IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATSY LEVANG, CHERYL TUCK-SMITH, SUSAN JENNINGS, MARGO KNORR, KAREN POPE, and ANN WITT,	:	
Plaintiffs,	:	**Case No. 2:24-cv-00316-MHW-KAJ**
v.	:	**Judge Michael H. Watson**
KAPPA KAPPA GAMMA FRATERNITY, et al.	:	**Magistrate Judge Kimberly A. Jolson**
Defendants.	:	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO CERTIFY QUESTIONS OF STATE LAW

Plaintiffs Patsy Levang, Cheryl Tuck-Smith, Susan Jennings, Margo Knorr, Karen Pope, and Ann Witt ("Plaintiffs") respectfully submit the following Reply in Support of their Motion to Certify Questions of State Law. While the Defendants' Response Brief assures the Court that the question of whether an organization's governing board, in this case the Kappa Kappa Gamma Fraternity Council, can "interpret" the organization's documents to effect a fundamental change in the organization's purpose is well-settled in Ohio, they provide no citation to any Ohio Supreme Court authority that might support that proposition. Nor can they point to any case in Ohio's corporate governance jurisprudence that would authorize the radical change that they have purported to make to the Kappa organization without a vote of the membership or following the regular process for amending Kappa's governing documents.

Similarly, Defendants' claims that the Motion to Certify is somehow untimely cannot be reconciled with the record in this case. After service and submission of waivers of service, and the filing of a motion to dismiss, this Court stayed this action sua sponte based in part on the Defendants' claim that the Wyoming District Court's dismissal without prejudice of *Westenbroek v. Fraternity,* 2023 WL 5533307 (D. Wyoming) ("the Wyoming case") was a final decision on the merits that precluded the Plaintiffs' suit here. After receiving notice of the Tenth Circuit's decision dismissing the *Westenbroek* appeal on the grounds that the District Court's decision was not a final decision on the merits, and was otherwise not a final appealable order, the Court lifted the stay on July 3, 2024.[1] (ECF 30, Order, 7/3/24) Plaintiffs filed their Motion to Certify nineteen days later, on July 22, 2024. The Court has yet to rule on any substantive motion or issue of law.

A. Despite Claiming That Ohio Law is Settled, The Defendants Cite No Authority For That Proposition.

Defendants first argue that certification is unnecessary because—in their view—Ohio law allows Kappa's Fraternity Council to alter Kappa's governing documents to mean anything, including erasing the limitation of "woman," and instead creating two broad categories of members, women and men who "identify as women." (ECF 1, ¶ 50 and 1-6, Kappa Position Statements, 1/25, 24.)

Despite Defendants' conviction on the clarity of Ohio law on this point, they fail to cite a single case where an Ohio court, much less the Ohio Supreme Court, has recognized this broad power, and certainly not a case where the governing body has allegedly exercised that power in bad faith. See, e.g., ECF 1, Complaint, at ¶¶ 158-169, 177-179. This is not surprising because

[1] As more fully explained in Plaintiffs' brief on issue preclusion under Wyoming law (ECF 37), the dismissal of the Wyoming case has no preclusive effect on the claims asserted here. *See also Casiano v. State ex rel. Wyoming Dept. of Trans.,* 2019 WY 16, 434 P.3d 116 (Wyo. 2019); *Rawlinson v. Wallerich*, 2006 WY 52, ¶ 10, 132 P.3d 204, 207 (Wyo. 2006). Defendants' assertions on this issue have no merit.

such a rule would conflict with even the minimally democratic governance requirements and the fiduciary duties of their officers recognized in Ohio law. *See, e.g. Carlson v. Rabkin*, 789 N.E.2d 1112, 1127 (1st Dist. 2003); R.C. 1702.10. Indeed, if such a power resided in governing boards, it would eliminate the need for written governing documents, rendering much of Chapter 17 of Ohio's Revised Code superfluous and turning voluntary membership organizations into the personal fiefdoms of a few members. That is not, nor has it ever been, the law of Ohio.

And while the federal courts should, of course, hesitate to "trouble [their] sister state courts every time an arguably unsettled question of state law comes across [their] desks," *City of Columbus, Ohio v. Hotels.com, L.P.*, 693 F.3d 642, 654 (6th Cir. 2012)(quoting Ohio *Pennington v. State Farm Mut. Auto. Ins. Co.,* 553 F.3d 447, 449–50 (6th Cir.2009), "[c]ertification is most appropriate when the question is new and state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). That is precisely the case here.

First, the governing body of an organization founded as, and historically operated as a single-sex organization, replacing "woman" and adding language that includes biological males is plainly something new. But more importantly, as Plaintiffs have made clear time and again, the "definition of a woman" is merely the manifestation of the deeper issue—whether a governing clique can effect what is plainly a change to its governing documents, indeed the group's reason for existence, through a "Policy Statement" rather than through the processes established in its governing documents. Plaintiffs contend that leaders who would make such a fundamental change through an "interpretation" necessarily act outside of their authority and cannot rely on the noninterference doctrine as a defense. Of course, no interpretation has occurred. An interpretation cannot *add* language. What has occurred here is legislation. Cf. *Barrash v. Am. Ass'n of Neurological Surgeons, Inc.*, 812 F.3d 416, 419 (5th Cir. 2016)(Texas courts will not interfere

with the internal management of voluntary associations so long as the governing bodies of such associations do not *substitute legislation for interpretation*. (emphasis added)).

Certainly, the Ohio Supreme Court has never authorized an "interpretation" that would add text to a bylaw or read a term to include its opposite. Whether such a power is contemplated by Chapter 1702 is a state law question best addressed by the Ohio Supreme Court.

Rather than pointing to any string of Ohio Supreme Court cases, or even a single Ohio Supreme Court case to support their notion that the Fraternity Council's interpretive practice is firmly ensconced in Ohio law, Defendants argue that certification is unnecessary because Plaintiffs have not yet *proven* that Fraternity Council acted outside of its authority. (ECF 39, Def. Brf. in Opposition, at 7-8). In support of this argument, Defendants cite dicta from *Strah v. Lake Cnty. Humane Soc'y*, 631 N.E. 2d 165, 171 (Ohio Ct. App. 1993) for the proposition that courts should not interfere in the internal management of a not-for-profit corporation *"in the absence of proof that the managing officers are acting in excess of their corporate power."* (ECF 39, Def. Brf in Opp. at 8)(emphasis in original).

But this case does allege actions taken in excess of corporate power, and Defendants' arguments only highlight the need for clarity from the Ohio Supreme Court. In fact, the *Strah* case is an example of an appellate court refusing to allow an organization to side-step its bylaws. *Strah* at 171-72. The Defendants' argument that there is no value to certification because Plaintiffs have not yet *proven* their case is circular, at best. Plaintiffs do not have to prove their case at this stage of the pleadings. In determining whether the complaint states a cause of action, which would be implicit in certification, the facts alleged in the Complaint are accepted as true. *City of Columbus v. Hotels.com, L.P*, 693 F.3d at 648. *Strah* arrived at the appellate court following an evidentiary hearing on a preliminary injunction motion where the plaintiffs had the opportunity to present

evidence and certain facts were established. *Strah* at 167-68. The court of appeals noted that trial court had, as a matter of fact, "clearly concluded that the board had exceeded the scope of its powers under the bylaws," but that the "the language of the bylaws simply [did] not support the [trial] court's interpretation." *Id.* at 171. In other words, *Strah* had nothing to do with requiring *proof* of an ultra vires action before the case could proceed. Rather, the court of appeals accepted the trial court's fact-finding, but held that the trial court had erred as a matter of law in applying those facts to the bylaws. Here, Plaintiffs argue that accepting the allegations in the complaint as true, Fraternity Council's actions exceeded its authority as a matter of law because its "interpretation" essentially amends and contradicts the governing documents, including, without limitation, Policy 3, Section 2, where Kappa expresses its concern that chapters not take actions that "jeopardize our single-sex status." (ECF 1, Complaint at ¶46, 1/25/24). For their part, Defendants are free to disagree that the interpretation is not ultra vires and does not actually amend or revise the governing document. But that is—in a nutshell—the disputed question of law that Plaintiffs seek to certify. And it is a question on which the Ohio Supreme Court has never ruled.

B. The Plaintiffs' Motion is Timely

Defendants imply, without stating directly, that the Motion to Certify is untimely. The Ohio Supreme Court rule authorizing certification of state law questions does not provide a deadline for filing such a motion. Federal courts hearing motions to certify have thus adopted the common-sense approach that "[t]he appropriate time to request certification of a state-law issue is before, not after, the district court has resolved [it]." *State Auto Property and Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015). This policy prevents "the initial federal court decision [from being] nothing but a gamble with certification sought only after an adverse decision." *Id.* Because no issues have been decided in this case, those dangers are not present here.

Moreover, the record in this case does not support the argument that Plaintiffs have been somehow less than diligent in raising the issue. Plaintiffs filed this case on January 25, 2024. (ECF 1, Complaint, 1/25/24). The Complaint raised all of the corporate governance issues and the applicable governing Ohio law. (Id). Defendants executed waivers of service on February 6, 2024 (ECF 11-18, Waivers, 2/6/24). On April 1, 2024, Defendants filed their Motion to Dismiss, arguing primarily that the case was barred by res judicata by a Wyoming dismissal without prejudice. (ECF 23, Mot. to Dismiss, 4/1/24). Plaintiffs timely responded on April 22, 2024, with the Defendants filing a Reply on May 6, 2024. On June 3, 2024, the Court stayed this case sua sponte while waiting for the Tenth Circuit Court of Appeals to rule either on the merits of the case or on Defendants' Motion to Dismiss for Lack of a Final Order. (ECF 28, Order Staying Case, 6/3/24). The Tenth Circuit dismissed the Wyoming appeal (on Kappa's motion) for lack of appellate jurisdiction on June 12, 2024, holding that the District Court's dismissal without prejudice was not a final appealable order. On July 3, 2024, this Court lifted its stay, and, on July 15, 2024, instructed the parties to brief the preclusion issue in light of the Tenth Circuit's dismissal and Wyoming law. (ECF 30 and 34, Orders, 7/3/24, 7/15/24). Plaintiffs filed their Motion to Certify on July 22, 2024. (ECF 35, Mot. to Certify, 7/22/24).

Defendants complain that, while the Plaintiffs raised the issue of certification regarding their Ohio Constitution's Free Speech protections in their Response to the Plaintiff's Motion to Dismiss, they did not also raise the possible certification of the corporate governance question. First, there is no rule requiring parties seeking certification of state law questions to move for certification in response to a motion to dismiss or at the first possible instance. A motion to dismiss tests the sufficiency of the pleadings, and in responding, Plaintiffs need not anticipate and preemptively respond to every legal argument that the Defendants might make. Second, Plaintiffs

did, in fact, raise the corporate governance issues in their response to the Motion to Dismiss, pointing out where the Defendants' interpretation of Ohio law lacked support. (ECF 26, Brf. in Opp., 4/22/24). Third, it would have been inappropriate, and inconsistent with judicial economy, for Plaintiffs to seek to certify the state law corporate governance question in this case while that question was pending before the Tenth Circuit. Regardless, this Court has not ruled on the merits on any of these questions, and certification is thus timely.

To the extent that Defendants argue, at page 11 of their response, that Plaintiffs cannot seek certification now because the plaintiffs did not seek it in the Wyoming case, Plaintiffs again direct the Court to the brief filed on that subject and the black-letter law of Wyoming holding that a dismissal without prejudice has no preclusive effect. (ECF 37); *Casiano v. State ex rel. Wyoming Dept. of Trans.,* 2019 WY 16, 434 P.3d 116, ¶¶10-16; *Rawlinson v. Wallerich*, 2006 WY 52, ¶ 10, 132 P.3d 204, 207 (Wyo. 2006); *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505–06, (2001). The dismissal of the Wyoming case without prejudice "leaves the situation the same as if the suit had never been brought." *Bomer v. Ribicoff*, 304 F.2d 427 (6th Cir. 1962). Plaintiffs are thus neither bound by the Wyoming decision nor required to pursue their remedies there.

C. The Majority Position in *Eastwood Mall* is Limited to Its Facts and Does Not Control Here.

As set forth in Plaintiffs' earlier briefs, the *Eastwood Mall* majority's decision was limited to its facts, which involved balancing the positive right to speak freely enshrined in Ohio's Constitution with the property rights of a mall owner seeking to exclude political pamphleteers from its real property. *See Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59 (Ohio 1994). Significantly, the *Eastwood Mall* majority, while holding that neither the First Amendment nor Section 11, Article I of the Ohio Constitution protects speech that "infringes on private property

rights," and that "*under the facts of this case*," found that "Section 11, Article I of the Ohio Constitution is no broader than the First Amendment." *Eastwood Mall* at 61.

The fact that the *Eastwood Mall* majority limited its holding to the specific facts before it is apparent from the majority's declining to overrule multiple prior decisions holding—in other contexts—that Article 11 provided broader protections than the First Amendment. For example, in *Ferner v. Toledo-Lucas Cty. Convention & Visitors Bur., Inc*., 610 N.E.2d 1158, 1161–62 (Ohio 6th Dist.1992), Ohio's Sixth District Court of Appeals acknowledged the conflict between Ohio districts regarding whether Ohio's Constitution provided broader protection than the First Amendment. The *Ferner* court held that Section 11 provided a positive right that applied even against private actors. "the better approach is that announced by the Supreme Court of California," noting that "[f]ree speech, especially political speech, is the foundation of our system of government," and "[w]ithout robust political debate, each of our other rights so deeply cherished would be without substance." *Id.* at 1162. Although *Ferner* was decided two years before *Eastwood Mall,* and plainly takes an expansive view of Section 11, neither the *Eastwood Mall* majority, nor any subsequent Ohio court, has overruled it.

Likewise, a string of Ohio cases has held that the protection provided by Ohio Const., art. I, § 11 for statements of opinion is in fact broader than those provided by the First Amendment. Thus, in *Vail v. The Plain Dealer Publishing Co*., 649 N.E.2d 182 (Ohio 1995), one year after *Eastwood Mall*, a unanimous Ohio Supreme Court noted that in contrast to the First Amendment, "the Ohio Constitution provides a separate and independent guarantee of protection of opinion ancillary to freedom of the press." *Id.* at 185 (Moyer, C.J., writing for the majority). *Vail* looked back to earlier cases, such as *Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986), which established an analytical framework for separating statements of fact from statements of opinion which is

independent of the First Amendment. *See Vail* at 185-86. Simply put, the law in Ohio seems to be that in some cases, Section 11, Article I's protections are co-extensive with the First Amendment's, and in other cases, they are broader. See *Rothschild v. Humility of Mary Health Partners*, 840 N.E.2d 258, 264 (Holding that Ohio Constitution's broader protection of opinion are broader than the First Amendment's and noting "there is a distinct difference between federal and [Ohio's] state constitutional protections specifically regarding opinion.")

The speech for which Plaintiffs claim protection here did not involve a physical intrusion onto another's property and was a matter of pure opinion under Ohio law. Plaintiffs voiced their opinion that the Fraternity Council had run rough-shod over the procedures established in Kappa's governing documents in order to further a political-social agenda that had not been put up for debate, much less a vote. For voicing that opinion, they were expelled from the organization. These facts are far different from those presented in Eastwood Mall. Certification is therefore appropriate.

D. Conclusion

In short, Defendants' opposition to Plaintiffs' Motion to Certify fails to offer any legal or factual bases to deny Plaintiffs' Motion. These issues are new and unsettled in Ohio and ripe for consideration by the Ohio Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Plaintiffs' Reply in Support of Motion to Certify State Law Questions to the Ohio Supreme Court* was filed electronically with the Court this 26th day of August 2024. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. Mail. Parties may access this filing through the Court's system.

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O*ne of the Attorneys for Plaintiffs*