO Policy is facially neutral and generally applicable, the incidental burden placed on Plaintiffs cannot violate the Free Exercise Clause.

3. Defendants are entitled to judgment on the Establishment Clause claim.

The RSO Policy does not on its face or as applied discriminate among

religions: the Policy facially precludes discrimination on the basis of religion, without preference for any particular sect, and is applied in the same way, having been used to deny applications of a variety of religious organizations that, like Plaintiffs, seek to discriminate. (*See* ECF No. 45, PageID.743-744.) Plaintiffs make two arguments to establish liability on this claim. Neither has merit.

First, Plaintiffs argue that WSU's actions cannot satisfy the *Lemon* test, relying on a conclusory recitation of the elements of the *Lemon* test and a cross reference to their opening brief. (*See* ECF No. 55, PageID.2566.) But the referenced section of the opening brief does not address the *Lemon* test (*see* ECF No. 47, PageID.1127-1133 (discussing the ministerial exception)); in fact, nowhere in Plaintiffs' briefs do they address the *Lemon* test. Plaintiffs have waived the issue.

Second, Plaintiffs claim that *Lemon* does not govern, advocating instead for the historical approach set forth in *Town of Greece v. Galloway*, 572 U.S. 565, 566 (2014). (ECF No. 55, PageID.2567.) But the Sixth Circuit has expressly declined to apply this "pure historical approach" where it is of "limited utility" to the particular facts presented. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015). In *Smith*, the Court looked to *Lemon*, not *Town of Greece*, in a dispute relating to public schools because "[t]he simple truth is that free public education was virtually nonexistent in the late 18th century . . . [so] it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it,

anticipated the problems of interaction of church and state in the public schools." *Id.* The same logic applies here: there is no historical practice, dating to the founding, regarding registered student organizations at public universities to guide the Court. *Lemon* applies, and judgment should be granted in favor of Defendants.

B. Defendants are entitled to judgment on the speech, association, and assembly claims.

Plaintiffs mischaracterize WSU's arguments regarding the speech, association, and assembly claims, ignoring large portions of WSU's brief in a futile effort to preserve these claims. Despite Plaintiffs' continued efforts to the contrary, these claims must be considered under one framework, not separate legal analyses:

> [Plaintiff] would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, [Plaintiff] reasons, colors what concept is conveyed. It therefore makes little sense to treat [Plaintiff's] speech and association claims as discrete. Instead, . . . our limited-public-forum precedents supply the appropriate framework for assessing both . . . speech and association rights.

Christian Legal Soc. v. Martinez, 561 U.S. 661, 680 (2010). Thus, the limited public forum doctrine governs and provides a clear answer here: because WSU's RSO Policy is viewpoint neutral on its face and as applied, (*see* ECF No. 45, PageID.747-754), the Court should grant summary judgment on Counts 6-9 in favor of WSU.

To avoid judgment in favor of WSU, Plaintiffs take impermissible liberty with the factual record. Though the majority of Plaintiffs' assertions have been addressed elsewhere, Defendants respond to two points here.

First, Plaintiffs contend "WSU applies its policy to permit dozens of RSOs to express views about protected characteristics 'by either limiting or encouraging membership and leadership based on those characteristics,' while InterVarsity cannot." (ECF No. 55, PageID.2559.) This is simply untrue—the record reveals only ***two organizations***, not dozens, that were registered, despite limiting leadership based on protected characteristics. (*See* ECF No. 53, PageID.2423.) The undisputed facts show that these registrations were inadvertent. (*Id.*, PageID.2382, 2386.)

Second, Plaintiffs allege that WSU's actions caused them to incur "thousands of dollars in rental fees" (ECF No. 55, PageID.2561). Plaintiffs belie this claim by conceding elsewhere that these fees were repaid. (*Id.*, PageID.2542 at ¶ 70.) Plaintiffs further claim lost communications and meetings (*id.*, PageID.2561), despite admitting that the organization did not lose members and continued to operate on campus, though under altered conditions (*see* ECF No. 45, PageID.724-725). Finally, Plaintiffs claim student leaders faced "expulsion" despite no record evidence supporting this claim. (ECF No. 55, PageID.2561.) The Court should not accept this purely speculative assertion.

C. <u>Strauss and Villarosa are entitled to qualified immunity.</u>

Plaintiffs seek to impose individual liability on Strauss and Villarosa for violations of the First Amendment. (ECF No. 55, PageID.2568-2576.) As an initial matter, and as set forth above and more fully in Defendants' Brief (ECF No. 45) and

Response (ECF No. 53), the issues in dispute are well-settled *in favor of Defendants*. Defendants are entitled to judgment on each claim, and because there has been no constitutional violation, Straus and Villarosa must thus also be entitled to immunity.

Assuming, only for the sake of argument, that a constitutional violation did occur, Strauss and Villarosa are entitled to qualified immunity because the legal rule at issue was not "clearly established" at the time of their actions. Plaintiffs attempt to demonstrate that the legal rules at issue were "clearly established" by defining the applicable rules broadly. This is improper, and when the issue is properly framed, it is clear that the constitutional issue has not been placed beyond debate.

To create a clearly established rule, a case need not be "on all fours" with the plaintiff's case. *Vanderhoef v. Dixon*, 938 F.3d 271, 278 (6th Cir. 2019). Rather, such a rule can arise "from direct holdings, from specific examples describing certain conduct as prohibited, or from the general reasoning that a court employs." *Id*. at 279. Nevertheless, the fact pattern of the prior case must be "similar enough to have given fair and clear warning to [government officials] about what the law requires." *Id*. That is, a rule "is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates" the rule. *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (per curiam). "This demanding standard protects all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

The standard requires a plaintiff to identify with "a high degree of specificity" the legal rule that a government official allegedly violated. *Id*. at 590. The rule "must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). Given this requirement, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1775-76 (2015). An abstract framing "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). A rule is defined too broadly "if the unlawfulness of the [official's] conduct does not follow immediately from the conclusion that [the identified rule] was firmly established." *Wesby*, 138 S. Ct. at 590.

For example, the Supreme Court has long held that the Fourth Amendment bars officers from making arrests without probable cause. *See id.* at 586. This general rule—that officers must have probable cause—typically will not answer whether an officer had probable cause on a particular occasion. *Id*. at 590. Accordingly, "a body of relevant case law" addressing similar facts "is usually necessary" to show a violation of a clearly established rule in the probable-cause context. *Id.*

Here, Plaintiffs attempt to take similarly broad concepts and create a clearly established rule without a body of relevant case law addressing similar facts. Regarding the speech claim, Plaintiffs state "[t]he requirement of viewpoint

neutrality in limited public fora has been established for decades, especially in cases involving recognition of student groups at public universities."[3] (ECF No. 55, PageID.2569.) As to association, Plaintiffs claim it is clear that "antidiscrimination regulations may not be applied by universities to student groups in an effort to suppress or promote a particular viewpoint." (*Id.* PageID.2573.) Finally, as to free exercise, Plaintiffs claim it has "long been established" that "restrictions on religion must be neutral and generally applicable." (*Id.* PageID.2575.) These general rules—like the concept of probable cause—do not answer the question as to whether Strauss and Villarosa's conduct violated the constitution. Without more precisely analogous cases, the legal rule cannot be clearly established.

In fact, Plaintiffs point to only three cases that remotely addressed the factual issue before the Court at the time of the actions at issue: *Martinez*, *Reed*, and *Walker*. As set forth in WSU's opening Brief, those cases do not resolve the issue: the *Martinez* Court limited its holding to all-comers policies, and *Reed* and *Walker* did

[3] In a footnote, Plaintiffs purportedly identify cases with "highly analogous facts" that further demonstrate that the free speech principles at issue were clearly established. (ECF No. 55, PageID.2573, n.5.) None of the cited cases involve application of a non-discrimination policy to a student organization whose religious beliefs conflict with that policy. *Rewt v. Madison Cty. Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001) (considering high school dress code); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (considering Army prohibition of religious practices in on-base day care); *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (considering denial of trademark license to student group based group's pro-marijuana message); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (considering denial of KKK's application to participate in state Adopt-a-Highway program).

not reach final determinations on the merits. (ECF No. 45, PageID.765.) Nor can Plaintiffs rely on the Iowa cases: they were decided after the conduct alleged and thus obviously cannot support a clearly established legal rule at that time.

Strauss and Villarosa made principled decisions guided by existing case law, decisions that did not violate the constitution, let alone "clearly established law." They are entitled to qualified immunity.

D. Defendants are entitled to judgment on the Fourteenth Amendment claims.

Defendants are entitled to judgment on Plaintiffs' claims for violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment.

First, regarding Equal Protection, Plaintiffs respond only to the issue of discriminatory intent. (ECF No. 55, PageID.2577.) In doing so, Plaintiffs ignore the fundamental factual deficiencies that defeat this claim. The undisputed facts establish that InterVarsity was not subject to any disparate treatment: WSU applied the RSO Policy consistently, each year, to more than 500 student organizations, registering those organizations who comply with the policy and refusing to register those that do not. (*See* ECF No. 45, PageID.757-758.) Nor do the facts establish that, to the extent there was *de minimis* differential treatment, such treatment was because of InterVarsity's religion. (*Id.*) Plaintiffs' failure to address these points is telling: the undisputed facts establish WSU did not violate the Equal Protection Clause.

Second, as to the Due Process claim, Plaintiffs rely merely on conclusory legal

statements without any factual support. In fact, Plaintiffs rely on this Court's prior denial of Defendants' Motion to Dismiss as proof that Plaintiffs have carried their burden. (ECF No. 55, PageID.2577 ("Because 'InterVarsity invokes its right to expressive association, it has identified a cognizable liberty interest.'" (quoting *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 413 F. Supp. 3d 687, 694 (E.D. Mich. 2019)).) But the fact that this Court determined that Plaintiffs pled a liberty interest does not establish the deprivation of such a liberty interest at summary judgment. Plaintiffs cannot avoid judgment based merely on conclusory legal statements. *See Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002) ("[T]he non-moving party must come forward with specific facts showing that there is a genuine issue for trial."). Defendants are entitled to judgment.

E. <u>Defendants are entitled to judgment on the ELCRA claim.</u>

The only pending claim under the Elliott-Larsen Civil Rights Act is Count 13, for retaliation. To support this claim, Plaintiffs contort the record beyond recognition. Plaintiffs blatantly misstate the timeline of events, claiming they suffered adverse actions only after Garza complained of discrimination. (ECF No. 55, PageID.2578.) But the undisputed facts are clear: InterVarsity was ***never*** registered and thus had no benefits to be removed in response to Garza's complaint. (*See* ECF No. 45, PageID.762.) Further, Plaintiffs claim WSU threatened

"aggressive measures" in response to the complaint. (ECF No. 55, PageID.2578.) This is a blatant misstatement of the document at issue, plucking a single phrase out of context: in response to InterVarsity's letter threatening legal action, WSU's general counsel suggested the parties come to the table "before either of us is compelled to take aggressive measures." (ECF No. 47-28, PageID.1841.) Rather than a threat, the quote represents a plea that calmer heads prevail.[4] There was no retaliation, and summary judgment in favor of Defendants is appropriate.

Respectfully submitted,

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Dated: December 3, 2020

[4] Plaintiffs also attempt to mislead the Court, citing provisions of the ELCRA—MCL 37.2302 and MCL 37.2402—underlying the state law claims that this Court ***already dismissed***. (ECF No. 26, PageID.505-506.)

CERTIFICATE OF SERVICE

This is to certify that on December 3, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all attorneys of record.

By: /s/ Andrew M. Pauwels

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