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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RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND A PERMANENT INJUNCTION AGAINST THE WAYNE STATE DEFENDANTS IN THEIR OFFICIAL CAPACITIES – ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Motion for Summary Judgment filed by Plaintiffs InterVarsity Christian Fellowship/USA and InterVarsity Christian Fellowship Wayne State University Chapter ("InterVarsity-Wayne" and, with InterVarsity Christian Fellowship/USA, "Plaintiffs") is yet another unforced error in their dispute with Wayne State University ("Wayne State"). As set forth in Wayne State's Motion to Dismiss, this lawsuit is both unnecessary and meritless.[1] The present motion—in which Plaintiffs argue that they not only have a claim but should summarily prevail on it—takes their position beyond the realm of the baseless and into that of the absurd.

Some facts here are indeed undisputed, but they all support the Wayne State Defendants' Motion to Dismiss. By way of background: Wayne State recognizes certain student organizations and makes available resources to assist those organizations on campus. In exchange for the benefits associated with recognition, an organization must abide by certain university policies, including its non-discrimination policy. That policy prohibits a student 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. Controlling Supreme Court precedent gives Wayne State the authority to enforce such a policy.

InterVarsity-Wayne applied to renew its status as a recognized student organization. When Wayne State reviewed InterVarsity-Wayne's application, it discovered that the organization wished to enforce an openly discriminatory requirement that its leaders subscribe to certain religious beliefs. Wayne State accordingly denied the application. InterVarsity-Wayne protested

[1] The Court should consider the Wayne State Defendants' Motion to Dismiss on the face of the Complaint prior to addressing the instant motion. If Plaintiffs fail to state a claim, then there is no reason for the Court to consider this motion.

and, while efforts were ongoing to resolve the dispute, filed this lawsuit.

In an effort to put this disagreement behind the parties, and even though it had no legal obligation to do so, Wayne State granted InterVarsity-Wayne recognized student organization status and refunded the fees it incurred during its brief period of non-recognition. Oddly, Plaintiffs have nevertheless elected to continue with this lawsuit. Even more oddly, they have done so despite a United States Supreme Court case clearly holding that universities are not legally required to subsidize student organizations that seek to discriminate in violation of school policy—a case that Plaintiffs conspicuously omit from a Complaint that cites numerous other cases. Now, perhaps most oddly, Plaintiffs argue that this Court should grant them partial summary judgment based on a collection of "undisputed facts," even though those "facts" actually support the arguments advanced by Defendants in their Motion to Dismiss.

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") respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment and enter judgment in favor of the Wayne State Defendants, dismissing the Complaint in its entirety and with prejudice

II. COUNTER STATEMENT OF UNDISPUTED FACTS

A. Student Organizations on Wayne State's Campus

Wayne State has over 400 recognized student organizations. *See* WSU, *Start a Student Organization*, https://doso.wayne.edu/org-services/start. To qualify for recognition, an organization must have "at least two currently registered WSU students." *Id.* Students applying for recognition must sign up via Wayne State's online registration system. *Id.* The application requests certain basic information about the organization, such as its name, a description, contact

information, and anticipated meeting days. *See* Ex. 1, InterVarsity Application. The applicant must also provide information regarding membership and leadership criteria. *Id.* The process requires acknowledgment of certain university policies, including a non-discrimination policy. *Id.*

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

Wayne State University Non-Discrimination/Affirmative Action Policy, *available at* https://oeo.wayne.edu/pdf/affrm_actn_policy.pdf. The non-discrimination policy generally applies to recognized student organizations, such as InterVarsity-Wayne, with a few limited exceptions. As a matter of policy, and for obvious reasons, Wayne State does not apply the gender component of the nondiscrimination policy to club sports. *See* Wayne State University, *Sample Constitution*, https://rfc.wayne.edu/adventure/sample_constitution.pdf. Nor does the policy apply to fraternities or sororities, in accordance with the exclusion of these organizations from the non-discrimination law under Title IX. Outside of these recognized exceptions, Wayne State reviews each application for recognized student organization status for consistency with the non-discrimination policy. Ex. 2, Declaration of R. Villarosa ¶¶ 3-4.

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. *See* WSU, *Apply for Funding*, https://doso.wayne.edu/org-services/funding. 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. 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. They can, however, participate at recruitment events as a vendor and reserve meeting space on campus for a fee, a fact that Plaintiffs concede.

B. Denial of InterVarsity-Wayne's Registration

InterVarsity USA states that it has chapters at campuses nationwide. Pls.' Garza Decl. ¶ 2. Its stated mission "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, *Our Purpose*, https://intervarsity.org/about-us/our-purpose. InterVarsity-Wayne is the chapter of InterVarsity USA located at the Wayne State campus and comprised of Wayne State students and community members. Pls.' Garza Decl. ¶¶ 2-6.

InterVarsity-Wayne does not require its *members* to subscribe to Christian beliefs or otherwise limit its membership to those who agree with its mission. Pls.' Garza Decl. Ex.1. It does, however, require its *leaders* to "share its Christian faith." 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.'" Pls.' Garza Decl. Ex.1. Further, InterVarsity Wayne requires its leaders to "affirm InterVarsity USA's statement of faith." Ex. 1.

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. She included the group's constitution, which requires leaders to embrace the organization's religious mission. In the application, Ms. Garza also 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. 1. Shortly after submitting the application, Ms. Garza received a message informing her that it violated school policy: "Neither membership, nor officer requirements may violate the university anti-discrimination policy—please amend the officer requirements accordingly and resubmit." *Id.*; Ex. 2 at ¶ 5.

For several months, the chapter continued to operate on campus although not as a recognized student organization. *See* Pls.' Garza Decl. ¶¶ 43-46. As such, InterVarsity-Wayne had to pay to reserve meeting space and pay to participate as a vendor at a recruitment event. *Id.* InterVarsity-Wayne was further restricted from utilizing the communication channels made available to recognized student organizations. *Id.*

In an effort to resolve this dispute, 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 nevertheless resisted every opportunity to enter into such discussions, and instead filed suit. Wayne State continued its good faith efforts to resolve the disagreement, granting the organization recognized student organization status, *see* WSU Get Involved, *InterVarsity Christian Fellowship*, https://orgsync.com/148301/chapter, and refunding the money InterVarsity-Wayne spent on event rentals and registrations while the organization was not recognized. Despite all of Wayne State's efforts to resolve this matter amicably, Plaintiffs have persisted in the suit. Indeed, apparently pursuant to the principle that "no good deed should go unpunished," Plaintiffs in part base the

instant motion on Wayne State's efforts to settle this matter informally.

III. LEGAL STANDARD

Plaintiffs have moved for summary judgment under Fed. R. Civ. P. 56. Pursuant to Rule 56, the Court may grant summary judgment only if "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). A moving party with the burden of proof, such as Plaintiffs here, must overcome a "substantially higher hurdle" than a party without the burden of proof when moving for summary judgment. *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002). Though a moving party without the burden of proof must only show that the opponent cannot sustain his burden at trial, where "the moving party has the burden—the plaintiff on a claim for relief or the defendant on an affirmative defense—his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderon v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (internal citations omitted). Thus, summary judgment in favor of the plaintiff "is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Harris v. Kowalski*, No. 1:05-CV-722, 2006 WL 1313863, at *3 (W.D. Mich. May 12, 2006) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).

Plaintiffs have failed to clear this "substantially higher hurdle," and summary judgment should be denied. Moreover, as explained herein and in the Wayne State Defendants' Motion to Dismiss, Plaintiffs' claims fail as a matter of law, whether considered on the face of the Complaint or in the context of Plaintiffs' Motion for Partial Summary Judgment. Indeed, as an alternative to granting the Motion to Dismiss filed by the Wayne State Defendants, the Court should award summary judgment in favor of the Wayne State Defendants pursuant to Rule 56(f)(1).

IV. ARGUMENT

Plaintiffs move for summary judgment on four claims, seeking final relief for alleged

violations of their various First Amendment rights. In so moving, Plaintiffs (1) unsuccessfully attempt to minimize the impact of the controlling Supreme Court case, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); (2) rely heavily on the "ministerial exception," a doctrine of law wholly irrelevant to the issues here; (3) cite speech and association cases that are easily distinguishable from this case; and (4) offer inadmissible evidence of settlement negotiations in an improper effort to prove wrongdoing. This motion should be denied and, instead, the Complaint should be dismissed and judgment rendered in favor of the Wayne State Defendants.

A. Plaintiffs Cannot Establish Violation of Their Right to Free Speech or Expressive Association

Plaintiffs move for summary judgment on their "First Amendment expressive association and viewpoint discrimination claims (Counts VI and VIII)." Pls.' Br. at 8. When analyzed under the legal framework articulated in *Christian Legal Society v. Martinez*, 561 U.S 661 (2010), these claims clearly fail. Moreover, even if viewed under the legal analysis asserted by Plaintiffs, Plaintiffs cannot establish, as a matter of law, entitlement to summary judgment. Indeed, the facts as alleged in support of Plaintiffs' motion demonstrate that these claims should be dismissed.

1. Plaintiffs Cannot Establish Liability under a Limited Public Forum Analysis

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."). This is the full extent of the analysis that a court must undertake in considering challenges such as

InterVarsity's to a campus non-discrimination policy. As the Supreme Court stated in *Martinez*:

> [Plaintiff] would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge … It therefore makes little sense to treat [Plaintiff's] speech and association claims as discrete. . . . [O]ur limited-public-forum precedents supply the appropriate framework for assessing both [Plaintiff's] speech and association rights.

Martinez, 561 U.S. at 680.

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," as 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.[2]

In their Complaint, Plaintiffs challenge the non-discrimination policy both on its face and as applied. Though the Motion for Summary Judgment does not clearly articulate whether

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[2] Plaintiffs assert that strict scrutiny must be applied to Wayne State's non-discrimination policy. *Martinez* makes clear, however, that a limited public forum is not considered under strict scrutiny, and Plaintiffs' strict scrutiny analysis has no relevance here. In a footnote lacking any citation, Plaintiffs strangely assert that "Strict scrutiny is an affirmative defense; Plaintiffs assume Wayne State will raise it here." Pls. Br. at 22 n.12. Plaintiffs provide no case law to support the assertion that strict scrutiny is an affirmative defense. Moreover, it makes no sense to assert that "Wayne State will raise it here" since strict scrutiny is a constitutional standard that heightens the government's burden in justifying a given policy or practice. The Wayne State Defendants do not raise strict scrutiny as a "defense" and, to the contrary, rely on *Martinez* and its progeny in support of the clear conclusion that strict scrutiny does not apply to its policy.

Plaintiffs believe summary judgment is appropriate due to viewpoint discrimination on the face of the policy or as applied, the distinction is of no importance here because, under either theory, Plaintiffs' motion fails.

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

Plaintiffs offer no facts or argument challenging the reasonableness of the non-discrimination policy in light of the purpose of the forum. Instead, they focus solely on an argument that the policy is not viewpoint neutral. To the extent Plaintiffs contend the policy is not viewpoint neutral on its face, they have failed to offer evidence sufficient to carry their burden under Fed. R. Civ. P. 56 and, indeed, fail even to state a claim. This is clear from the controlling Supreme Court precedent they mention only in passing: *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 a "textbook" viewpoint-neutral policy. *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).

Plaintiffs discuss *Martinez* very briefly and only to distinguish it in a cursory manner by stating that, because Wayne State's non-discrimination policy is not an "all comers" policy, *Martinez* does not control here. Plaintiffs are simply wrong. In the only Circuit opinion considering

the issue, the Ninth Circuit applied *Martinez* to a university non-discrimination policy that, like the Wayne State policy, was not an all-comers policy. *See Reed*, 648 F.3d 790. The policy at issue in *Reed* 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 to this case. Plaintiffs have neither plead nor come forward with facts sufficient to establish that Wayne State instituted the

non-discrimination policy "for the purpose" of suppressing expression based on its viewpoint. They accordingly have failed to carry their substantial burden on a motion for summary judgment—and, indeed, have simply confirmed that their case should be dismissed. 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 barriers against certain students serving as leaders—not their speech.

b. Wayne State's Policy Is Constitutional as Applied

Plaintiffs fail to offer any evidence sufficient to establish that Wayne State has applied the non-discrimination policy in a manner that is not viewpoint neutral. In an attempt to prove that Wayne State targeted InterVarsity-Wayne for its viewpoint, Plaintiffs first rely on the following: "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.'" Pls.' Brief at 18. This statement, however, offers no support for Plaintiffs' argument; instead, it clearly serves to support the viewpoint neutrality of Wayne State's actions: Wayne State decertified InterVarsity-Wayne because of the group's conduct in violating the non-discrimination policy. There are no facts in Plaintiffs' Brief supporting the claim that this action targeted InterVarsity-Wayne's speech.

Plaintiffs then engage, as they did in their Complaint, in a misguided and flawed effort to establish viewpoint discrimination based on a review of other organizations at Wayne State. To do so, Plaintiffs rely on the declaration of one of their attorneys, Lori Windham, who states that she "personally viewed the descriptions of student organizations" on Wayne State's website and has compiled a list of organizations that—based solely on this review—she thinks are in violation of the non-discrimination policy. Pls. Br. Ex. 1 ¶ 2. Ms. Windham declares that each organization listed "makes distinctions according to a prohibited category, or that it limits membership or leadership according to viewpoint." *Id.*

For several reasons, this Declaration completely fails to support Plaintiffs' argument. As an initial matter, the Declaration does not include the facts necessary to prove Plaintiffs' claims. Ms. Windham does not state that she viewed any of these organizations constitutions[3] or applications. She therefore has no personal knowledge as to whether any of these organizations actually limit membership or leadership in violation of the non-discrimination policy. Contrary to her snap judgment, website statements suggesting that these organizations seek to serve or bring together certain populations obviously do not establish prohibited discrimination. Furthermore, even if Ms. Windham did have such personal knowledge, she would also need evidence that Wayne State was aware of such discrimination but consciously chose to do nothing about it. Again, the Declaration says no such thing.

In addition, many of these organizations are exempt from the non-discrimination policy on its face, for reasons that clearly satisfy constitutional scrutiny. Club sports are exempt from the policy, a reasonable distinction based on the long recognized government interest in promoting health, safety and welfare. Fraternities and sororities are also exempt from the policy. 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. Moreover, an exemption from the gender discrimination aspect of the policy for such organizations does not constitute hostility toward other organizations, let alone

[3] Ms. Windham attaches as an exhibit to her affidavit what she purports to be a model constitution for Students for a Democratic Society. Though this model constitution does restrict the organizations membership to students "in support of radical egalitarian politics," this restriction does not support Plaintiffs' claims: political discrimination is not prohibited by the non-discrimination policy.

religiously-based viewpoint hostility directed specifically toward InterVarsity.

The laundry list contained in Ms. Windham's Declaration does nothing to overcome the pleading deficiencies in Plaintiffs' Complaint as articulated in the Wayne State Defendants' Motion to Dismiss. At the very least, these facts fall well short of carrying Plaintiffs' burden at trial—as they must do in this motion as the moving parties with the burden of proof—and settle the relevant factual inquiry. In sum, the Declaration adds precisely nothing to Plaintiffs' motion.

2. The Cases Relied on by Plaintiffs Are Patently Distinguishable

Plaintiffs attempt to establish a claim under the Free Speech Clause by diminishing the impact of *Martinez* and relying on a patchwork of easily distinguishable cases. Plaintiffs assert that these cases—cases that, generally speaking, involved complete and, in several instances, arbitrary prohibitions on speech based on viewpoint—create a regime in which religious organizations like themselves cannot be treated as "second-class citizens." Pls.' Br. at 15. This argument might be compelling if it were true, but Plaintiffs are not treated as second class citizens as a result of Wayne State's enforcement of the non-discrimination policy. To the contrary, Wayne State's initial decision merely refused to grant InterVarsity-Wayne the special privilege of disregarding a generally applicable policy. As discussed above, this Court need not look past *Martinez* or bother with these other cases. Should it choose to do so, however, the Court will find the cases relied on by Plaintiffs clearly distinguishable.

Plaintiffs' speech argument begins with *Healy v. James*, 408 U.S. 169 (1972). Pls.' Br. at 15. In *Healy*, the Supreme Court held that a college could not exclude from campus a chapter of the Students for a Democratic Society because of its philosophy, even thought that philosophy was violent. *Healy*, 408 U.S. at 176. Though Plaintiffs misleadingly refer to *Healy* as involving merely the denial of "official recognition to a student group" in an attempt to fit this case within that framework, *Healy* involved facts completely different from those here: the student organization

was completely barred from campus, including being prohibited from placing announcements in the student newspaper and holding meetings in any campus facilities, because of the school's disagreement with its message.[4] *Id.* This case, in contrast, does not involve banishing an organization from campus or treating it differently based on its viewpoint.

The Supreme Court similarly struck down broad bans targeting religious content and expression in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Good News Club v. Milford*, 533 U.S. 98 (2001), and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). In *Widmar*, the Supreme Court considered a policy that directly excluded speech based on content: the university prohibited student groups from using school facilities for religious worship or discussion. In *Good News Club*, an elementary school opened its doors to community groups for after school activities but denied access to any religious groups. In *Rosenberger*, the Supreme Court struck down a university's denial of funding to any publication with a religious viewpoint. The Supreme Court in *Martinez* emphasized the distinction between these exclusionary policies and a policy such as Wayne State's: "In contrast to *Healy*, *Widmar*, and *Rosenberger*, in which universities singled out organizations for treatment *because of their points of view*, Hastings' all-comers requirement draws no distinction between groups based on their message or perspective." *Martinez*, 561 U.S. at 694 (emphasis added).

The remaining cases relied on by Plaintiffs can similarly be distinguished. Plaintiffs cite *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001), as an example of impermissible restrictions on a limited public forum. In *Kincaid*, the university confiscated the school yearbook because of content the school found objectionable. In ruling against the university, the Sixth Circuit described

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[4] The *Healy* court emphasized that colleges may require a student group "seeking official recognition affirm in advance its willingness to adhere to reasonable campus law." *Healy*, 408 U.S. at 193.

confiscation as "amongst the purest forms of content alteration." *Id.* at 355. Moreover, the Sixth Circuit found the action to be arbitrary, as it expressly violated the school's own policy governing yearbook editorial decisions. *Id.* at 356. Wayne State's conduct—withholding subsidies from non-compliant student organizations—does not amount to content alteration, and Wayne State acted in accordance with a policy, not in flagrant disregard for it. *Kincaid* offers no guidance here.

Finally, Plaintiffs discuss *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). In *Ward*, Eastern Michigan University expelled a graduate student from its counseling program for refusing to counsel a gay client on religious grounds. *Id.* at 729-30. In reversing a grant of summary judgment in favor of the university, the Sixth Circuit articulated the interests at stake: "A university cannot compel a student to alter or violate her belief systems based on a phantom policy as the price for obtaining a degree." *Id.* at 738. Here, Wayne State does not require InterVarsity-Wayne or any of its members to change their beliefs to avoid sanction; it merely applies its non-discrimination policy of broad application in determining which student groups to provide access to benefits.[5]

The cases relied on by Plaintiffs actually serve to put a finer point on the flaws in Plaintiffs' arguments. Each case involves clear content or viewpoint discrimination resulting in significant sanction: complete exclusion from a forum, confiscation of speech materials, and even expulsion from school. Plaintiffs present no evidence to establish that they suffered similar viewpoint-based punitive measures.

3. Plaintiffs Cannot Establish Violation of Their Right to Expressive Association

As stated *supra*, Plaintiffs' speech and association claims are properly analyzed under the

[5] Moreover, evidence in the record in *Ward* demonstrated that the school's decision was motivated by Ward's religion: "These statements represent the contemporaneous thoughts of the decision-makers who dismissed Ward, and they permit the inference that Ward's religious beliefs motivated their actions, particularly in the absence of a formal policy barring referrals." *Id.* at 738. Plaintiffs have offered no such evidence here.

limited public forum analysis prescribed in *Martinez*, and the Court simply need not apply the analysis in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), despite Plaintiffs' insistence to the contrary. Even if *Dale* applies, however, Plaintiffs have failed to present evidence sufficient to establish a claim.

In *Dale*, the Boy Scouts sought to exclude a "gay rights activist" from an assistant scoutmaster position. *Dale*, 530 U.S. at 653. The Supreme Court held that requiring the Boy Scouts to accept Dale would alter the Boy Scouts' message: his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* Accordingly, the Boy Scouts could not be compelled to accept such a leader into their ranks.

Under *Dale*, Plaintiffs must prove the following elements: (1) the group engages in expressive association; (2) the government action at issue affects in a significant way the group's ability to advocate public or private viewpoints; and (3) the government interest at stake fails to justify the burden it imposes on the group's expressive association. *Dale*, 530 U.S. at 648, 659.

Dale clarified the Supreme Court's ruling in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). In that case, the Supreme Court held that Massachusetts's antidiscrimination law could not be constitutionally applied so as to compel private parade organizers to include the Irish-American Gay, Lesbian, and Bisexual Group ("GLIB") in their parade. The inclusion of GLIB, marching behind a banner identifying it as such, clearly required the organizers to alter the content of their parade. *Id.* at 572. As the Supreme Court emphasized in *Dale*, the opinion in *Hurley* was not directed at attempts to exclude participation but rather at explicit attempts to alter content of private speech: "We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but

because they wanted to march behind a GLIB banner." *Dale*, 530 U.S. at 653.

Hurley and *Dale* are easily distinguishable from this case. Both involved government attempts to significantly alter the message of a given organization's speech by affirmatively requiring the acceptance and promotion of a contrary message. This analysis does not apply here for several reasons. First, InterVarsity-Wayne has presented no facts to support the claim that it is being forced to accept anyone into its organization as a leader; to the contrary, InterVarsity-Wayne acknowledges that it was given a choice: abide by the non-discrimination policy and receive certain benefits or operate independently from the recognized student organization system. Moreover, InterVarsity-Wayne has not put forth any evidence that de-recognition significantly impacted its advocacy; to the contrary, during the brief period of its de-recognition, InterVarsity-Wayne admits that it was not barred from meeting on campus, sponsoring events, or otherwise engaging with students. Finally, unlike in *Hurley* and *Dale*, Plaintiffs offer no evidence that any non-Christians have attempted to take leadership roles or otherwise alter InterVarsity-Wayne's message. In short, even under the *Hurley-Dale* analysis (which does not apply here), Plaintiffs have simply failed to establish a significant burden on speech and summary judgment in their favor should be denied.

In addition, even if the non-discrimination policy imposed a significant burden on InterVarsity—which it does not—Wayne State's policy is justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). Laws that prohibit discrimination, including religious discrimination, "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley*, 515 U.S. at 572. Accordingly, Wayne State has a compelling interest in preventing discrimination on its campus and the policy, by prohibiting discrimination, is narrowly

tailored to serve this compelling interest.

B. Plaintiffs Have Failed to Establish Liability under the Religious Clauses

Plaintiffs also move for summary judgment on two claims under the religion clauses of the First Amendment. Plaintiffs make two arguments to purportedly establish liability: first, Plaintiffs argue that the "ministerial exception" establishes liability under both the Free Exercise and Establishment Clauses, *see* Pls.' Br. at 8-14; second, they contend that the non-discrimination policy fails strict scrutiny in violation of the Free Exercise Clause. Both arguments fail.

1. Plaintiffs Cannot Establish Liability Pursuant to the Ministerial Exception

Plaintiffs devote roughly six pages to an argument completely devoid of merit: Plaintiffs claim that judgment should be granted in their favor under both religion clauses because the "ministerial exception" prohibits Wayne State "from punishing InterVarsity for requiring its religious leaders to share its religious beliefs." Pls.' Br. at 8-14. The Ministerial Exception, however, is not a cause of action but instead 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)."). The Wayne State Defendants are unaware of any case in which the Ministerial Exception was invoked affirmatively to support a cause of action by a religious organization, and the cases cited by Plaintiffs, including *Hosanna-Tabor* and *Conlon*, only affirm that the doctrine operates solely as a defense. *See, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (ministerial exception barred Title VII claim by Roman Catholic priest); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (5th Cir. 1985) (same as to Seventh-day Adventist pastor).

A closer look at *Hosanna-Tabor* underscores the inapplicability of the doctrine here. In *Hosanna-Tabor*, the Hosanna-Tabor Evangelical Lutheran Church and School employed Cheryl Perich as a "called teacher"—a position that required applicants to complete certain theological courses, obtain church endorsement, and pass an oral exam before being given the title "Minister of Religion, Commissioned." *Id.* at 177-78. Perich suffered from narcolepsy that interfered with her ability to teach, and ultimately the congregation voted to offer her a "peaceful release" from her called position. *Id.* at 178. Despite the vote, Perich refused to sign a resignation and even showed up to work upon being medically cleared. *Id.* at 178-79. Hosanna-Tabor then sent her a letter of termination, and Perich filed a charge with the Equal Employment Opportunity Commission, alleging violation of the Americans with Disabilities Act. *Id.* Among the relief requested, Perich sought reinstatement to her called position. *Id.* at 180.

The Supreme Court held that the suit had to be dismissed under the Ministerial Exception. In doing so, the Court emphasized that suits such as Perich's threatened the organization's religious freedom by replacing government decisions for ecclesiastical ones:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-89. This case is plainly distinguishable: Plaintiffs are not threatened with suit or prosecution that would replace an ecclesiastical decision with that of a government actor or otherwise dictate the appointment of InterVarsity-Wayne's leaders. Instead, Plaintiffs seek an exclusion from a viewpoint-neutral rule that conditions the receipt of a governmental benefit.

Plaintiffs were given the same choice faced by other student organizations at Wayne State: comply with the rules governing student organizations and receive benefits or operate outside of those rules and forgo them.

Indeed, Plaintiffs' argument could give rise to Establishment Clause issues that otherwise do not exist. Plaintiffs' position would require Wayne State to analyze each student religious organization and to decide which ones elevate student leaders to ministerial positions before deciding whether to apply the non-discrimination policy. Such entanglement in religious affairs is at the heart of Establishment Clause concerns. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), discussed *infra*.

2. Plaintiffs Have Not Established Liability under the Establishment Clause or the Free Exercise Clause

Plaintiffs rely primarily on the Ministerial Exception to establish liability under the Religion Clauses, an argument that fails as explained *supra*. Considering these claims under the proper analysis only further demonstrates the factual and legal deficiencies in Plaintiffs' argument.

An Establishment Clause claim requires a court to 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 assert that strict scrutiny applies, but that argument fails.

To trigger strict scrutiny, a plaintiff must demonstrate 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 religious discrimination here; on its face, the policy applies to all religions equally.

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 wants to engage in religious discrimination in its leadership then it has always been free do to so—just not as an officially recognized student organization. Plaintiffs' Establishment Clause claims thus fail for multiple reasons.

Plaintiffs' Free Exercise argument fares no better. 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 a group that violated its non-discrimination policy. 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' claims under the Religions Clauses fail, and the motion for summary judgment should be denied.

C. Permanent Injunctive Relief Is Inappropriate

The relief sought by Plaintiffs is inappropriate and unnecessary, as the relief requested as to InterVarsity-Wayne has already been granted. InterVarsity-Wayne requests that this Court enter

an order enjoining the Wayne State Defendants:

> From withdrawing recognition from InterVarsity Christian Fellowship Wayne State Chapter, denying their renewal applications, or from taking any further action to punish, retaliate, or otherwise discriminate against Plaintiffs, or any other similarly situated student religious organization at Wayne State University, for the exercise of their constitutionally protected rights to ensure that their leaders embrace and live consistently with their religious beliefs.

As to InterVarsity-Wayne, Wayne State has already provided the relief requested in a good faith effort to resolve this dispute: Plaintiffs admit (and improperly rely on as affirmative evidence of liability) that Wayne State has returned InterVarsity-Wayne to recognized student organization status and refunded the fees it paid. Plaintiffs have presented no evidence that there is any threat from Wayne State to enforce the non-discrimination policy against it in the future, and the organization's history on campus suggests that it has no reason to fear enforcement of the policy. Accordingly, relief in the form of a permanent injunction is not necessary in order to "protect" InterVarsity-Wayne—putting aside the fact that, for the reasons discussed above, it has no legal right to any such protection.

The requested relief must also be considered in light of its broader implications. Plaintiffs seek injunctive relief prohibiting Wayne State from applying its non-discrimination policy as to any "similarly situated student religious organization at Wayne State University." Plaintiffs, apparently not content to overreach on their own behalf, thus seek "relief" on behalf of some set of unidentified organizations that are not even parties to this case.

In addition, while Wayne State has made good faith efforts to accommodate InterVarsity-Wayne in an effort to resolve the dispute between the parties, the sort of broad and permanent injunction demanded by the Plaintiffs could have dire unintended consequences. For example, what if an organization emerges that holds as an article of religious faith that their leaders must be

white or male or free of physical disabilities? A permanent injunction along the lines sought by the Plaintiffs would deprive Wayne State of the flexibility it needs and would force it to support and subsidize all manner of discriminatory conduct packaged as "religious."

D. Plaintiffs Improperly Make Use of Settlement Discussions as Affirmative Evidence

In a desperate effort to save their claims and establish liability, Plaintiffs rely on the good faith efforts made by Wayne State to resolve this matter as affirmative evidence of liability:

> 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 interests 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.

Pls.' Br. at 22. Such evidence of settlement efforts is clearly inadmissible for this purpose under Fed. R. Evid. 408[6], and Plaintiffs cannot rely on it here to carry their substantial burden in seeking judgment on their claims. Fed. R. Evid. 408(a). Indeed, by using settlement evidence for a plainly inadmissible purpose, while trying to punish Wayne State for its efforts to make peace between the parties, Plaintiffs manage to commit two fouls in one play.

Furthermore, Plaintiffs' argument reflects a deep intellectual confusion. A compelling

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[6] Rule 408 provides:

> Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

interest allows the government to act—but does not require it. Thus, for example, a state university may have a compelling interest in admitting a diverse student body, but this does not mean that it must do so or that its failure to do so lessens that interest. Contrary to Plaintiffs' misconceived argument, Wayne State's decision to try to resolve this dispute by allowing InterVarsity-Wayne to make leadership decisions based on religious belief in no way contradicts its compelling interest in prohibiting discrimination on its campus or undermines the Defendants' position here.

V. CONCLUSION

For the foregoing reasons, the Wayne State Defendants respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment and grant judgment in favor of the Wayne State Defendants, dismissing the Complaint with prejudice.

Dated: May 22, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 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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