NO. 21-2945

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

EMILY DAHL, HANNAH REDOUTE, BAILEY KORHORN, MORGAN OTTESON, JAKE MOERTL, KIA BROOKS, AUBREE ENSIGN, REILLY JACOBSON, TAYLOR WILLIAMS, KAELYN PARKER, ANNALISE JAMES, MAXWELL HUNTLEY, SYDNEY SCHAFER, DANIELLE NATTE, NICOLE MOREHOUSE, AND KATELYN SPOONER,

Plaintiffs-Appellees,

v.

THE BOARD OF TRUSTEES OF WESTERN MICHIGAN UNIVERSITY, EDWARD MONTGOMERY, KATHY BEAUREGARD, AND TAMMY L. MILLER,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE PAUL MALONEY
Civil Case No. 1:21-cv-757

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO EMERGENCY MOTIONS TO STAY, CERTIFICATE OF COMPLIANCE, AND CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

ISSUES PRESENTED

I. WHETHER THIS HONORABLE COURT SHOULD DENY DEFENDANTS' MOTION FOR A STAY OF THE DISTRICT COURT'S PRELIMINARY INJUNCTION?

PLAINTIFFS/APPELLEES' ANSWER: YES

DEFENDANTS/APPELLANTS' ANSWER: NO

INTRODUCTION

Defendants/Appellants (hereinafter "Defendants") appealed a District Court Order simply requiring them to operate in the exact same manner as virtually every other college or university in the Midwest. This allows Defendants to require reasonable alternatives to vaccination because of religious objections, such as mandatory Covid-19 testing, quarantining, and masking requirements. Such an approach allows Defendants to still combat Covid-19 while not infringing on Plaintiffs/Appellees' (hereinafter "Plaintiffs") constitutional rights.

The District Court properly issued a Preliminary Injunction protecting Plaintiffs' constitutional rights. Defendants' Motion for Stay should be denied.

FACTUAL BACKGROUND

Plaintiffs are Christian people who adhere to the teachings of the Bible and are morally bound to follow the universal, consistent moral teaching of the Christian faith (ECF No. 15, PageID.153). Plaintiffs have sincerely held Christian beliefs that preclude them from taking the Covid-19 vaccine (ECF No. 15, PageID.153). Defendants do not question Plaintiffs' sincerely held religious beliefs (ECF No. 18-3, PageID.339).

Defendants adopted a policy, practice, custom, and procedure on August 12, 2021, requiring and forcing Plaintiffs to take one of the Covid-19 vaccines by August 31, 2021, or be removed from their positions on the WMU athletic teams and forfeit

their privilege to participate in intercollegiate athletics (ECF No. 15, PageID.155). Defendants' policy stated that "Medical or religious exemptions and accommodations will be considered on an individual basis" (ECF No. 1-2, PageID.20).

Defendants denied all requested religious exemptions and stated the following:

> The University has a compelling interest in taking action to avoid the significant risk posed to the intercollegiate athletic programs of a Covid-19 outbreak due to unvaccinated participants and prohibiting unvaccinated members of the teams from engaging in practices and competition is the only effective manner of accomplishing this compelling interest.[1]

Defendants informed Plaintiffs their decision was final and there was no further appeal available to them (ECF No. 15, PageID.158). The NCAA does not require Defendants to implement this policy mandating Covid-19 vaccination in order to participate in intercollegiate athletics (ECF No. 15, PageID.158).

Further, Defendants do not require the general student body at WMU to be vaccinated in order to be physically present on campus, to attend school, to attend intercollegiate athletic events, to live in the dorms, or to participate in any other educational programs at WMU (ECF No. 15, PageID.158).

Plaintiffs filed suit for vindication of their constitutional and statutory rights

[1] First Amended Complaint Exhibits F, G, H, and I.

on behalf of four Plaintiffs, and requested a Temporary Restraining Order which the District Court Granted (ECF No. 7). Plaintiffs then filed a First Amended Verified Complaint to add twelve additional Plaintiffs (ECF No. 15). The District Court held a hearing regarding Plaintiffs' Motion for Preliminary Injunction on September 9, 2021 (ECF No. 23, 24). The District Court issued an Opinion and Order granting Plaintiffs' requested Preliminary Injunction (ECF No. 25). Defendants then appealed and requested an emergency stay of the District Court's Preliminary Injunction.

ARGUMENT

I. LEGAL STANDARD.

This Court considers four factors to determine whether to grant or deny a stay pending appeal:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.'

DV Diamond Club of Flint, LLC v. Small Bus. Admin., 960 F.3d 743, 745-746 (6th Cir. 2020). A district court's decision to grant a preliminary injunction will be reversed "only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.* at 746.

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

A. DEFENDANTS' POLICY IS NOT GENERALLY APPLICABLE AND IS SUBJECT TO STRICT SCRUTINY.

Defendants have not established that the District Court erred in its findings of fact or improperly applied governing law. Defendants spend a large portion of their motion arguing points not in dispute and legal theories that were never argued in the lower court, instead of addressing the threshold requirements of their motion. For example, Plaintiffs are not arguing against the existence of COVID-19 or that they have a fundamental constitutional right to be WMU athletes. Instead, Plaintiffs argue, and the District Court found, that Defendants violated their constitutional right to the Free Exercise of Religion. Defendants' argument fails for a number of reasons.

1. Individualized Exemptions and Sole Discretion.

The District Court's factual findings demonstrate that Defendants' mandatory vaccination policy creates a mechanism for individualized exemptions. As the District Court correctly cited, "[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.'" *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021) (citation omitted). In *Fulton*, Supreme Court further held:

> The creation of a formal mechanism for granting exceptions renders a

> policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude, *Smith*, 494 U.S. at 884, 110 S.Ct. 1595—here, at the Commissioner's "sole discretion."

Id. at 1879.

Despite Defendants' claim that no such mechanism for individualized exemptions exists, their policy and affidavits show otherwise:

> Medical or religious exemptions and accommodations will be considered **on an individual basis**.

(ECF No. 18-2, PageID.333 (emphasis added)).

Defendants' policy explicitly states the accommodations in this case will be provided "**on an individual basis**." Defendant Miller reviewed each request for religious accommodation and made individual determinations as to each Plaintiff's request (ECF No. 18-3, PageID.339). Ms. Miller stated that she did not grant any Plaintiffs' requests (ECF No. 18-3, PageID.339). As *Fulton* clearly holds, the creation of the mechanism for granting individualized exceptions and accommodations granted at the sole discretion of Defendants renders a policy to not be generally applicable, "regardless whether any exceptions have been given[.]" *Id*. at 1879.

Defendants claim in their attached affidavit:

> [WMU] 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.

(ECF No. 18-2, PageID.336). This language gives Defendants the sole discretion to not only establish policies, *ad hoc*, but to also enforce those policies against student-athletes. This situation differs from many of the cases regarding a "mechanism for individualized exceptions" because typically those laws or policies are enacted by a separate legislative body or city council and then enforced by the executive branch.

However, Defendants reserved for themselves the exclusive right (or sole discretion) to not only enact the policies, but also the authority to enforce them. Defendants are rule maker and rule enforcer. Such language "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude" because Defendants have the authority to decide, at any time, who is affected by their policy, who has to comply with their policy, and who is exempted from their policy. *Fulton*, 141 S. Ct. at 1879.

Defendants have the sole authority and discretion to determine their policies, exemptions, and how those exemptions are applied. For example, if the starting quarterback for WMU's football team decided he did not want to take the Covid-19 vaccine because of a reason not currently listed as an exemption, there would be absolutely nothing preventing WMU from creating a new exemption which would allow that quarterback to remain on the team and participate. This is because WMU reserved to itself the sole discretion to set its own polices and exemptions at any time

for any reason.

Under *Fulton*, it is irrelevant whether any additional exemptions have been given or if WMU plans to issue any further exemptions. The issue is whether WMU has the sole discretion to create any exemptions it deems worthy and whether it "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*. To be sure, if it was the difference between keeping or losing its starting quarterback, WMU could implement any exemption it wanted in order to keep the quarterback on the team. Moreover, WMU could just simply decree that the vaccination policy does not apply to the quarterback position. This is the epitome of an "individualized mechanism."

Therefore, Defendants' policy, combined with their ability to exercise sole discretion to exempt anyone at any time for any reason proves the rule of general applicability does not apply.

2. Coercion.

Defendants make the absurd argument that because WMU has not held down and forcibly vaccinated any Plaintiffs against their will,[2] WMU has not violated Plaintiffs' constitutional rights. In essence, Defendants incredulously argue that because they have not yet committed a criminal assault and battery against Plaintiffs, they cannot be held liable for First Amendment violations. This is hardly the

[2] Document 10-1, Page: 13 and 20.

standard to determine whether constitutional rights have been violated.

Defendants' reliance upon *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 108 S.Ct. 1319 (1988) is misplaced. While that particular Plaintiff's religious claims were denied, the *Lyng* Court outlined two approaches to determine whether a governmental policy violates the First Amendment.

First, whether "the affected individuals [would] be coerced by the Government's action into violating their religious beliefs," and second, whether the "governmental action [would] penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id*. at 449. The *Lyng* Court concluded:

> [T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.

Id. at 450 (internal citations omitted) (emphasis added).

Under the first *Lyng* approach, Defendants are coercing Plaintiffs "into violating their religious beliefs." Neither *Lyng,* nor any other case, requires that Defendants physically hold down and forcibly vaccinate Plaintiffs before they can bring any First Amendment claim. Unconstitutional coercion does not require a criminal assault and battery.

Being on an intercollegiate athletic team is one of the greatest achievements in a person's life because of the hard work and dedication required to achieve it. It

is extremely coercive for Defendants to threaten everything Plaintiffs have achieved and threaten to permanently remove them from all participation in WMU athletics unless they violate their sincerely held religious beliefs and submit to a vaccination requirement. The government cannot coerce a person to violate sincerely held religious beliefs as a prerequisite for participation in intercollegiate sports or other governmental activities.

Under *Lyng's* second approach, Defendants' conduct also violates Plaintiffs' constitutional rights. Defendants are penalizing Plaintiffs' religious beliefs by denying them the privilege of participating in intercollegiate sports.

Defendants create a straw man argument by alleging that Plaintiffs' believe they have a constitutional right to participate in intercollegiate sports. Plaintiffs make no such a claim. This case is about whether WMU violated Plaintiffs' First Amendment rights.

Defendants cite *Lyng* which requires that WMU cannot deny "rights, benefits, and privileges enjoyed by other citizens," and then Defendants proceed to only analyze the first two categories (rights and benefits). *Id*. at 449. Defendants fail to provide any argument as to why Plaintiffs are not being denied the "privilege" of participating on an intercollegiate sports team as a penalty for exercising their religious beliefs.

Defendants apparently agree that participating in intercollegiate sports is a

privilege (ECF No. 18, PageID.313 and 323). Yet they fail to provide any explanation as to how a complete bar from any participation in intercollege activities is not "penalize[ing] religious activity." *Id*. at 449.

Under either *Lyng* approach, Defendants violated Plaintiffs' First Amendment rights. Defendants are coercing Plaintiffs to violate their sincerely held religious beliefs and are penalizing Plaintiffs' religious activity by denying them the ability to participate in a privilege (intercollegiate sports) that is enjoyed by other citizens.

The Sixth Circuit held:

> It is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion, is the evil prohibited by the Free Exercise Clause.

Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987).

Defendants are compelling Plaintiffs to commit an act forbidden by their sincerely held religious beliefs. Defendants' argue the only way Plaintiffs may enjoy the privilege of participating in their state-run program of intercollegiate athletics is if they violate their sincerely held religious beliefs via injection of the Covid-19 vaccine. Such a requirement is exactly the type of "evil prohibited by the Free Exercise Clause."

Pursuant to Defendants' policy, no person with a religious objection to vaccines will be permitted to participate in WMU athletics. Defendants completely exclude an entire class of people based upon their sincerely held religious beliefs.

The constitution forbids such blanket exclusions from participation in government-run programs, especially when less restrictive and more narrowly tailored means exist.

3. Comparable Secular Conduct.

Defendants' conduct is also not generally applicable because they did not extend their restrictions to comparable secular conduct, specifically, members of the WMU general student-body who refuse the Covid-19 vaccine. The Sixth Circuit held:

> Mitigation of that risk, of course, was the State's asserted interest in support of its restrictions on attendance at religious services; **the State did not extend those restrictions to comparable secular conduct; and thus, the Court held, "the challenged restrictions" were not "of 'general applicability[.]'"** *Id*. at 67 (quoting Lukumi, 508 U.S. at 546, 113 S.Ct. 2217). It followed as a matter of course that the restrictions were invalid.

Monclova Christian Academy v. Toledo-Lucas County Health Department, 984 F.3d 477, 480 (6th Cir. 2020) (emphasis added).

Defendants' argue their policy is necessary to mitigate the risk of spreading Covid-19. However, Defendants are not imposing that requirement on the entire student body. This creates the untenable scenario where secular WMU students will suffer no punishment or restriction whatsoever for refusing the Covid-19 vaccine, but religious WMU student-athletes will suffer the most extreme punishment in athletics for refusing the Covid-19 vaccine: permanent banishment from the team.

The Sixth Circuit further held:

> Whether conduct is analogous (or "comparable") for purposes of this rule does not depend on whether the religious and secular conduct involve similar forms of activity. Instead, comparability is measured against the interests the State offers in support of its restrictions on conduct. **Specifically, comparability depends on whether the secular conduct "endangers these interests in a similar or greater degree than" the religious conduct does.**

Id. (emphasis added).

The analogous conduct in this case is a student refusing the Covid-19 vaccine, which leads to unvaccinated student-to-student interaction. Defendants have repeatedly stated that their primary concern is that a Covid-19 outbreak will occur. Yet, there will be copious amounts of student-to-student interaction whether it occurs in dorms, cafeterias, parties, intramural sports, or on the soccer or football field that could potentially spread Covid-19. Defendants presented no evidence that two unvaccinated students playing intercollegiate soccer outdoors pose more of a risk to spread Covid-19 than two unvaccinated students attending class, interacting at a party, or eating together in the cafeteria without masks. Specifically, Defendants have no evidence that unvaccinated an WMU student-athlete "endangers" Defendants' interests in preventing the spread of Covid-19 any more than unvaccinated WMU students.

Further, the Sixth Circuit held:

> That question is whether we may consider only the secular actors (namely, other schools) regulated by the specific provision here in

> determining whether the plaintiffs' schools are treated less favorably than comparable secular actors are. We find no support for that proposition in the relevant Supreme Court caselaw. The Free Exercise Clause, as noted above, "protects religious observers against unequal treatment[.]" *Lukumi*, 508 U.S. at 542, 113 S.Ct. 2217. **That guarantee transcends the bounds between particular ordinances, statutes, and decrees.**

Id. at 481.

Thus, when analyzing whether Defendants treated Plaintiffs less favorably than secular actors also refusing the Covid-19 vaccine and engaging in student-to-student interaction, the Court's analysis must "transcend the bounds" of Defendants' policy and determine if they have treated comparable secular activities more favorably. Defendants treated comparable secular activities more favorably because members of the WMU student body may refuse to be vaccinated for any reason with no restrictions, while religious WMU student-athletes will suffer extreme consequences for that very same refusal.

The Supreme Court's recent opinion in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) also supports Plaintiffs' position. The Court held:

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, **whenever they treat <u>any</u> comparable secular activity more favorably than religious exercise.**

Id. at 1296 (emphasis added).

Again, the comparable activity is refusing the Covid-19 vaccine. Religious WMU student-athletes are punished; comparable secular members of the WMU

student body are not. The Court further held:

> Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. *Id*., at ——, 141 S.Ct., at 67(per curiam) (describing secular activities treated more favorably than religious worship that either "have contributed to the spread of COVID–19" or "could" have presented similar risks). **Comparability is concerned with the risks various activities pose, not the reasons why people gather.**

Id. (emphasis added).

The analysis does not include the reasons why the students are gathering. It is irrelevant whether students are gathering together for class, for a party, or to play intercollegiate sports. The relevant analysis is whether the risk is comparable. Defendants have no evidence that unvaccinated WMU student-athletes pose any more of a risk to spread Covid-19 than an unvaccinated member of the WMU student body. Therefore, because Defendants have treated secular members of the WMU student-body more favorably than religious WMU student-athletes for engaging in the exact same activity (refusing the vaccine), Defendants' actions are not generally applicable and must survive strict scrutiny.

In summary, Defendants' policy is not generally applicable, included individualized exemptions based upon their sole discretion, coerced Plaintiffs to violate their sincerely held religious beliefs, and treated comparable secular conduct more favorably. Therefore, Defendants' policy must survive strict scrutiny. It cannot.

B. DEFENDANTS HAVE NO COMPELLING INTEREST AND DID NOT UTILIZE NARROWLY TAILORED MEANS.

The Supreme Court in *Fulton* held:

> Rather than rely on "broadly formulated interests," courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O'Centro*, 546 U.S. at 431, 126 S.Ct. 1211. **The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.** Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk.

Fulton, supra, at 1881-1882 (emphasis added).

Thus, in this case, it must be analyzed whether Defendants had a compelling interest in denying Plaintiffs' requested religious accommodations. Defendants now claim that religious accommodations were, in fact, granted for Plaintiffs. However, Defendants' proposed "accommodations" are illusory and provide no actual accommodation for Plaintiffs' religious beliefs. Defendants state that a student who requests a religious 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" (ECF No. 18-2, PageID.336).

To begin, complete removal from the WMU athletic team is no more an accommodation than an employer "granting a religious accommodation" by firing that employee. Defendants cannot claim they are providing an accommodation to these Plaintiff student-athletes by telling them that they can no longer "participate

as a student athlete."

Next, Defendants claim that Plaintiffs can maintain their scholarships. When a person promises something they are already obligated to do, such a promise is illusory. Defendants are already obligated and have entered into agreements with many of the Plaintiffs to provide scholarships. Defendants' promise is essentially that they are agreeing to fulfill what they have already agreed to do and will not breach their agreement with Plaintiffs. Such an "accommodation" is illusory.

Finally, Defendants' offer to keep Plaintiffs' names on the team website is no meaningful accommodation. For example, an accommodation would be completely illusory if a club or fraternity told one of its members that they were permanently barred from participating in any club or fraternity activities, yet they would still be listed online as a member of that club or fraternity.

Imagine in *Fulton* if the City of Philadelphia told the Plaintiffs in that case that they were providing an accommodation by prohibiting Plaintiffs from engaging in any foster care activities, but instead would still be listed on the City's website as an approved foster care agency. Obviously, such an "accommodation" is not any accommodation in any reasonable sense of the word. The bottom line is that Defendants' proposed "accommodations" do nothing to alleviate or fulfill their duties under the First Amendment and are illusory at best.

Defendants provided no exception, accommodation, or opportunity for

Plaintiffs to comply with their sincerely held religious beliefs while still participating on WMU's athletic teams. Plaintiffs simply want to continue their dream of playing college sports at WMU while also remaining faithful to their sincerely held religious beliefs. Such a requested accommodation is required by the First Amendment.

Moreover, the Sixth Circuit has held:

> Under strict scrutiny review, the government bears the burden of showing that its regulation is "necessary to serve a compelling state interest" and that it is "narrowly drawn to achieve that end."

Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd., 172 F.3d 397, 409 (6th Cir. 1999).

Defendants have presented no argument as to why their policy and conduct in this case is supported by a compelling interest or is narrowly tailored. Instead, Defendants state in conclusory terms that providing religious accommodations "undermines the efficacy and intent of the requirement" (ECF No. 18-2, PageID.333). However, Defendants provide no explanation for why this interest is compelling, narrowly tailored, or rises to the level of overcoming a constitutional right.

Defendants claim they are implementing this policy because of concerns over Covid-19 outbreaks, and they do not want unvaccinated student-athletes infecting vaccinated student-athletes. Defendants presented no evidence as to why or how the vaccinated student-athletes are placed at risk by having unvaccinated student-

athletes on the team who are being regularly tested. Further, Defendants do not deny that there is no mandatory vaccine requirement for all students at WMU. It does not make any sense for Defendants to be so concerned about vaccinated student-athletes coming into contact with anyone who is unvaccinated when those same student-athletes will inevitably come into daily contact with unvaccinated students everywhere on campus.

It is inevitable that WMU student-athletes will have contact with other unvaccinated student-athletes when they play other schools in intercollegiate games. For example, WMU just played the University of Michigan on September 4, 2021, in Ann Arbor. WMU's student-athletes undoubtably had innumerable contacts with unvaccinated U of M student-athletes, staff, employees, and guests. If Defendants' primary goal and concern was to reduce any possibility of causing a Covid-19 outbreak, then Defendants' conduct certainly does not match their rhetoric.

Defendants also provide no explanation for how their policy is narrowly tailored. Defendants previously cited *Klaassen v. Trustees of Indiana Univ*., No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021)). Indiana's policy provided a religious exemption which permitted students to participate in all school activities, but they had to comply with additional safety requirements. *Id*. at 13.

Plaintiffs are complying with additional safety requirements in order to continue to participate in WMU activities. Defendants failed to provide any

explanation for why such a less restrictive and narrowly tailored policy, as used by most other surrounding colleges and universities, could not also achieve their goal of reducing the spread of Covid-19.

Defendants failed to demonstrate that they have a strong likelihood of success on the merits on appeal and the District Court's Preliminary Injunction should be upheld.

III. IRREPARABLE HARM.

The loss of a constitutional right, "for even [a] minimal period[ ] of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). As stated by the Sixth Circuit, "when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury *is mandated*." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (emphasis added); *see also Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Because "a constitutional right is being threatened or impaired" in this case, "a finding of irreparable injury is mandated."

Moreover, Plaintiffs will be irreparably harmed if a stay is issued because they will lose out on the opportunity to participate in intercollegiate sports, an activity

Plaintiffs have spent years of their life training and preparing to do. No amount of money or any other remedy can make up for the lost games, practices, and all of the other activities that are included with being an intercollegiate athlete.

Finally, Defendants' alleged irreparable harm is speculative at best and they spend approximately one sentence to explain why their alleged harm is irreparable (Document: 10-1, Page. 20). Defendants allege that without a stay, it could "jeopardize" an entire season. Yet, Defendants fail to explain how this could be or how the already ordered mandatory testing, quarantining, and masking requirements do not alleviate those concerns.

It is disingenuous for Defendants to argue that they have such a compelling interest in keeping their student athletes from having any contact with the unvaccinated when WMU is not requiring that the entire student body be vaccinated. WMU student athletes engage in virtually limitless activities with all other WMU students. Apparently Defendants have no issue with WMU student-athletes having unfettered contact with any and all unvaccinated students anywhere on campus, but permitting those same student-athletes to have contact with an another unvaccinated student-athlete who is undergoing regular testing and masking requirements is a bridge too far.

The Sixth Circuit held:

> To merit a preliminary injunction, **an injury "must be both certain and immediate," not "speculative or theoretical."** See *Griepentrog*,

> 945 F.2d at 154. D.T.'s parents say they are injured because: *if* D.T. regresses at his new private school, and *if* they choose to disenroll him, and *if* they choose not to enroll him in another state-approved school, the state *may* choose to prosecute them for truancy again. The district court said it well: "there's a lot of ifs in there." R. 56, Pg. ID 494. And all those "ifs" rule out the "certain and immediate" harm needed for a preliminary injunction.

D.T. v. Sumner County Schools, 942 F.3d 324, 327 (6th Cir. 2019) (emphasis added).

Similarly, Defendants have failed to demonstrate how they will suffer any alleged injury that is "both certain and immediate." Instead, their entire argument is both "speculative and theoretical." Defendants are essentially arguing that *if* Plaintiffs are allowed to participate in sports, and *if* someone on the team gets sick with Covid-19, and *if* Covid-19 is then transferred to a student who is not vaccinated, and *if* mandatory Covid-19 testing somehow misses that the unvaccinated student does have Covid-19, and *if* that unvaccinated student then transmits Covid-19 to more members of the team, and *if* enough members of the team get sick, that "could jeopardize a team's entire season." Just as in *Sumner*, such logic is purely speculative and "there's a lot of ifs in there."

Despite Defendants having the burden to demonstrate irreparable harm, the only reason they request a stay is that a Covid-19 outbreak might occur sometime in the future at some unknown time or place. Instead, Defendants argue that Plaintiffs will not suffer irreparable harm. This is not the standard to obtain a stay. Defendants

have failed to outline any way that they will be irreparably harmed if a stay is not issued. Thus, Defendants have not satisfied this element.

IV. HARM TO OTHERS.

Providing religious accommodations will not cause substantial harm to others because less restrictive measures, such as testing, quarantining, and mask-wearing, can be implemented. Most of Plaintiffs' sports are played outdoors, which is widely known as one of the least likely places to transfer Covid-19.

Further, Defendants own actions indicate that they do not believe unvaccinated students are a potential harm to others. This is because Defendants are not requiring the entire student body to be vaccinated and are permitting all student-athletes to have unfettered contact with every other student on campus.

It is disingenuous for Defendants to argue that somehow unvaccinated WMU student-athletes are essentially engaging in a "suicide pact" by not being vaccinated, but all other unvaccinated WMU students are not. Anyone that is remotely familiar with life on a college campus would understand that college fraternities/sororities, parties, or any other place a student-athlete might go for entertainment, are not exactly prime examples of hygiene, social distancing, or sterility.

As another example, the entire NCAA men's basketball tournament was safely played indoors utilizing testing, quarantining, and masking procedures. There was no requirement that every player be vaccinated in order to participate. Yet, the

tournament was handled in a safe manner. In this case, for example, soccer or football are played outdoors where Covid-19 is even harder to transmit to other people. If it's safe for people to play basketball indoors without a vaccine mandate, then it is certainly safe for people to play soccer or football outdoors without a vaccine mandate. This factor supports Plaintiffs' position that the stay should be denied.

V. THE PUBLIC INTEREST.

As stated by the Sixth Circuit, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws . . .").

In addition to all the reasons already outlined above, it is in the public interest to keep the preliminary injunction in place to preserve Plaintiffs' constitutional rights.

VI. STAY OF PROCEEDINGS.

Defendants also filed a Motion for Stay of Proceedings in the District Court while this appeal is heard on the Preliminary Injunction and First Amendment issues. Plaintiffs take no position on the Motion to Stay Proceedings in the District Court

and leave it to this Honorable Court's discretion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Stay of the District Court's Preliminary Injunction.

Respectfully submitted,

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517-322-3207

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I hereby certify that this brief contains 5,168 words, exclusive of the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, and is thus within the word limit allowed under Fed. R. App. P. 27(d)(2)(A). The word count was generated by the word processing software used to create this brief: Word for Microsoft Office 365.

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/s/ *David A. Kallman*
David A. Kallman

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2021, a copy of the foregoing Plaintiffs/Appellees' Response in Opposition to Emergency Motions to Stay was filed electronically with the Court. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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/s/ *David A. Kallman*
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