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

NATHAN BARBIERI, *et al.*,

Plaintiffs,

v.

THOMAS JEITSCHKO, *et al.*,

Defendants.

Case No. 1:23-cv-00525

Honorable Paul L. Maloney

Oral Argument Requested
(W.D. Mich. LCivR. 7.2(d))

PLAINTIFFS' RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANT WISNER'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendant Wisner used her authority as a Michigan State University ("University") professor pursuant to the University's policy to force Plaintiffs, along with hundreds of other students, to pay membership fees to her personal expressive organization called "The Rebellion Community." Wisner then used these funds to support her personal expression and to support the expression of other political organizations, like Planned Parenthood. (*See* ECF No. 1 Compl. ¶¶ 78–115 PageID.16-22.) Plaintiffs sued, seeking declaratory and injunctive relief and nominal, compensatory, and punitive damages for the willful violation of their constitutional rights. (*Id.* ¶¶ 115, 133, 137, 142 PageID.22, 26-28; Compl. at Prayer for Relief ¶¶ (A)–(G) PageID.34-35.) Defendant Wisner now moves to dismiss, admitting that she did what Plaintiffs allege. But she contends that she didn't violate Plaintiffs' constitutional rights because once she converted the fees they were "her funds." (*See* ECF No. 26 Br. in Supp. of Def. Amy Wisner's Mot. to Dismiss ("Def. Wisner's Br.") PageID.345.)

This is a remarkable admission. Defendant Wisner admits she knew she was lying when she represented (in boldfaced type) in her syllabus: "**Your professor does not receive any financial compensation from your membership fees as that would be a conflict of interest.**" (Compl. ¶ 80 PageID.16.) Defendant Wisner tries to cover this discrepancy by pointing to University policy that permits faculty to "*derive some financial benefit*" like "royalties" from the "materials" they assign. (Def. Wisner's Br. PageID.344 (quoting Compl. ¶ 64 PageID.13[1]).) But acting pursuant to University policy doesn't reduce her actions' unconstitutionality. Rather, her use of policy to perpetrate the harm multiplies the violation by implicating the "policy or custom" of the University. *See Kentucky v. Graham*, 473

[1] The link referenced at Compl. ¶ 63 n.12 PageID.13 is: https://bit.ly/3oY5XCT.

U.S. 159, 166 (1985) (cleaned up). (*See also* ECF No. 28 Pls.' Resp. Mem. in Opp. to Defs.' Jeitschko and Whipple's Mot. to Dismiss PageID.389-393 (describing University Defendants' official capacity liability because of their continued responsibility for the operation of the policy that Wisner used to violate Plaintiffs' rights).)

Wisner invokes the policy now (*see* Def. Wisner's Br. PageID.321) and followed its procedure, which "encouraged" her to "donate" the "payments" she received from "materials" to groups that (in her view) "would benefit students." (*See* Compl. ¶¶ 65, 92 PageID.13, 18.). She created, as she admits, a so-called "replacement for a textbook" with her own self-published website that she charged each student $99 to use. (Def. Wisner's Br. PageID.322 (citing ECF No. 1-6 Compl. Ex. F PageID.60).) This generated tens of thousands of dollars that Defendant Wisner now claims were "her funds." (Def. Wisner's Br. PageID.345.) But at the time, she felt the need to lie to her students and disclaim receiving "*any* financial compensation." (Compl. ¶¶ 80, 90, 99 PageID.16, 18, 20 (emphasis added).) That's because she knew: policy or no policy, what she was doing was wrong. (*See id.* ¶ 115 PageID.22.)

Even worse, she used these funds to support her private political expression outside the classroom and, as the policy "encouraged," to donate to other expressive organizations like Planned Parenthood. (Compl. ¶¶ 65, 91–92, 102–03 PageID.13, 18, 20.) This escalated her theft into a First Amendment violation. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) ("The compelled subsidization of private speech seriously impinges on First Amendment rights . . . ."). To this day, she is using money that she would not have had but for her unconstitutional acts to finance her personal expression in continued violation of Plaintiffs' rights. (*See* Compl. ¶¶ 101, 135 PageID.20, 27.)

Defendant Wisner also claims cases like *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) and *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) protect her right to do what she did. (*See* Def. Wisner's Br. PageID.336-338, 344-346, 351.) Remarkably, she casts Plaintiffs as seeking to restrict *her* expression and the rights of *other* students to receive information in the classroom. (*Id.* PageID.336-337, 341-342.)

All of Defendant Wisner's arguments are full of mischaracterization and misdirection. But Defendant Wisner's most fundamental legal error is this: she repeatedly seeks to elide the distinction between her own rights to express her views and the abuse of her authority under the policy to compel students to support that expression financially. (*See* Def. Wisner's Br. at PageID.318-319, 336-338, 344-345, 348-349, 351.) Plaintiffs support her academic freedom and their claims do not jeopardize the rights of other students—Defendant Wisner can say what she wants in class and other students can hear whatever she says. But she can't *force* students to pay for her speech *out of class*, make them become members of organizations designed to further her private expression, or condition students' ability to participate in a public university course on their willingness to surrender any constitutional right. Plaintiffs have adequately alleged that this is what she did and that, through her unlawful acts, she still has the money she unconstitutionally obtained and thus needs to be stopped from doing additional harm. (*See* Compl. ¶¶ 78–115 PageID.16-22.) Consequently, they have standing and have stated claims for relief, and this Court should deny Defendant Wisner's motion to dismiss.

RESPONSE TO DEFENDANT WISNER'S STATEMENT OF FACTS

"In deciding a Rule 12(b)(6) motion, a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478,

488 (6th Cir. 2009). Defendant Wisner begins her discussion of the "Facts and Procedural History" by claiming, "[g]iven the case's procedural posture, Wisner accepts the allegations in Barbieri and Radomski's complaint as true for purposes of this motion." (Def. Wisner's Br. PageID.321.) But Defendant Wisner follows this proclamation with serious mischaracterizations of Plaintiffs' allegations (either by direct contradiction, the insertion of facts Plaintiffs did not allege, or the omission of key allegations).

A. Defendant Wisner's order to pay membership fees to The Rebellion Community was not a "request."

Defendant Wisner begins by discussing her requirement that students become members of The Rebellion Community as a condition of participation in her course, MKT 250. (Def. Wisner's Br. PageID.321-322.) Citing her syllabus attached as an exhibit to Plaintiffs' Complaint, Defendant Wisner says she "*requested* that her students purchase a membership to the Rebellion Community . . . ." (*Id.* (emphasis added).) But this was no request. As the syllabus states and Plaintiffs alleged, this was a "course requirement." (Compl. Ex. F PageID.60. *See also* Compl. ¶¶ 73, 79 PageID.15-16.)

B. The Rebellion Community was not a bona fide "replacement for a textbook" and was designed to serve personal, not "pedagogical" goals.

Next, Defendant Wisner admits that The Rebellion Community is "a web platform she created to advance dialogue on social issues." (Def. Wisner's Br. PageID.322.) But she then claims, again citing (but not quoting) the syllabus attached to Plaintiffs' Complaint, that this website "was a replacement for a textbook." (*Id.*) She claims (without citing the Complaint) the "website was also consistent with Wisner's pedagogical goals." (*Id.*) This contradicts the allegation in the Complaint. Plaintiffs allege that (i) the site was completely duplicative of

existing Michigan State University infrastructure (*see* Compl. ¶ 88 PageID.18), (ii) the fees charged were used to support operations of the site that were *not* germane to the course, and (iii) the funds were used to support the expression of groups that have nothing to do with the course. (*See id.* ¶¶ 90–92, 101–04 PageID.18, 20.)

Additionally, the Complaint alleges that Defendant Wisner charged students more than she needed to deliver services germane to her course. Specifically, she charged them for an auto-renewing, $99 annual subscription for a semester-long course. This is the same price she charged the general public for an annual subscription. (*See* Compl. at ¶¶ 104–05, 114 PageID.20-22.) Plaintiffs have alleged sufficient facts to establish that this requirement was *not* related to any legitimate "pedagogical goals." (Def. Wisner's Br. PageID.322.) Rather, The Rebellion Community was a part of Defendant Wisner's *personal* political expression outside the classroom. The purpose of this expression was to "dialogue on social issues" that Defendant Wisner personally seeks to "advance." (*Id.*) Defendant Wisner expressed these messages through The Rebellion Community along with her promised book and her donations "to organizations fighting systemic oppression." (Compl. ¶¶ 58–62, 103 PageID.11-12, 20.)

C. Plaintiffs alleged that Defendant Wisner used proceeds from The Rebellion Community's membership fees for both personal expressive purposes and to support expressive organizations.

After this, Defendant Wisner claims she "followed the University's policy and donated all proceeds from her students' use of the Rebellion Community to the charity of her choice—Planned Parenthood, according to their complaint." (Def. Wisner's Br. PageID.322.) This omits important allegations about Defendant Wisner's use of their funds to support *her own* expressive activities. Plaintiffs do allege that Defendant Wisner *claimed* at one point that she donated "100%" of the

proceeds from the membership fees to Planned Parenthood—the claim that ultimately led Plaintiffs to realize that The Rebellion Community membership was a sham course requirement. (*See* Compl. ¶¶ 91–92 PageID.18.) But Plaintiffs *also* alleged that "Defendant Wisner used some of these funds to advance her own political advocacy," which included funding Defendant Wisner's RV tour, funding other expression of The Rebellion Community that was not germane to the MKT 250 course, and donating to other undisclosed expressive associations that Defend-ant Wisner described as "fighting systemic oppression." (Compl. ¶¶ 93, 100–03, 109–14 PageID.18, 20-22.) The Complaint alleges (based on Defendant Wisner's own words) that Defendant Wisner has used and is still using these funds for multiple expressive purposes that were not germane to her course. (*Id.* ¶¶ 134–45 PageID.26-28.)

D. Defendant Wisner attributed beliefs to Plaintiffs that they do not have and did not allege.

Defendant Wisner goes on to bizarrely mischaracterize Plaintiffs' religious beliefs, claiming that they "assert[ ] that Christian belief precludes any critical analysis of forces causing poverty." (Def. Wisner's Br. PageID.322.) Defendant Wisner cites page seven of the Complaint for this assertion, but nothing of the sort is alleged (there or anywhere else). Plaintiffs do object to "critical theory," which they identify as "the idea that all human history . . . [etc.] should be evaluated through the lens of group conflict." (Compl. ¶ 34 PageID.7) But (other than including the word "critical") this has nothing to do with alleging that their faith precludes "any critical analysis of forces causing poverty." (Def. Wisner's Br. PageID.322.)

E. Plaintiffs alleged Defendant Wisner's course was "required" and then, because of Defendant Wisner's deception, they had no meaningful opportunity to avoid Defendant Wisner's compulsion until it was too late.

Defendant Wisner tries to dilute Plaintiffs' allegation that MKT 250 was "a required course for every student at the University's Broad College of Business" by protesting that Plaintiffs "don't allege that they were required to take MKT 250 *in their sophomore year*," and that they "could have even dropped the course and added a substitute within the first quarter of the semester." (Def. Wisner's Br. at PageID.322-323 (emphasis added).) There are two problems with this. First, though Defendant Wisner offers a copy of the University's policy on add/drop, she offers nothing to show that any "substitute" was available—something she can't do without converting her motion to dismiss into a motion for summary judgment. *See Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010).

In addition, Plaintiffs alleged that Wisner's subterfuge prevented them from detecting the nature of her unconstitutional course requirement before they paid the fee. The syllabus claimed that all the membership fees were used to pay for class-related functions. In fact, the syllabus goes further and falsely claims: "Your professor does not receive any financial compensation from your membership fees as that would be a conflict of interest." (Compl. ¶ 80 PageID.16.) Wisner now admits this representation is false. Plaintiffs allege that this misrepresentation led them (by Wisner's design) "to believe that [Defendant Wisner] was entirely unaffiliated with The Rebellion Community." (*Id.* ¶¶ 82–84 PageID.17.) They believed that the membership requirement was a bona fide course requirement to purchase a subscription to a website that had real value for the course. (*Id.* ¶¶ 81–85 PageID.17.)

Based on these misrepresentations, Plaintiffs paid the membership fee. After paying the fee, Plaintiffs learned (i) the site did not offer any course-related benefit

to justify the hefty $99 membership fee that was not already provided by what the University offers for free, and (ii) Defendant Wisner intended to donate "100% of membership fees . . . to Planned Parenthood." (Compl. ¶ 92 PageID.18.) It was only then that Plaintiffs realized that the whole thing was a scheme to generate tens of thousands of dollars per semester that Defendant Wisner could use as she pleased, including to support political expression Plaintiffs did not wish to support. (Compl. ¶¶ 86–95 PageID.17-19.) Defendant Wisner cannot deceive Plaintiffs about the nature of her course requirement and then rely on her own deception to undermine Plaintiffs' claims by arguing Plaintiffs should have withdrawn from the course. *See Osborn v. Griffin*, 865 F.3d 417, 451 (6th Cir. 2017) (courts will not grant "relief to one, who has created by h[er] fraudulent acts the situation from which [s]he asks to be extricated" (cleaned up)).

F. Defendant Wisner contradicts the Complaint's allegations about the scope of The Rebellion Community.

Defendant Wisner claims that Plaintiffs were only compelled to associate with the part of The Rebellion Community that was related to the course. She claims they "knew that they would be working in a separate area for students, not in the community at large." (Def. Wisner's Br. PageID.323.) But this contradicts Plaintiffs' allegations. The Complaint alleges that "The Rebellion Community . . . is a global social learning community with a private space dedicated to this course" *and* that students "will have access to shared spaces that are used by members of the broader community" after paying their required subscription. (*See* Compl. ¶ 78 PageID.16 (quoting Compl. Ex. F PageID.59).) Plaintiffs further alleged that they were added to the "shared spaces." The Complaint includes an example of the shared page that permitted Plaintiffs to see the total number of active subscribers to the site. At the time, the total number of subscribers was 1,157. This means most, if not all, paying subscribers were students from the two course sections

Defendant Wisner forced to subscribe. (Compl. ¶¶ 98–99 PageID.19-20.) Therefore, it is directly contrary to the Complaint to say that Defendant Wisner did not force Plaintiffs to be a part of "the community at large." (Def. Wisner's Br. PageID.323.)

G. Plaintiffs' allegations about Defendant Wisner's other personal expressive activities show that Defendant Wisner used The Rebellion Community to further her personal expressive goals, not legitimate pedagogical interests of the University.

Defendant Wisner catalogues allegations about her TEDx Talk, her social media accounts, her "anticipated book," and her GoFundMe campaign to finance her RV tour. (Def. Wisner's Br. at PageID.324-325.) She says these are "immaterial allegations" and puts them alongside what she calls "personal attacks," protesting that the allegations "suggest that Wisner is opposed to the very concept of family" (which, ironically, is itself a twisting of Plaintiffs' words). (*Id.* PageID.325.) But Plaintiffs' allegations show why none of this is "immaterial." This case is about whether The Rebellion Community is a bona fide course requirement or a scheme to use official authority to unconstitutionally extract money to be used for private expressive purposes. Plaintiffs alleged that Defendant Wisner had personal expressive goals, that her TEDx Talk outlined those goals, that Defendant Wisner said on a University podcast that she was retooling her course in light of those goals, and that the book marketing, the GoFundMe, and the various websites promoting The Rebellion Community were all part of a personal and not a pedagogical endeavor. (*See* Compl. ¶¶ 41–62 PageID.9-12.) None of these allegations are "immaterial." (Def. Wisner's Br. PageID.325.) They are central to understanding what transpired.

ARGUMENT

Defendant Wisner moves to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim.

While Defendant Wisner's briefing misconstrues the allegations in the Complaint for the reasons described above, she does not offer any evidence of her own to challenge jurisdiction. (*See* Def. Wisner's Br. PageID.321 ("Given the case's procedural posture, Wisner accepts the allegations in Barbieri and Radomski's complaint as true for purposes of this motion.").) Her 12(b)(1) motion therefore raises a "facial attack" on the Complaint, which means it "merely questions the sufficiency of the pleading." *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). "In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss." *Id.*

"In deciding a rule 12(b)(6) motion, a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." *Tackett*, 561 F.3d at 488. So long as the Complaint alleges "enough facts to state a claim to relief that is plausible on its face" a motion to dismiss must be denied. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Plaintiffs' Complaint alleges in detail how Defendant Wisner has perpetrated completed and ongoing constitutional violations of their rights. Therefore, they have standing and have stated claims for relief. So the Court should deny Defendant Wisner's motion to dismiss.

I. Plaintiffs have standing for all of their claims.

Defendant Wisner argues that Plaintiffs have no standing to challenge her order to pay membership fees to The Rebellion Community. Her arguments mischaracterize the nature of the standing inquiry and the harms Plaintiffs alleged they have suffered. Plaintiffs need only "plausibly allege standing's elements at the pleading stage." *Davis v. Colerain Twp.*, 51 F.4th 164, 171 (6th Cir. 2022). Plaintiffs have amply alleged that they suffered (and are suffering) injuries, their injuries

were caused by the unlawful acts of Defendant Wisner, and favorable decision by this Court would redress their injuries. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

A. Plaintiffs have alleged completed and ongoing constitutional injuries.

Defendant Wisner's first mistake is getting the analysis backward. Her four arguments focus on the *relief* Plaintiffs request and then argue that the "request . . . doesn't *establish* standing." (*See* Def. Wisner's Br. PageID.328-331 (emphasis added).) Obviously, a request for relief doesn't establish the standing necessary to seek the relief. Rather, *injury* (and causation and redressability) "establish" standing. And the nature of the injury determines what type of relief may be appropriate: retrospective monetary and declaratory relief for past harm, prospective injunctive and declaratory relief for ongoing or sufficiently likely future harm. *See Davis*, 51 F.4th at 171. Plaintiffs have sufficiently alleged both past and ongoing injuries to establish standing, which justifies their claims for all the relief they seek.

1. Plaintiffs have alleged that Defendant Wisner has committed completed violations of their constitutional rights.

Plaintiffs have alleged that Defendant Wisner violated their rights to be free from compelled speech, compelled association, and unconstitutional conditions by requiring them to pay membership fees to join The Rebellion Community.[2] (*See*

[2] This is true whether or not Defendant Wisner actually donated funds to other organizations because Plaintiffs also alleged that The Rebellion Community itself is an expressive association. (*See* Compl. ¶¶ 109–15 PageID.21-22.) This is also true whether or not *some* of The Rebellion Community membership fees were used for purposes germane to the MKT 250 course. Plaintiffs alleged that Defendant Wisner charged them more than was required to provide services for the course. This is

Compl. ¶¶ 152–79 PageID.29-33.) This is a completed constitutional violation. As such, Plaintiffs have a right to seek appropriate relief for that violation, even if some circumstances change or some claims become moot (though here, none have). *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021).

Defendant Wisner argues that the University's decision to issue a $99 credit takes away *all* of Plaintiffs' claims for completed injuries and associated relief. (*See* Def. Wisner's Br. PageID.328-330.) But this is wrong for three reasons.

First, it confuses mootness with standing: a person can have an actual injury sufficient to support standing but still find claims mooted "if in the course of litigation a court finds that it can no longer provide a plaintiff with *any* effectual relief . . . ." *Uzuegbunam*, 141 S. Ct. at 796 (emphasis added). But that hasn't happened here: both declaratory relief, nominal damages, and equitable relief in the form of disgorgement *are* effectual relief even in cases where there are no compensatory damages.[3] *Id.* at 802. So while Defendant Wisner is wrong to suggest that the $99 credit moots any of their claims, that argument is also irrelevant to whether any injury occurred in the first place.

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demonstrated by the facts that (a) she charged Plaintiffs for a one year subscription for a semester long course, and (b) she charged all her students the same price for membership that she charged non-student subscribers. (*See id.* ¶¶ 104–05, 115 PageID.20-22.)

[3] Defendant Wisner also cites *Mikel v. Quin*, 58 F.4th 252, 259 (6th Cir. 2023) on this point. (*See* Def. Wisner's Br. PageID.328.) But this case supports Plaintiffs. In *Mikel*, a requested declaratory judgment that a particular contract had been violated was not regarded as redress because the contract was already acknowledged as void and the plaintiff there could not articulate any other concrete effect of the declaration. *See Mikel*, 58 F.4th at 259. Here, all parties contest the legality of Defendant Wisner's action *and* the legality of the University policies under which she acted. Plaintiffs have alleged that they are still subject to the policies, so a declaratory judgment adjudging the illegality of Defendant Wisner's actions would also protect them from additional, similar violations. (*See* Compl. ¶¶ 136–137 PageID.27.)

Second, receiving $99 dollars from the university does not prevent this Court from entering an order requiring Defendant Wisner to "return the funds Plaintiffs were forced to pay in membership fees to the Rebellion Community." (Compl. at Prayer for Relief ¶ (B)(1) PageID.34.) This Court's equitable authority includes its authority to enter an order to disgorge unlawfully obtained gains, regardless of the Plaintiffs' original damages or if subsequent events have impacted the amount of the damages.[4] *See Osborn*, 865 F.3d at 461. "This is because disgorgement 'is not available primarily to compensate victims,' but rather 'forces a defendant to account for all profits reaped through' h[er] wrongful conduct, 'even if it exceeds actual damages to victims.'" *Id.* (quoting *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006)). Because disgorgement focuses on preventing the wrongdoer from benefitting from wrongful conduct, the University's $99 credit does not cut off that remedy. *See Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 425 (6th Cir. 2013) *vac. for reh'g & overruled on other grounds* 780 F.3d 364 (6th Cir. 2015) ("An award of both actual damages and disgorgement does not offend the doctrine against double recovery.").

Third, focusing on the $99 credit conveniently ignores the elephant in the room: punitive damages. Defendant Wisner doesn't once mention punitive damages. But Plaintiffs have alleged that Defendant Wisner "consciously disregarded the rights of her students" and therefore seek punitive damages against her. (*See* Compl. ¶ 115 PageID.22; Compl. at Prayer for Relief ¶ (D) PageID.35.) In constitutional cases, it is common for compensatory damages to be low. But even in cases

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[4] *Osborn* goes on to recount Judge Posner's example of a tortfeasor that breaks a plaintiff's vase valued at $10,000, after which the plaintiff takes an income tax deduction of $3,000. *See* 865 F.3d at 453. In such a case, even though the plaintiff is now only 'out' $7,000, the defendant "could not in the ensuing tort suit deduct the $3,000 from the damages due." *Id.* (cleaned up). Rather, "the fact that the plaintiff was able to lay off a part of the harm on someone else—the taxpayer—is not a good reason to cut down the tortfeasor's damages." *Id.* (cleaned up).

where the damages are "so minimal as to be essentially nominal," punitive damages may be awarded for the conscious disregard of constitutional rights. *Romanski v. Detroit Entm't, LLC*, 428 F.3d 629, 645 (6th Cir.2005). So it doesn't matter if the University partially redressed Plaintiffs' financial injury by crediting them $99. That doesn't get Defendant Wisner off the hook for misleading Plaintiffs to believe that she received no "compensation" from their membership fees. To the contrary, Defendant Wisner now admits that every dime went to her, could be used at her discretion, and were in fact used by her to finance expressive activities Plaintiffs did not wish to subsidize. (*See* Compl. ¶¶ 80–84, 115 PageID.16-17, 22.) Plaintiffs have suffered completed violations of their constitutional rights, and their claims for declaratory relief, disgorgement, and nominal and punitive damages are still live.

2. Plaintiffs have alleged that, until Defendant Wisner returns their money, they are suffering ongoing violations of their constitutional rights.

Plaintiffs have also alleged that they are suffering ongoing injuries despite the University's $99 credit. Defendant Wisner still has the money she unlawfully took from them and is using it to engage in and support expression they do not wish to support. (*See* Compl. ¶¶ 134–35 PageID.26-27.) No party contests that Defendant Wisner has received tens of thousands of dollars—perhaps over one hundred thousand dollars—in student funds from her two semesters of requiring membership in The Rebellion Community. And no one contests that the University's decision to offer a credit to students has allowed her to keep that money. (*See id.* ¶¶ 90, 118 PageID.18, 23.) Disgorgement of the unlawfully obtained funds is the appropriate remedy for the completed harm. *See supra* Part I.A.1. In addition, because of the special nature of ongoing constitutional violations, it is also an appropriate means to stop the ongoing injury.

Constitutional violations that also cause monetary loss are *multifaceted* injuries, such that some redress of the financial injury alone is not a redress of the ongoing constitutional injury. A helpful example is employment. In the private sector, "[a]n at-will employee is subject to dismissal at any time and without cause . . . ." *Bailey v. Floyd Cnty. Bd. of Educ.*, 106 F.3d 135, 141 (6th Cir. 1997). But suppose the government terminates an at-will employee in retaliation for the employee's constitutionally protected speech. The employee suffers a cognizable financial injury in the form of lost wages. In addition, the employee is regarded as suffering an *ongoing* and *irreparable* constitutional injury supporting an injunction for reinstatement. *See Newsom v. Norris*, 888 F.2d 371, 378 (1989) ("The majority of federal circuit courts, however, have concluded that an individual, who has been subjected to direct and intentional retaliation for having exercised the protected constitutional right of expression, *continues* to suffer *irreparable injury* even after termination of some tangible benefit such as employment." (emphasis added)). Because the constitutional injury is ongoing, a remedy of past damages alone would never fully redress it, nor would a third party's proffer of financial compensation alleviate the continuing irreparable injury. *Id.* So too here: the University's credit only addresses a part of the past injury Plaintiffs suffered when they were unlawfully ordered to pay the $99 membership fee.[5] But receiving that money from

[5] Defendant Wisner has separately argued that there can be no ongoing injury because she offered to personally refund the membership fees. (*See* ECF No. 19 Def. Wisner's Resp. Br. to Pls.' Mot. for Prelim. Inj. PageID.217-218.) She does not raise the issue here, likely to avoid converting her motion to dismiss into a motion for summary judgment. *See Wysocki*, 607 F.3d at 1104. In its ruling on Plaintiffs' motion for preliminary injunction, the Court credited Defendant Wisner's assertion, going so far as to say that "Plaintiffs cannot establish the irreparable injury element necessary for a preliminary injunction after *declining* Wisner's offer to refund their money." (ECF No. 27 Op. & Order Denying Mot. for Prelim. Inj. PageID.364 (emphasis added).) Plaintiffs respectfully dispute this characterization. There's no evidence that Plaintiffs declined an offer for a refund. In fact, Plaintiffs

the University does not redress the harm Defendant Wisner perpetrated, which was converting those funds to *her* use for expressive purposes. Until Defendant Wisner is compelled to disgorge the money she unlawfully obtained, she can engage in private expression that Plaintiffs are compelled to subsidize, subjecting them to additional injury.[6] *See Janus*, 138 S. Ct. at 2464 ("the compelled subsidization of private speech seriously impinges on First Amendment rights . . . .").

B. Plaintiffs have alleged that Defendant Wisner's conduct is the cause of their completed and ongoing injuries.

For standing, Plaintiffs must also allege that their injuries are "fairly traceable" to the Defendant's allegedly unlawful conduct. *Davis*, 51 F.4th at 172. The injuries Plaintiffs identify are (1) being ordered to subsidize Defendant Wisner's private expression (both in the past and on an ongoing basis), (2) being ordered to become members of The Rebellion Community, an expressive association Plaintiffs do not wish to associate with, and (3) being subject to unconstitutional conditions by being ordered to do (1) and (2) as a condition of course participation in the MKT 250 course. (*See* Compl. ¶¶ 152–79 PageID.29-33.) Defendant Wisner does not contest that she implemented the course requirement to join The Rebellion

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pointed to *documentary* evidence that undercuts Defendant Wisner's claim to have made such an offer. (*See* ECF No. 22 Reply Mem. to Def. Wisner in Supp. of Pls.' Mot for Prelim Inj. PageID.287.) Regardless, at this stage, where the Plaintiffs' allegations must be taken as true, Wisner's claims outside the pleadings in her response to the motion for preliminary injunction should not be considered at all.

[6] This remedy does not require the Court to ascertain whether Defendant Wisner has spent all the money she originally took or to find which particular dollars belong to Plaintiffs. A disgorgement order is appropriate, for example, even if the Defendant has transferred all of the funds to third parties or even if the Defendant never personally possessed the money at all (for example, in cases where a trustee transfers funds directly to third parties in breach of her fiduciary duties). *See Osborn*, 865 F.3d at 455 ("As our case law has indicated (and as our opinion here confirms), when third parties have benefitted from illegal activity, it is possible to seek disgorgement from the violator, even if that violator never controlled the funds."). The issue is the amount wrongfully taken, which is undisputedly $99.

Community. (*See* Def. Wisner's Br. PageID.321-322.) Since the merits of Plaintiffs' claims are irrelevant to the standing inquiry, the fact that Defendant Wisner personally implemented the allegedly unlawful requirement is sufficient to allege causation for purposes of standing. *See Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 292 (6th Cir. 2006).

C. A favorable ruling would redress Plaintiffs' injuries.

A favorable ruling would redress Plaintiffs' injuries. Nominal and punitive damages and disgorgement would provide meaningful redress against Defendant Wisner for her completed violations of Plaintiffs' constitutional rights, *see supra* Part I.A.1. And declaratory relief and an order to disgorge the misappropriated $99 would effectively stop the ongoing injuries. *See supra* Part I.A.2. Because Plaintiffs have alleged injuries caused by Defendant Wisner's unlawful acts that a favorable ruling would redress, they have standing, and Defendant Wisner's Rule 12(b)(1) motion should be denied.

II. Plaintiffs have plausibly alleged that Defendant Wisner violated their constitutional rights.

Plaintiffs have plausibly alleged that Defendant Wisner violated their constitutional rights by conditioning their ability to participate in her MKT 250 course on their willingness to submit to unconstitutional orders to subsidize speech they did not wish to subsidize or to personally become members of an expressive association they did not want to join.

A. Plaintiffs have alleged that Defendant Wisner has violated and is violating their right to be free from compulsion to fund private speech.

Plaintiffs have alleged that Defendant Wisner violated their rights in two separate ways. First, she unconstitutionally required them to speak by forcing them to pay membership fees to The Rebellion Community, an expressive association

engaged in expression that Plaintiffs did not wish to subsidize. (Compl. ¶¶ 90, 101–02 PageID.18, 20.) Second, Defendant Wisner donated part of Plaintiffs' funds to other expressive organizations Plaintiffs did not want to fund. (*See id.* ¶¶ 90–115, 152–63 PageID.18-22, 29-31.) In response, Defendant Wisner argues (1) that her actions were not truly compulsive, (2) that the fact that she spoke in a private capacity cuts off Plaintiffs' constitutional claims, and (3) that in any event her compulsion served a compelling state interest in academic freedom. (*See* Def Wisner's Br. PageID.331-346.) All of these arguments are wrong because (1) government orders are compulsive when they put people to the choice between enjoying access to any benefit and surrendering a constitutional right (and in any case Defendant Wisner's acts were factually compulsive), (2) private citizens have a constitutional right not to be compelled *by* the government to support *private* speech, so Defendant Wisner did precisely what the Constitution prohibits, and (3) the constitutional interest in academic freedom emphatically preserved Defendant Wisner's freedom to speak as a professor even while the Constitution denies her the ability to *compel* students to subsidize her private expression.

1. Plaintiffs have adequately alleged that Defendant Wisner has compelled them to subsidize her private speech.

Quoting the Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023), Defendant Wisner agrees that "the government may not compel a person to speak its own preferred messages." (Def. Wisner's Br. PageID.332.) But then she argues that, because Plaintiffs didn't have to attend her class (or the University itself), Defendant Wisner's "course requirement" to pay fees to The Rebellion Community (*see* Compl. Ex. F PageID.60) wasn't actually compulsory. (*See* Def. Wisner's Br. PageID.333-335.) This is wrong legally and factually.

Legally, Defendant Wisner is invoking an old approach that the Supreme Court has long rejected. At one time, if a person had some status or benefit from the government to which they were not entitled (say, an at-will employment position), they could be made to accept some burdens on their constitutional rights. This idea was often summarized: a person "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). The Supreme Court has rejected this approach to constitutional rights. *See Garrity v. New Jersey*, 385 U.S. 496, 499 (1967) (describing the same language from *McAuliffe* as "dictum" and refusing to apply it to an order to surrender Fourth Amendment rights). *See also Perry v. Sindermann*, 408 U.S. 593, 596 (1972) (holding that nontenured employee could still sue for First Amendment violation).

Defendant Wisner's argument is a version of this long-rejected idea. She says Plaintiffs didn't have to be MSU students, so the conditions she placed on course participation weren't compulsory. (Def. Wisner's Br. PageID.333-335.) But this is like saying "one doesn't have to be a policeman, so he can't complain about conditions on his constitutional rights in that context," which is wrong. *See Garrity*, 385 U.S. at 499. Or it would be like saying, "one doesn't have to be a web designer, but if she chooses that profession, limits on her speech rights aren't truly compulsory," which is wrong. *See 303 Creative*, 143 S. Ct. at 2312. It would be like saying, "you don't have to have your parade in Boston, but if you choose to, any limits on your parade's message aren't really compulsory," which is wrong. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573–74 (1995). It would be like saying "you don't have to have a public sector job, so you can't complain if a portion of your paycheck is used to fund the private speech of public sector unions," which is, again, wrong. *See Janus*, 138 S. Ct. at 2478.

Defendant Wisner relies heavily on *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). (*See* Def. Wisner's Br. PageID.333-335.) But her reliance is misplaced. First and foremost, if *Ward* stood for the broad proposition that the ability to remove oneself from a course (or an entire school) renders a requirement of a particular course non-compulsory, then the Sixth Circuit would have ruled against Julea Ward. But it ruled for her. *See Ward*, 667 F.3d at 735.

Second, while the court did mention that students "are not forced to" attend universities as they are to attend public schools, this played no role in the analysis of whether the school's action qualified as compulsory. *Id.* at 734. Rather, this addressed whether, in light of the generally *higher* constitutional speech protections students receive in the university context compared to the K-12 context, the school's "discretion over their curriculum and *class-related* speech" was correspondingly reduced. *Id.* (emphasis added). The court concluded that the answer was "no," and that university students, while enjoying greater rights to express their own views, do not have a general ability to "veto" a "program's curriculum or class's *requirements* . . . ." *Id.* (emphasis added). The court did *not* question whether a class's requirements were, in fact, requirements—it expressly agreed that they were by calling them as much. *Id.*

As discussed more below, *see infra* Part II.A.4, *Ward* is also not helpful for Defendant Wisner because Plaintiffs are not challenging "class-related speech" at all, as was at issue in *Ward*. *See* 667 F.3d at 734. Rather, Plaintiffs challenge Defendant Wisner's ability to *abuse* her authority to select materials by forcing students to pay money to support her private, *non* "class-related speech," *id.* Plaintiffs have alleged that Wisner knowingly did just that. (*See* Compl. ¶¶ 51, 67–71, 80-92, 115 PageID.10, 14, 16-18, 22.)

In addition to contradicting black letter law on the nature of state compulsion, Defendant Wisner's argument fails to comprehend the facts alleged in

the Complaint, which must be taken as true. The ability to add or drop courses is immaterial. Plaintiffs alleged that Defendant Wisner intentionally deprived them of the ability to determine the true nature of her course requirements before it was too late. (*See* Compl. ¶¶ 80–84 PageID.16-17.) She's the one who wrote in her syllabus that all the membership fees would be used to pay for class-related functions and "Your professor does not receive any financial compensation from your membership fees as that would be a conflict of interest." (*Id.* ¶ 80 PageID.16.) Plaintiffs alleged they did not know this was false and that Wisner had control of all the funds and was using them to support her personal political expression until they had already paid the fee and (part of) the constitutional violation had already been completed. (*Id.* ¶¶ 81–92 PageID.17-18.)

2. That Defendant Wisner *used* Plaintiffs' money in her personal capacity does not defeat Plaintiffs' claims; they have a right to be free from her *official* compulsion to *fund* that private speech.

Defendant Wisner also argues that there can be no constitutional violation because, when she used the proceeds from the Rebellion Community fees, she "spent private money, not public money." (Def. Wisner's Br. PageID.342.) But what she wrote at the time also gives the lie to this. Defendant Wisner told students she did "not receive any financial *compensation* from your membership fees." (Compl. ¶ 80 PageID.16 (emphasis added).) Why did she make this representation? Because she knew it was grossly disproportionate to the needs of her course to charge her students for full price, one-year subscriptions to The Rebellion Community (to the tune of $60,000 per semester) (*id.* ¶ 90 PageID.18) and pocket that as her "own money." (Def. Wisner's Br. PageID.344.) She knew this was wrong. That's why she attributed all of the fees to "use of the technology" or to "pay guest speakers,

educators, and facilitators"—that is, bona fide course activities—and disclaimed receiving any "compensation." (Compl. ¶¶ 80, 83–85 PageID.16-17.)

Even while the facts and Defendant Wisner's own arguments show that she knew what she was doing was wrong, she still acted under University policy and followed its procedures. The policy allows instructors to receive "payments" from the "materials" they assign but then "encourage[s]" them to donate those funds to other groups. (Compl. ¶ 65 PageID.13.) And other University policy defines course materials to include "Internet sites" and "Subscriptions." (*Id.* ¶ 130 PageID.26.) Defendant Wisner saw and cooked up her "textbook replacement" in the form of a website "created to advance dialogue on social issues," (Def. Wisner's Br. PageID.322), so that she could charge obviously and unnecessarily high fees to access that site. (Compl. ¶¶ 68–69 PageID.14.) That same fall, she began forcing students to join and fund her political project (which included her book and planned RV tour but centered on The Rebellion Community). (*See id.* ¶¶ 42–62 PageID.9-12.) To cover the degree to which the pricey $99 subscription benefitted her, Defendant Wisner disclaimed that any of those fees were her "compensation," even as she now argues that that's exactly what they were. (Def. Wisner's Br. PageID.342-346.)

While Defendant Wisner's new characterization of the fees sheds new light on the nature of her scheme, it does her no help legally. The "private" nature of the funds actually makes it *easier* to show that any compulsion to furnish those funds is unconstitutional. Defendant Wisner does not contest that she was a state actor when she implemented her course requirement to join The Rebellion Community. The Supreme Court was clear in *Janus* (which Defendant Wisner never cites): "[b]ecause the compelled subsidization of *private speech* seriously impinges on First Amendment rights, it cannot be casually allowed." 138 S. Ct. at 2464 (emphasis added). *Compare Johannns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005)

("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.")

Defendant Wisner invokes *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). (*See* Def. Wisner's Br. PageID.344-345.) Her argument here exemplifies the theme running through much of her brief: eliding the distinction between exercising her own constitutional freedoms and abusing her authority to compel others to support that exercise. (*See id.* PageID.318-319, 336-338, 344-345, 348-349, 351.) In fact, *Kennedy* supports Plaintiffs' position squarely. In *Kennedy*, the Court held that a coach could use his personal time to pray on the football field after a football game because he was no longer acting pursuant to his official duties. This is evidenced by the fact that other employees "were free to attend briefly to personal matters" during the same time. 142 S. Ct. at 2425. Central to the Court's analysis was that students were "never coerced" or even "asked" by the coach to pray along. *Id.* at 2429 (cleaned up.)

And, just as much as Coach Kennedy could not force the students to pray, it would have been unconstitutional for him to create "The Revival Community" and force his players to pay to support his off-campus evangelism. Defendant Wisner is free to spread her ideas in a university classroom. She wouldn't violate Plaintiffs' rights by *saying* things they disagree with *in class*; she violated their rights by forcing them to subsidize expression they disagree with *out of class*, which is what Plaintiffs have alleged she did. (*See* Compl. ¶¶ 78–115 PageID.16-22.) And Defendant admits this is true. (*See* Def. Wisner's Br. PageID.346 (invoking *Kennedy* for the proposition that Defendant Wisner could use the "formerly public funds" however she liked).)

3. Plaintiffs have alleged that Defendant Wisner's actions did not serve any legitimate, let alone compelling, governmental interest.

Defendant Wisner agrees that, when evaluating official compulsion to financially support other speech, "[c]ourt[s] should apply strict scrutiny and ask whether 'the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" (Def. Wisner's Br. PageID.336 (quoting *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015)).) But in arguing that her "actions served a compelling governmental interest," Defendant Wisner again plays a variation on her theme of blurring the distinction between her own right to speak and abusing her authority by compelling others to support her private speech. (*See* Def. Wisner's Br. PageID.335-342.) She alleges two compelling interests: protecting her own speech rights and the rights of other students to receive information. (*Id.* PageID.336-338, 341.)

Regarding her own rights, Defendant Wisner starts with *Meriwether*, which was itself a case about *avoiding* governmental compulsion to speak (and not *permitting* anyone to compel others to speak or subsidize speech). *See* 992 F.3d at 503-04. (*See also* Def. Wisner's Br. PageID.336.) Defendant Wisner argues, "*Meriwether* embraced principles that undermine Barbieri and Radomski's claims entirely," referring to the principles of academic freedom articulated in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion) and *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). (Def. Wisner's Br. PageID.337.) The problem is that all these cases stand for the same thing—permitting freedom of speech and inquiry but prohibiting compulsion. As such, they doom Defendant Wisner's argument.

As she quotes from *Meriwether*: "Our nation's future depends on leaders trained through wide *exposure* to the robust exchange of ideas—*not* through the authoritative *compulsion of orthodox speech*." (Def. Wisner's Br. PageID.337

(quoting *Meriwether*, 992 F.3d at 505) (emphasis added) (cleaned up).) Defendant Wisner is absolutely correct in saying that "*Meriwether* forcefully held that professors must be able to speak freely—even about political matters—in classrooms." (Def. Wisner's Br. PageID.338.) Her argument flies wide of the mark, though, in claiming this holding provides any cover for *her* actions. Defendant Wisner's actions have nothing to do with speaking "in classrooms." (Plaintiffs have not challenged any in-class speech.) Rather, Plaintiffs are challenging Defendant Wisner's authority to compel Plaintiffs to support *her* speech *outside* class. *Meriwether* says the government can't compel professors to speak. 992 F.3d at 504–11. It does not authorize professors to compel students to speak or subsidize a professor's private speech outside of class. Indeed, its emphasis on denying universities the "alarming power to compel ideological conformity" forbids *any* reading that would sanction Defendant Wisner's conduct. *Id.* at 506.

Defendant Wisner also argues that Plaintiffs' claims implicitly jeopardize other students' "First Amendment right to hear professors' viewpoints . . . ." (Def. Wisner's Br. PageID.340.) She goes so far as to argue that Plaintiffs seek "a student's veto" by which they "could enroll in a literature class, argue that their understanding of Christian doctrine prohibits supposedly obscene literature, and prevent anyone from teaching James Joyce's *Ulysses*." (*Id.* PageID.341.) These arguments grossly misconstrue Plaintiffs' legal arguments and the facts alleged in the Complaint.

Plaintiffs seek no restriction on the speech of any professor or any impediment to any other student being exposed to diverse ideas. In fact, Plaintiffs allege that *they* "enjoy testing the mettle of their own views by exploring other ideas and perspectives in the context of their coursework." In fact, "they believe this is part of the value of higher education . . . ." (Compl. ¶ 26 PageID.6.) They don't want to silence anyone, including those they disagree with. They want to grapple with those

ideas. (*Id.*) But they object to being forced "to financially support the speech of others that contradicts their views" or "to become members of groups organized for the purpose of promoting messages that contradict their views." (*Id.*)

A rule protecting Plaintiffs from Defendant Wisner's compulsion does not jeopardize her own speech or academic freedom interests; it just prevents her from abusing her authority to violate Plaintiffs' rights. And, a rule against Defendant Wisner's compulsion would *protect* the rights of other students, not threaten them. Professors remain free to say what they like (and students remain free to hear them) while all remain protected against compulsion. Thus, none of Defendant Wisner's alleged compelling interests actually support her actions.

4. Defendant Wisner's action was not narrowly-tailored to achieve any legitimate interest.

Defendant Wisner agrees that her action must be "'narrowly tailored to achieve that [compelling] interest.'" (Def. Wisner's Br. PageID.336 (quoting *Russell,* 784 F.3d at 1050).) Defendant Wisner claims that, since her action was a part of her academic freedom, any narrowly-tailored policy must protect what she did. (Def. Wisner's Br. PageID.341.) This isn't true. Defendant Wisner's own right to speak doesn't include the ability to compel Plaintiffs to subsidize her private speech. Thus, a policy protecting Plaintiffs from compelled subsidy doesn't threaten the rights of Defendant Wisner or anyone else. *See supra* Part II.A.3.

Next, Defendant Wisner argues that professors need unlimited discretion to select course materials. Otherwise, if Plaintiffs "can object to paying $99 for the Rebellion Community website, then they can object on constitutional grounds to having to purchase books they dislike." (Def. Wisner's Br. PageID.342.) But Plaintiffs *haven't* objected to purchasing anything that is actually a bona fide course requirement. They object to The Rebellion Community because it was *not* designed to further any legitimate pedagogical interest. Instead, it was used to extract tens of

thousands of dollars from students to fund Defendant Wisner's personal expression and the expression of other groups. (Compl. ¶¶ 87–90, 104–05, 115 PageID.17-18, 20-22.)

Defendant Wisner could have used the completely free system available through the University. Instead, she chose to create The Rebellion Community and charge every student $99 to use the website. (*See* Compl. ¶¶ 86–88 PageID.17-18.) Forcing students to pay membership fees to Defendant Wisner's personal group that engaged in political expression is not a narrowly-tailored way of achieving any legitimate pedagogical interest. Defendant Wisner could have achieved the same interests for free. *See Janus*, 138 S. Ct. 2465 (compelled subsidy unconstitutional where the state ignores "means significantly less restrictive of associational freedoms" (cleaned up)).

There may be some future case where drawing the line between compelled subsidy and permissible course material selection is difficult. But that is not this case. Here, Defendant Wisner forced students to purchase a subscription that was (a) *completely* unnecessary for the course and (b) was implemented to extract tens of thousands of dollars to finance *outside* expression, both by Defendant Wisner herself and through other advocacy groups. (Compl. ¶¶ 87–90, 104–05, 115 PageID.17-18, 20-22.) Those allegations, which must be taken as true, make this the easy case.

Defendant Wisner abused her authority when she required students to join her website, disclaimed receiving "compensation" from it, charged them the full price of a year-long subscription for a semester-long course, then used the money to further her own personal expressive goals. (*See* Compl. ¶¶ 73, 79–80, 102–07 PageID.15-16, 20-21.) *None* of this was a narrowly-tailored means to achieve *any* legitimate state interest. Therefore, Plaintiffs have alleged that Defendant Wisner

violated their right to be free from compelled subsidy of private speech. *See Janus*, 138 S. Ct. 2465.

B. Plaintiffs have alleged that Defendant Wisner has violated their right to be free from compelled association.

Defendant Wisner agrees that "the First Amendment grants 'a freedom not to associate.' Any infringement on the right to associate must 'be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" (Def. Wisner's Br. PageID.347 (quoting *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 600 (6th Cir. 2013).) Defendant Wisner repackages her strict scrutiny arguments from her compelled speech analysis. But they fail for the same reasons: her academic freedom doesn't include the right to compel students to join her expressive association, and her requirement to become members of The Rebellion Community did not further any legitimate (and certainly no compelling) state interest. *See supra* Part II.A.3–4.

1. Defendant Wisner's right to engage in her own speech and association does not authorize her to compel Plaintiffs to speak or associate.

Defendant Wisner invokes the "compelling governmental interest" of academic freedom. (Def. Wisner's Br. PageID.349.) She asserts that this justifies "burden[ing] Barbieri and Radomski's freedom by exposing them to new ideas in a classroom." (*Id.*) This is another strawman: Plaintiffs have alleged that they *want* to be exposed to new ideas in the classroom. (Compl. ¶ 26 PageID.6.) They only seek to avoid being compelled to *subsidize* ideas they oppose *outside* the classroom, which they allege Defendant Wisner has done. (*Id.*) *See also supra* Part II.A.3. Again, the interest Defendant Wisner identifies is simply not implicated by the action she took, and that Plaintiffs allege violated their rights.

2. Defendant Wisner's order to Plaintiffs to become members of The Rebellion Community was not the least restrictive means of achieving any legitimate, let alone a compelling governmental interest.

On narrow-tailoring, Defendant Wisner argues that Plaintiffs "don't say what those [significantly less restrictive means for achieving the state interest] are." (Def. Wisner's Br. PageID.347.) But this is simply not true. Plaintiffs allege (1) the University has a free online platform called "Desire to Learn," (2) Plaintiffs' experience with The Rebellion Community revealed no functional advantage that Defendant Wisner's site had over Desire to Learn, and therefore (3) "Defendant Wisner could have posted all of the course content that she provided through 'The Rebellion Community' on the University's D2L system instead of requiring each of her 600 students to pay a $99 subscription fee." (Compl. ¶¶ 86–88, 150, 172 PageID.17-18, 29, 32.)

In the association context, the lack of narrow-tailoring is even more obvious. Even if there was some tangible value that justified charging students to use The Rebellion Community (though at this stage it must be taken as true that there was not), there was *no* interest in forcing them to become *members* of The Rebellion Community. Yet, Defendant Wisner did exactly that by (1) charging them for a years' subscription for a semester-long course, (2) automatically adding them to the larger "shared spaces" in the "global social learning community," and (3) setting them up for autorenewal. (Compl. ¶¶ 78, 97–99, 114–15 PageID.16, 19-20, 22.) It would be significantly less restrictive for Defendant Wisner to have (1) required only a semester-long access, (2) limited mandatory access to the course page instead of automatically extending it to larger spaces, and (3) disabling the auto-renew feature. She refused to do all of this when all of it would have been significantly less restrictive of students' associational freedoms. So, she violated Plaintiffs' constitu-

tional rights by compelling them to join The Rebellion Community. *See Janus*, 138 S. Ct. at 2465.

C. Plaintiffs allege that Defendant Wisner has violated their right to be free from unconstitutional conditions.

Defendant Wisner claims Plaintiffs failed to state an unconstitutional conditions claim because they were "witness to academic freedom." (Def. Wisner's Br. PageID.351.) Plaintiffs witnessed no freedom in operation, academic or otherwise. Instead, they witnessed a professor use her authority to require hundreds of college students to pay her $99 each while disclaiming receiving "compensation" from the fees. She then used that money to further her own personal expressive goals and to donate to activist organizations. (*See* Compl. ¶¶ 73, 79–80, 102–07 PageID.15-16, 20-21.) Defendant Wisner has the right to speak. But she has no right to force students to speak, subsidize her outside speech, or force them to associate with groups with which they do not wish to associate. *See supra* Part II.A–B.

For the same reasons, and the reasons described in Part II.A.1 above, Defendant Wisner, as a state actor, cannot put students to the choice of surrendering those constitutional rights or being able to participate in her course. As the Supreme Court has explained:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597 (cleaned up). Plaintiffs allege that Defendant Wisner engaged in exactly this type of "interference with constitutional rights." She conditioned their ability to take her course on their willingness to surrender their rights to "protected speech or associations . . . ." *Id.* (*See also* Compl. ¶¶ 8, 69–70, 174–79 PageID.2-3, 14, 33.) The Constitution forbids this.

CONCLUSION

Plaintiffs have alleged that Defendant Wisner violated their rights and threatens them with further deprivations. This Court should deny Defendant Wisner's motion to dismiss their Complaint.

Respectfully submitted this 25th day of September, 2023.

s/ P. Logan Spena

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CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count of Microsoft® Word for Microsoft 365 MSO (Version 2302 Build 16.0.16130.20754), this brief contains 9,468 words as defined by and in compliance with W.D. Mich. LCivR 7.2(b)(i).

Dated: September 25, 2023 s/ P. Logan Spena