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

EMILY DAHL, HANNAH REDOUTE, BAILEY KORHORN, and MORGAN OTTESON,

Plaintiffs,

Case No. 1:21-cv-757

v.

Hon. Paul L. Maloney

THE BOARD OF TRUSTEES OF WESTERN MICHIGAN UNIVERSITY, EDWARD MONTGOMERY, President of WMU, KATHY BEAUREGARD, WMU Athletic Director, and TAMMY L. MILLER, Associate Director of Institutional Equity,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

INTRODUCTION

The Court is being asked to convert a TRO that was entered on August 31, 2021 (ECF No. 8), into a preliminary injunction. The August 31, 2021 Order enjoined the Defendants from enforcing the COVID-19 vaccine requirement against Plaintiffs. The TRO should be dissolved, and the Court should deny the request for a preliminary injunction because the Plaintiffs cannot satisfy the necessary standard for the relief sought. Specifically, because the COVID-19 vaccine policy is a neutral rule of general applicability it is subject to rational basis review. The Plaintiffs cannot demonstrate a likelihood of success on the merits of such a challenge.

STATEMENT OF FACTS

There have been approximately over 39 million diagnosed cases of COVID-19 in the United States to date. https://covid.cdc.gov/covid-data-tracker/#datatracker-home Over

640,000 people have died from the COVID-19 virus in the United States to date. *Id*. From February 2020 until August 30, 2021, Michigan has had over 950,000 confirmed cases of COVID-19 and an additional 114,000 probable cases. https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html There have been over 20,000 confirmed deaths from COVID-19 in Michigan in that same period of time. *Id*. There have been over 22,000 confirmed cases of COVID-19 in Kalamazoo County and an additional 3,063 probable cases. *Id*. There have been 375 confirmed deaths from COVID-19 in Kalamazoo County and 43 probable deaths, for a total of 418 deaths from COVID-19 in Kalamazoo County. *Id*. Since June 2021 the number of new COVID-19 cases in Michigan has steadily increased. *Id*. Since June 2021, both cases and hospitalizations due to COVID-19 have increased in Michigan. *Id*.

There are currently three vaccines available in the United States: Pfizer-BioNtech, Moderna and Johnson & Johnson/Janssen. (**Exhibit A**, Affidavit of Dr. Gayle Ruggiero, ¶ 5). All three were initially available under Emergency Use Authorization ("EUA") from the Food and Drug Administration. (*Id*. ¶ 6). All three vaccines under the EUA went through multi-phase clinical trials for safety and efficacy. (*Id*. ¶ 7). The FDA has now approved the Pfizer-BioNTech vaccine. (*Id.* ¶ 8). Each vaccine has demonstrated a high level of efficacy, although less than 100%, both in published clinical trials and data from post-vaccination collecting on incidence of severe illness, hospitalization, and death. (*Id*. ¶ 9).

Requiring those participating in intercollegiate athletics to be fully vaccinated in the most efficacious manner of reducing the risk of transmitting the COVID-19 virus both to teammates and to opponents. (*Id*. ¶ 10). Although soccer is typically played in an outdoor setting, the team frequently practices in an indoor facility and the close contact between

players during a game and practice carries a high risk of transmitting the virus. (*Id*. ¶ 11). The likelihood of a Covid-19 outbreak in the Athletics program is greatly reduced by having uniform vaccination among the student athletes. (*Id*. ¶ 12). Based on transmission levels and isolation requirements, a Covid-19 outbreak in any given sport could reasonably result in forfeited games and suspension or cancellation, in whole or in part, of a season. (*Id*. ¶ 13). The requirement that student athletes be vaccinated against Covid-19 is the most effective and reasonable way to guard against a Covid-19 outbreak in any given sport. (*Id*. ¶ 14). Allowing students to participate in a masking and testing protocol as an accommodation for any reason greatly undermines the efficacy and intent of the vaccine requirement and is not medically reasonable. (*Id*. ¶ 15).

Relying on the advice of medical experts, WMU's Athletic Director, Kathy Beauregard, implemented its vaccine requirement to ensure, to the greatest extent possible, the health, safety, and well-being of student athletes, and that student athletes could complete their athletic seasons without a Covid-19 outbreak. (**Exhibit B**, Affidavit of Kathy Beauregard, ¶ 9). The policy states: "Thus, to maintain full involvement in the athletic department community at Western Michigan University, all student-athletes, coaches, and athletic staff members are directed to provide proof of a minimum of a first COVID-19 vaccine no later than August 31, 2021." (*Id*. ¶ 10). Allowing unvaccinated students to participate in intercollegiate athletic activities undermines the efficacy and intent of the requirement. (*Id*. ¶ 12). Should a student athlete contract the Covid-19 virus on a team with other unvaccinated students, the infected student would have to quarantine for 10 days and contract tracing and testing would be required for the team. Any other team member who tested positive would also have to quarantine for 10 days. Based on the size of the team and

the number of positive cases, all team activity could be halted. Having a large portion of a team under quarantine would decimate their chances for participation (*Id*. ¶ 13). The NCAA requires that any institution unable to field a team in competition –including due to COVID-19 – will forfeit such competition. (*Id*. ¶ 14). If WMU forfeits competitions, it will be hurt both reputationally and financially. WMU is a party to legally signed contracts committing it to participate in intercollegiate competitions. Each of those contracts carry with it legal and financial responsibilities. (*Id*. ¶ 19). For example, if the football team were to forfeit its September 18, 2021, game against the University of Pittsburgh, WMU could have to pay $1 million to the University of Pittsburgh. (*Id*. ¶ 20). Additionally, without the $1.4 million financial guarantee from the University of Michigan for participating in the September 4, 2021 football game, WMU would not be able to balance its athletic budget. (*Id*.)

In addition to any fees the university receives in exchange for playing certain competitions, the university has already signed contracts for travel, hotels, some food, and other costs. It would forfeit all of those funds if it were forced to cancel a competition at the last minute due to a COVID outbreak. (*Id*. ¶ 21). In addition to direct financial losses from cancelling contracts, the WMU could be subject to legal liability for breach of contract. Such liability will also likely lead to difficulty in scheduling future competitions, thus reducing WMU's reputation as an athletic program. (*Id*. ¶ 22). Moreover, other schools would know that WMU could forfeit a game at any time and would be less likely to agree to enter into competition with the university. Therefore, students who now fail to get vaccinated will limit athletic opportunities for other current and future student athletes. (*Id*. ¶ 23).

WMU's vaccination requirement was implemented without regard to protected class status, including religion. (*Id.* ¶ 15). The policy does include a medical and religious

exemption. "Medical or religious exemptions and accommodations will be considered on an individual basis." (*Id.* ¶ 11). Any athlete who has been granted a religious exemption, for which the only reasonable accommodation is to no longer participate as a student-athlete, will maintain any athletic scholarship they have and will continue to be listed as a player on the team website. (*Id*. ¶ 24).

Currently, the best practice for accepted health standards is to be vaccinated against COVID-19. In the event a student-athlete violates the vaccination policy and has not requested a medical or religious exemption, that athlete will be deemed to be in violation of the Code of Conduct and will be subject to discipline up to and including dismissal from the team, loss of scholarship, and termination of eligibility to participate in intercollegiate athletics at Western Michigan University. Conversely, student-athletes who have obtained a medical or religious exemption continue as members of their team, retain their scholarship, and remain eligible to participate in intercollegiate athletics at Western Michigan University. (*Id.* ¶ 18). All students athletes execute a document that provides:

> Western Michigan University and its Division of Intercollegiate Athletics expressly reserve the exclusive right to establish and determine the standards of conduct, behavior, and performance of student-athletes participating in the intercollegiate athletic program ("Program") and to require compliance with such standards as a condition of continued participation in the Program. The undersigned expressly acknowledges these rights and agrees that failure to comply with such standards may result in the student-athlete being prohibited from participating in the Program, as well as possible forfeiture of any scholarships or funding related to his/her participation in the Program.

(*Id*. ¶ 25).

As quoted above, the policy applies to all students participating in intercollegiate athletics at WMU. There are only two exemptions: one for medical reasons and one for religious reasons. Each of the Plaintiffs sought a religious exemption from the vaccination

policy. The specific accommodation requested by each Plaintiff was an exemption from the vaccination policy while continuing to participate in intercollegiate sports. Tammy Miller, the Associate Director and ADA Coordinator in the Office of Institutional Equity at WMU reviewed the Plaintiffs' requests for a religious exemption. (**Exhibit C**, Affidavit of Tammy Miller, ¶¶ 1, 3). Ms. Miller did not and does not question the sincerity of any student's religious beliefs and does not question the sincerity of the Plaintiffs' religious beliefs. (*Id*. ¶ 4). Although the formal response on the form from WMU states the requested exemption was denied (ECF No. 1-7, PageID 42; ECF No. 1-8, PageID 45; ECF No. 1-9, PageID 48; ECF No. 1-10, PageID 51), each is more accurately described as granting the exemption but denying the specific accommodation that the Plaintiffs requested: participating unvaccinated in intercollegiate athletics while the policy is in place and they are unable to comply. (Exhibit C, ¶ 6). Requests for a medical exemption are handled through the Disability Services for Students offices. The medical accommodations available for student athlete are the same as for religious accommodations: the students maintain their scholarship if they are receiving one, remain a student in good standing, are not required to take the vaccine, and are not permitted to participate in any team activities. (*Id*. ¶ 7).

Each Plaintiff remains a member of their team, retains their scholarship if they have one, remains a student in good standing, and retains eligibility to participate in intercollegiate athletics at WMU. (Exhibit B, ¶ 24). No Plaintiff is being forced to be vaccinated over her religious objections. (Exhibit B, Exhibit C). Conversely, any unvaccinated student-athlete who has not obtained a religious or medical exemption is subject to disciplinary action for failure to comply with an Athletics Department Policy up to and including dismissal from the team, loss of scholarship, and loss of eligibility. (Exhibit B, ¶ 18).

Moreover, every student-athlete who has requested a religious exemption has been treated in exactly the same way. (Exhibit C, ¶ 5). WMU has not acted differently based on the nature or type of religious belief asserted. Prior to the Court's issuance of the TRO no student-athlete was permitted to participate in practices or games unless and until that individual had been vaccinated. (Exhibit B, ¶ 24).

STANDARD

This Court described the standard for deciding a motion for preliminary injunction under Fed. R. Civ. P. 65 in *Libertas Classical Ass'n v. Whitmer*, 498 F. Supp. 3d 961, 969–970 (W.D. Mich. 2020):

> Rule 65 of the Federal Rules of Civil Procedure governs requests for preliminary injunctions. District courts exercise their discretion when granting or denying preliminary injunctions. *Planet Aid v. City of St. Johns, Michigan*, 782 F.3d 318, 323 (6th Cir. 2015). When deciding a motion for a preliminary injunction, a court should consider and balance four factors: (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) the balance of equities; and (4) whether granting injunctive relief services the public's interest.

(citing *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020)). When a court considers the four factors as part of a constitutional challenge, "'the likelihood of success on the merits often will be the determinative factor.'" *Thompson v. DeWine*, 976 F.3d 610, 615 (6th Cir. 2020) (quoting *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). The United States Supreme Court has stated that a preliminary injunction is an "extraordinary and drastic remedy," that should "only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*,

555 U.S. 7, 22, 129 S.Ct. 365 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 690, 128 S.Ct. 2207 (2008)).

In this case, Plaintiffs do not have a likelihood of success on the merits. Therefore, the Motion for a Preliminary Injunction should be denied.

ARGUMENT

I. Western Michigan University's COVID-19 vaccination policy does not violate the Free Exercise Clause.

A. WMU's policy is a neutral rule of general applicability that survives rational basis review and the Plaintiffs cannot demonstrate they are likely to succeed on the merits of their claims.

Religious freedom is unquestionably a value of the highest order in our constitutional system. However, the constitutional guarantee of the free exercise of religion "does not mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The same is true of individuals and their free exercise rights. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215–216 (1972). "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). And, as Justice Scalia wrote:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. … Can a man excuse his practices to the contrary because of his religious belief? To permit this would

> be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 878–879 (1990). As a result, the federal courts have uniformly held that laws that have an incidental burden on religious conduct but that are neutral toward religion and apply generally are not constitutionally infirm. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Resurrection School v. Hertel*, ___ F. 4th ___, (No. 20-2256, 2021 WL 3721475, at *11 (6th Cir. 2021) ("Where a challenged law is neutral and of general applicability and has merely an 'incidental effect' on Plaintiffs' religious beliefs, Defendants need not show a compelling governmental interest.")); *Resurrection School v. Gordon*, 507 F. Supp. 3d 897, 901 (W.D. Mich. 2020)("On one side of the line, a generally applicable law that incidentally burdens religious practices usually will be upheld.")(citing *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020)."

The neutrality requirement means that a rule must not "infringe upon or restrict practices **because of their religious motivation**." *Lukumi, supra*, 508 S. Ct. at 533. (Emphasis added). The Free Exercise Clause therefore bars the government from discriminating against religion either facially or through "religious gerrymanders" that target specific religious conduct. *Id.* at 534. General applicability is a related concept. It proscribes governmental rules that selectively "impose burdens **only** on conduct motivated by religious belief." *Id*. at 531, 543. (Emphasis added).

WMU's vaccination policy does not discriminate against religion. It applies equally to all student-athletes regardless of their religious beliefs and regardless of whether they have religious beliefs. While the Plaintiffs make conclusory assertions that the WMU policy is neither neutral nor generally applicable, there is not a single fact pled in the Complaint to

support those conclusions. Rather, paragraphs 50 and 51 of the Complaint contain the following unsupported contentions:

50. Defendants' policies and practices are not general laws as they specifically target Christians who share Plaintiffs' sincerely held religious views but leave untouched students who ascribe to other or no faith traditions.

51. By design, Defendants' exemption denials, policies and practices are imposed on some religious students, but not on others, resulting in unjust discrimination amongst religious beliefs.

Neither of these paragraphs contain factual allegations the Court must (or should) accept as true but rather contain conclusory assertions that are not entitled to such acceptance. *Clark v. Stone*, 998 F.3d 287, 298 (6th Cir. 2021) ("We need not, however, accept as true the 'plaintiff's legal conclusions or unwarranted factual inferences.'"). Paragraph 50 does not identify who the students are that are supposedly "untouched" by the rule and who ascribe to "other or no faith traditions." That is insufficient to be considered a factual allegation as opposed to a conclusion. To the extent paragraph 50 is alleging that unvaccinated players who are atheists or practice religions other than Christianity are being permitted to participate in intercollegiate athletics, that allegation is false. The Affidavits submitted by WMU officials completely destroy any such assertion. And again, the Complaint does not identify any actual facts, but only a conclusory assertion.

Paragraph 51 fares no better. It asserts that WMU's policy is "imposed on some religious students, but not on others, resulting in unjust discrimination amongst religious beliefs." There are no facts alleged to support this contention and the court should not accept it as true. It is not even clear what is being alleged. Are the Plaintiffs alleging that WMU is

allowing (for example) some Catholics to participate who are not vaccinated, but not others (such as Emily Dahl)? If so, that assertion is completely refuted by the Affidavits of the WMU officials. Or is the Complaint alleging that some Catholics (for example) have been vaccinated and are being allowed to participate? If this is the assertion (which would be consistent with the letter from Father Hawk, ECF No. 1-4, PageID 29), how does that reflect in any way on WMU? If one Catholic has a religious objection to being vaccinated but another does not (and, therefore, is vaccinated), is WMU supposed to treat the unvaccinated person the same as the vaccinated person simply because they practice the same religion? Plaintiffs have identified no evidence demonstrating that WMU's "design" in instituting this policy was anything other than the health, safety, and welfare of the student athletes and the viability and reputation of WMU's athletic programs. Indeed, what benefit could WMU possibly receive by designing a policy to eliminate some of its best athletes from competition? Apart from paragraphs 50 and 51, there are no allegations in the Complaint that WMU's policy is neither neutral nor generally applicable.

In granting the Plaintiffs' Ex-Parte Motion for Temporary Restraining Order, the Court stated: "Plaintiffs have established a likelihood of success on the merits of the Free Exercise Claim. Plaintiffs have established that WMU's vaccination requirement is subject to strict scrutiny." (ECF No. 8, PageID 129). The Defendants submit there is no basis for applying strict scrutiny to the WMU vaccination policy.

It appears the Court focused on two points in ruling that strict scrutiny should apply. First, the Court stated that "[w]hen a law forces an individual to choose between following her religious beliefs or forfeiting benefits, the law places a substantial burden on the individual's free exercise of religion." (ECF No. 8, PageID 129)(citing *Living Water Church of*

God v. Charter Twp. Of Meridian, 258 F. App'x 729, 734 (6th Cir. 2007). The Court then stated that "a law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing a 'mechanism for individualized exemptions.'" (ECF No. 8, PageID 129) (citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). The Court then continued, "Courts review denials of individualized requests for a religious exemption to determine if the government entity had a compelling reason." (ECF No. 8, PageID 130)(citing *Meriweather v. Hartop*, 992 F.3d 492, 514 – 515 (6th Cir. 2021)). Respectfully, there is no basis to apply strict scrutiny on either basis.

1. Plaintiffs do not have a constitutionally protected interest in participating in intercollegiate athletics.

The Defendants first point out that *Living Water, supra*, was decided under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which **mandates** strict scrutiny review. In pertinent part, RLUIPA provides that:

> [n]o government shall impose or implement a land use regulation in a manner that imposes **a substantial burden on the religious exercise** of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
> (A) is in **furtherance of a compelling governmental interest**; and
> (B) is the **least restrictive means** of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1) (emphasis added). In addressing this issue, the Sixth Circuit in *Living Water* in turn cited the Supreme Court's decision in *Sherbert v. Verner*, another case decided under strict scrutiny review. The *Living Water* opinion states: "[The Supreme Court] has found no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs." *Living Water Church*

of God, supra, 258 F. App'x at 734 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). In making its decision, the court focused primarily on the "pressure" or the nature of the alleged coercion.

In *Sherbert*, where the Supreme Court applied strict scrutiny, the plaintiff was given the choice of violating her religious beliefs by working on her faith's Sabbath (Saturday) or forfeiting eligibility for unemployment compensation benefits. 374 U.S. at 399. The Supreme Court found that choice to be no different than imposing a fine on the Plaintiff for Saturday worship. 374 U.S. at 404. Similarly, in *Everson v. Board of Education*, the Supreme Court held that the government may not exclude the members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. 330 U.S. 1, 16 (1947).

In *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div*., the Supreme Court held that denial of unemployment compensation benefits to the plaintiff, who terminated his job because of his religious beliefs, constituted a violation of his First Amendment right to free exercise of religion – again employing strict scrutiny. 450 U.S. 707 (1981). However, while courts have employed strict scrutiny when evaluating whether individuals forfeited employment rights based on their religion previously, that is not the correct standard of review in this case. Here, the strict scrutiny analysis is foreclosed by the Supreme Court's decision in *Employment Division v. Smith, supra*. In this case, the Plaintiffs were not put to the choice of following their religious beliefs or "forfeiting benefits," because there is neither a liberty interest nor a property interest in participating in intercollegiate athletics. Plaintiffs continue to receive their scholarships and remain as students in good standing at WMU. The only limitation is that they cannot participate in intercollegiate athletics. That is not sufficient to constitute the sort of choice the Constitution forbids.

The Sixth Circuit has repeatedly and uniformly held that participation in athletic programs – either at the collegiate level or the high school level – is not an interest protected by the Constitution. "On appeal, plaintiffs acknowledged that Karmanos III did not have a constitutionally protected right to participate in intercollegiate athletics." *Karmanos v. Baker*, 816 F.2d 258, 260 (6th Cir. 1987) (citing *Graham v. NCAA*, 804 F.2d 953, 959 n. 2 (6th Cir. 1986)); *Hamilton v. Tennessee Secondary School Athletic Association*, 552 F.2d 681, 682 (6th Cir. 1976); *Jones v. Wichita State University*, 698 F.2d 1082, 1086 (10th Cir. 1983); *Parish v. NCAA*, 506 F.2d 1028, 1034 (5th Cir. 1975). In a similar case, the Sixth Circuit stated:

> Graham has wisely abandoned on appeal the theory that the defendants deprived him of a fundamental right by preventing him from playing intercollegiate football. The courts have consistently held that participation in interscholastic athletics is not a constitutionally protected fundamental right.

Graham v. Nat'l Collegiate Athletic Ass'n, 804 F.2d 953, 959 (6th Cir. 1986) (citing *Hamilton v. Tennessee Secondary School Athletic Ass'n*, 552 F.2d 681, 682 (6th Cir. 1976)); *Jones v. Wichita State University*, 698 F.2d 1082, 1086 (10th Cir. 1983); *Colorado Seminary v. NCAA*, 570 F.2d 320, 321–22 (10th Cir. 1978); *Parish v. NCAA*, 506 F.2d 1028, 1034 (5th Cir. 1975).

The "privilege of participating in interscholastic athletics must be deemed to fall . . . outside the protection of due process." *Hamilton v. Tennessee Secondary Sch. Athletic Ass'n*, 552 F.2d 681, 682 (6th Cir. 1976). Similarly, in *Awrey v. Gilbertson*, 833 F. Supp. 2d 738, 741–742 (E.D. Mich. 2011), Judge Ludington ruled:

> Although it is possible that Plaintiff had a property interest in his continued relationship with the University, particularly in light of the letter of intent and scholarship agreement, his property interest claim will be dismissed because he has not demonstrated that the Constitution protects his interest in playing college football, standing alone. First, the University's decision deprived him of only a partial season of eligibility. His eligibility was restored in 2008 before the start of the next season. Second, while the letter of intent may furnish some

> suggestion of an implied contract, the University promised Plaintiff a scholarship and an education in exchange for his participation in the football program. The University did not promise that he would be permitted to play football, practice with the team, or play in the games.
>
> Notably, Plaintiff does not allege that his scholarship was revoked, or that the University interfered with his efforts to attain an education. The interest Plaintiff had in playing football at SVSU for the final month of the 2007 season, while undoubtedly important to him, is simply not the type of property interest the Due Process Clause was intended to protect. Plaintiff did not have a 'legitimate claim of entitlement' to playing football at SVSU.

(internal citations omitted); see also, *Colorado Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 570 F.2d 320, 321 (10th Cir. 1978); *Spath v. Nat'l Collegiate Athletic Ass'n*, 728 F.2d 25, 29 (1st Cir. 1984) (a college athlete has only a non-protectable expectancy for renewal of a scholarship); *Austin v. Univ. of Orego*n, 205 F. Supp. 3d 1214, 1221–22 (D. Or. 2016) (college student-athletes had no clearly established right in the economic benefit of their athletic scholarship); *Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 635 (W.D. Va. 2015) ("Cases widely hold that college athletic scholarships and participation in collegiate athletics are not cognizable property interests."); *Fluitt v. Univ. of Neb.*, 489 F. Supp. 1194, 1203 (D. Neb. 1980) (a scholarship "would not seem to be the type of property interest that could be relied upon" except for a one-year scholarship that already has been offered).

Moreover, Plaintiffs have at least one other option. They are free to transfer to a school with a different vaccination policy. Since the Plaintiffs are not being put to a "choice" of constitutional significance, there is no basis to apply strict scrutiny to their claim.

2. WMU's decision to allow a religious exemption does not create a system of individualized exemptions subjecting the policy to strict scrutiny.

Based on Plaintiffs' allegations and arguments WMU would have been better off if it had made no allowances for a religious exemption – which it was constitutionally permitted to do. As far back as 1905, the Supreme Court has found that there is no right to a religious exemption for compulsory vaccination laws. See *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358 (1905) (holding that compulsory vaccination laws with only medical exemptions do not violate any federal constitutional right). *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017). This Court recently identified the *Klaasen v. Trustees of Indiana University* case from the Northern District of Indiana as "persuasive." *Norris v. Stanley*, No. 1:21-CV-756, 2021 WL 3891615, at *1 (W.D. Mich. Aug. 31, 2021) (citing *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021)). In *Klaassen*, Judge Leichty rejected a similar Free Exercise challenge:

> The vaccine mandate is a neutral rule of general applicability. It applies to all students, whether religious or not. It doesn't discriminate among religions. Indeed, the university has chosen to enable the practice of religion by providing a religious exemption to this vaccination requirement—one that the university, on this record, has freely granted to students if they request it, no questions asked. This is consistent with the Constitution. . . . Indiana University adopted a religious exemption, despite a religious-neutral vaccine mandate, which the law views as a matter of grace. Indeed, six of the eight students here applied for just such a religious exemption and obtained one.

Klaassen, 2021 WL 3073926 at *25-27 (citing *Nikolao*, 875 F.3d at 316 (religious plaintiff had no constitutional right to an exemption from mandatory vaccination law for public school students, though state provided one)); *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015) (state "could constitutionally require that all children be vaccinated in order to attend public school.... [but the State went] beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs"); *Workman v.*

Mingo Count. Bd. of Educ., 419 F. Appx. 348, 355-56 (4th Cir. 2011); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016); *Boone v. Boozman*, 217 F. Supp.2d 938, 954 (E.D. Ark. 2002). In this case the record establishes that every request for a religious exemption has been individually considered, each has been granted to the extent that no student is being compelled to receive a vaccination, no student is having their scholarship revoked, and no student is being "kicked off" their team.

Turning to the "individualized exemption" issue, the Defendants submit there is no system of exemptions in place that calls for the application of strict scrutiny. This Court cited *Meriweather v. Hartop, supra*, for the proposition that "Courts review denials of individualized requests for a religious exemption to determine if the government entity has a compelling reason." (ECF No. 8, PageID 130). But read in context, *Meriweather* does not support strict scrutiny review in this case. To begin, *Meriweather* cited *Lukumi's* discussion about "religious gerrymanders." "A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander." 992 F.3d at 515 (citing *Lukumi*, 508 U.S. at 537). The *Lukumi* court in turn relied on *Employment Division v. Smith, supra*, which found that their decisions "in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884. And the *Meriweather* court in applying the rule explained:

> *Second*, the university's policy on accommodations was a moving target. Why does this matter? Because when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting Smith, 494 U.S. at 884).

> When Dean Milliken told Meriwether that he was violating the university's gender-identity policy, Meriwether proposed a compromise: He would address Doe using Doe's last name and refrain from using pronouns to address Doe. Dean Milliken accepted this accommodation. But several weeks later, she retracted the agreed-upon accommodation and demanded that Meriwether use Doe's preferred pronouns if he intended to use pronouns to refer to other students. Now the university claims that its policy does not permit any religious accommodations.
>
> This about-face permits a plausible inference that the policy allows accommodations, but the university won't provide one here.

Meriwether, 992 F.3d at 515.

These cases, read together, stand for the proposition that if a system of individualized exemptions for secular reasons is put in place, but not for religious reasons, the government must justify the disparity. Here, the WMU policy included only two exemptions – one for medical reasons and one for religious reasons. There is no "system of individualized exemptions." There are only two exemptions, and both are categorical, not individual: one for religious exemptions and one for medical exemptions. The system of exemptions in *Meriweather*, *Lukumi*, and *Employment Division v. Smith* are the polar opposite of WMU's two exemptions. Strict scrutiny should not apply to WMU's policy.

Moreover, *Meriweather* does not stand for the proposition that if each request for a religious exemption is reviewed individually, strict scrutiny applies. In fact, the law is directly to the contrary: "The [Free Exercise] inquiry should have been as follows. First, a determination must be made: (1) whether the belief or practice asserted is religious in the person's own scheme of things, and (2) whether it is sincerely held." *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987); *Maye v. Klee*, 915 F.3d 1076, 1083 (6th Cir. 2019) ("**In any free exercise claim**, the first question is whether 'the belief or practice asserted is religious

in the [plaintiff's] own scheme of things' and is 'sincerely held.'"(Emphasis added).) Those inquiries cannot be made without assessing each request individually. The record here establishes that Ms. Miller reviews each request for a religious exemption individually (as she is required to do) and has accepted each individual's statement of their religious beliefs and that those beliefs are sincerely held. Nothing about the WMU policy or its application calls for strict scrutiny review.

Finally, WMU's policy does not suffer from the same flaws that caused the Supreme Court to employ strict scrutiny in *Fulton v. City of Philadelphia, supra*. In that case, the City of Philadelphia refused to consider a religious exemption at all, but gave the Commissioner unfettered discretion to grant other exemptions:

> Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner. The City has made clear that the Commissioner 'has no intention of granting an exception' to CSS. App. to Pet. for Cert. 168a. But the City 'may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason.'

Fulton, 141 S. Ct. at 1878 (quoting *Smith*, 494 U.S. at 884). At the risk of being repetitive, WMU's policy has only two categories of exemptions – a medical exemption and a religious exemption. The policy does not allow "a system of individualized exemptions" on the one hand but refuse to consider a religious exemption on the other hand. To the contrary, WMU's policy does not include "individualized exemptions" that can be granted at the discretion of an administrator, and it explicitly allows religious exemptions. There is no basis to subject WMU's policy to strict scrutiny.

WMU's policy is neutral toward religion and generally applicable. Rational basis review should apply. The WMU policy is rationally related to a legitimate government interest, so it easily satisfies rational basis review. "To satisfy rational-basis review,

Defendants must show 'only that the regulation bear[s] some rational relation to a legitimate state interest.' Here, Defendants had a legitimate state interest in controlling the spread of COVID-19 in Michigan." *Resurrection Sch. v. Hertel*, supra, at *15 (quoting *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002)). So, too, WMU has a legitimate interest in preventing the spread of COVID-19 among both its student athletes and those of the other schools they play around the country, and the vaccination policy bears some rational relation to that interest. The Plaintiffs are not likely to succeed on the merits of their Free Exercise Clause claim.

II. The Plaintiffs do not have a reasonable likelihood of succeeding on the merits of their substantive due process claim.

Count II of the Complaint asserts a substantive due process claim for an alleged violation of the right to privacy, personal autonomy, and personal identity. The Plaintiffs allege the Defendants "force medical treatment" over Plaintiffs' objections. (ECF No. 1, ¶ 60, PageID 10). In their Brief, Plaintiffs argue they have a right to refuse medical treatment and Defendants are attempting to compel them to submit to medical treatment (the vaccine).

The Sixth Circuit has held that in order to state a viable claim of this type a plaintiff must first prove the deprivation of a protected liberty interest, and then meet the constitutional standard:

> Upon a showing of a deprivation of a constitutionally protected liberty interest, a plaintiff must show how the government's discretionary conduct that deprived that interest was constitutionally repugnant. ... We use the "shocks the conscience" rubric to evaluate intrusions into a person's right to bodily integrity.

Guertin v. State, 912 F.3d 907, 922 (6th Cir. 2019) (citing *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 688 (6th Cir. 2011) ("[A] plaintiff must demonstrate a deprivation of a constitutionally protected liberty or property interest in order to establish

a due process violation based on discretionary conduct of government officials[.]"). It is factually untrue that the Plaintiffs have been compelled to submit to a medical treatment. The policy does not require the Plaintiffs to receive any medical treatment at all. It merely imposes a consequence for athletes who are not vaccinated. As discussed above, there is no right to participate in athletics, so the consequence is not the deprivation of a constitutionally protected liberty interest – there is no constitutional right to participate in intercollegiate athletics.

Even assuming a protected liberty interest had been implicated, the standard is not strict scrutiny review, as Plaintiffs contend, but is the "shocks the conscience" standard. The Plaintiffs cannot establish that the WMU policy – which seeks to protect against the spread of COVID-19 and preserve the ability of the athletic program to function – shocks the conscience. "Due-process-violative conduct (there, forced stomach pumping to obtain evidence) 'shocks the conscience,' infringes upon the 'decencies of civilized conduct,' is 'so brutal and so offensive to human dignity,' and interferes with rights 'implicit in the concept of ordered liberty.'" *Guertin*, 912 F.3d at 923 (citing *Rochin v. California*, 342 U.S. 165, 166, 72 S. Ct. 205, 206 (1952). The record does not support such a finding in this case.

III. The Plaintiffs do not have a reasonable likelihood of succeeding on the merits of their public accommodation claim.

Count III of the Complaint alleges a violation of 42 U.S.C. § 2000a. The Plaintiffs allege they have been denied the public accommodation of the WMU sports arenas, stadium, or place of exhibition or entertainment. The Plaintiffs do not have a reasonable likelihood of succeeding on the merits of this claim.

First, it is doubtful WMU is subject to 42 U.S.C. § 2000a under the circumstances presented. Unlike the Americans with Disabilities Act which explicitly include colleges and universities as places of public accommodation (*See* 42 U.S.C. § 12181(7)(J)), Title II does not include educational institutions within the definition of a place of public accommodation. 42 U.S.C. § 2000a(b).

Moreover, Plaintiffs have not satisfied the notice requirement of the Act. 42 U.S.C. 2000a-3(a) allows a civil action "for preventive relief." But before such an action is brought the requirements of 42 U.S.C. § 2000a-3(c) must be satisfied. That section of the Act states:

> In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, **which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice** or to institute criminal proceedings with respect thereto upon receiving notice thereof, **no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority** by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(Emphasis added). The Plaintiffs have included a claim under the Michigan Civil Rights Act alleging they have been denied access to a place of public accommodation. M.C.L. 37.2101, et. seq. (ECF No. 1, Count V). There can be no dispute that Michigan has a law prohibiting the allegedly wrongful practice. Therefore, Plaintiffs were required to satisfy the notice requirement of 42 U.S.C. § 2000a-3(c) before bringing this claim. The Plaintiffs have not alleged they have satisfied the notice requirement and there is no evidence in the record they have done so. They are therefore not likely to prevail on this claim.

Beyond that, the Plaintiffs cannot demonstrate a prima facie claim under 42 U.S.C. § 2000a. In *Christian v. Wal–Mart Stores, Inc.*, 252 F.3d 862 (6th Cir.2001) the Sixth Circuit established the requirements to state a prima facie case of discrimination in public accommodations. The plaintiffs must show that: (1) they belonged to a protected class; (2) they sought to make a contract for services ordinarily provided by the defendant; and (3) they were denied the right to enter into a contract for such services while similarly situated persons outside the protected class were not, or they were treated in such a hostile manner that a reasonable person would find it objectively discriminatory. *Id.* at 872. *Keck v. Graham Hotel Sys., Inc.*, 566 F.3d 634, 639 (6th Cir. 2009), held the same analysis applied to claims brought under the Michigan Civil Rights Act. Judge Cleland ruled the same prima facie requirements applied to claims under 42 U.S.C. § 1981 and 42 U.S.C. § 2000a. *Downing v. J.C. Penney, Inc.*, No. 11-15015, 2012 WL 4358628, at *3 (E.D. Mich. Sept. 23, 2012).

Here, there are no allegations that Plaintiffs attempted to make a contract for "services" ordinarily provided by WMU. That is, they have not alleged they were denied the ability to purchase a ticket to attend an event, they have not alleged they were denied access to a recreational space open to all other students, and they have not alleged they were denied access to a classroom or library.

Finally, the Plaintiffs have not been denied access to a place of "public" accommodation. The policy prohibits them from participating in intercollegiate athletic activities. That puts the Plaintiffs in the same shoes as every other WMU student. No one has a right under Title II to demand to accompany a sports team onto the practice field, into a locker room, sit on the team bench, ride the team bus, attend team meetings, or any other team activity. Title II simply does not apply to this situation.

IV. The Plaintiffs do not have a reasonable likelihood of succeeding on the merits of their state constitutional claim or their Michigan Civil Rights Act claim, and the Eleventh Amendment would preclude the Court from enjoining WMU for an alleged violation of state law.

Contrary to Plaintiffs' argument, Michigan law does not support their claims. First, their Michigan constitutional claims are unlikely to succeed in light of *McCready v. Hoffius*, 459 Mich. 131, 143, 586 N.W.2d 723, 728 (1998), opinion vacated in part, 459 Mich. 1235, 593 N.W.2d 545 (1999), which adopted *Employment Division v. Smith, supra*, for analyzing Free Exercise claims under the Michigan constitution. Additionally, the Michigan Court of Appeals' holding in *Reid v. Kenowa Hills Pub. Schools*, 261 Mich. App. 17, 680 N.W.2d 62 (2004), demonstrates the Plaintiffs' claims are unlikely to succeed:

> Unlike the parents in DeJonge, who were faced with criminal violations of state law for exercising the freedom to practice their religious beliefs, the MHSAA enrollment requirements do not infringe on plaintiffs' right to be homeschooled. Nor do the enrollment requirements subject the next friends to criminal prosecution. Rather, by exercising their right to practice their religion through homeschooling, plaintiffs and the next friends made a choice between homeschooling and having the children participate in extracurricular interscholastic athletic competition. Moreover, the next friends' desire to have their children participate in extracurricular interscholastic athletic activities runs counter to their stated religious purpose to "ensure that the education provided to their children integrates their religious beliefs on a curriculum-wide basis and to minimize the influence of other world-views (e.g. secular humanism/scientific naturalism) and other persons (e.g. peers and other authority figures) which threaten to undermine those sincerely held religious beliefs."
>
> In [*Cardinal Mooney High School v. MHSAA*, 437 Mich. 75, 81; 467 N.W.2d 21 (1991)] our Supreme Court stated that "compliance with MHSAA rules on the part of student athletes is an appropriate and justifiable condition of the privilege of participating in interscholastic athletics under the auspices of the MHSAA."

Id. at 28, 680 N.W.2d at 69 -70. The Plaintiffs' Civil Rights Act Claim fails for the same reason their Title II claim fails. The Plaintiffs are not being deprived of the full benefit of WMU's public accommodations and educational facilities. The Plaintiffs have the same access to, and benefit of, those accommodations and facilities as every other WMU student.

Finally, even assuming the Court were to find the Plaintiffs have a reasonable likelihood of success on the merits of their state law claims, the Eleventh Amendment bars the entry of an injunction on that basis.

The Eleventh Amendment and background principles of sovereignty ordinarily bar lawsuits against States and state officials. *Alden v. Maine*, 527 U.S. 706, 712–714 (1999). An exception to this immunity is that private parties may sue state officials to stop ongoing constitutional violations. *Ex parte Young*, 209 U.S. 123, 155–156 (1908). See, *McNeil v. Community Probation Services, LLC*, 945 F.3d 991, 994 (6th Cir. 2019).

Western Michigan University is a state entity which the state legislature supports through appropriations. See Mich. Const. art. 8, § 4 ("The legislature shall appropriate moneys to maintain the University of Michigan, Michigan State University, Wayne State University, Eastern Michigan University, Michigan College of Science and Technology, Central Michigan University, Northern Michigan University, **Western Michigan University**, Ferris Institute, Grand Valley State College, by whatever names such institutions may hereafter be known, and other institutions of higher education established by law") (emphasis added). Therefore, WMU is an arm of the state entitled to the protections of the Eleventh Amendment. The Eleventh Amendment prohibits federal courts from enjoining the state or state officials for alleged violations of state law.

"As the Court wrote in *Pennhurst*, 'it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.' 465 U.S. at 106." *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 124–25, 104 S.Ct. 900 (1984)).

V. Other Factors.

Since "[p]reliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors," *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020), the Defendants do not believe it is necessary to address the other three factors. Rational basis should apply and the Plaintiffs cannot demonstrate a reasonable likelihood of success on the merits.

RELIEF REQUESTED

The Defendants respectfully request the Court deny the Plaintiffs' Motion for Preliminary Injunction and issue an order dissolving the Temporary Restraining Order entered on August 31, 2021.

Respectfully submitted,

DATED: September 3, 2021

PLUNKETT COONEY

BY: */s/Michael S. Bogren*

Michael S. Bogren (P34835)
Attorney for Defendants
BUSINESS ADDRESS:
333 Bridge Street, N.W., Suite 530
Grand Rapids, Michigan 49503
Direct Dial: 269/226-8822
mbogren@plunkettcooney.com

Open.07616.14299.27113312-1