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, MARY PAT ROONEY, MARIA BROWN, NANCY CAMPBELL, BARB GOETTELMAN, LIZ WONG, KYLE DONNELLY, and BETH BLACK,	:	**Magistrate Judge Kimberly A. Jolson**
Defendants.	:	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY QUESTIONS TO THE OHIO SUPREME COURT

I. INTRODUCTION

Plaintiffs' claims fail under clearly established Ohio law. Recognizing the likelihood of dismissal of their claims, over two and a half months after Defendants' Reply in Support of Motion to Dismiss was filed with this Court, Plaintiffs have asked this Court to certify two questions to the Ohio Supreme Court. This is simply another attempt to insert the courts into the governance of a private organization and advance their unsupported theory that they can enforce free-speech rights against non-state actors. But as there are no unsettled principles of state law to certify; the only thing left for the Court to do is apply already-established law to Plaintiffs' claims.

Plaintiffs' first issue—the contours of a private organization's right to interpret its own governing documents—has been addressed repeatedly by Ohio courts. As argued in Defendants' Motion to Dismiss, courts defer to private organizations' reasonable interpretations of their own governing documents. (*See* Mot. to Dismiss, ECF No. 23, PageID 312–15.) Plaintiffs' position that

the Court should certify a question on this issue to the Ohio Supreme Court rather than apply existing law to these facts is premised on their view that this case is fundamentally different from other cases involving non-interference principles because of the specific claims at issue here. But a belief that their case is somehow special or different does not provide a basis for certifying a question to the Ohio Supreme Court. Federal courts have repeatedly recognized that they can rule on issues of state law without state supreme courts first addressing the exact issue presented when existing state law provides an analytical roadmap to addressing the case. Here, the court has a body of law before it that it can use to assess the viability of Plaintiffs' claims, so certification is unnecessary.

Plaintiffs' second question—whether the Ohio Constitution provides for a free-speech right that can be enforced against a private actor—is even easier. The Ohio Supreme Court answered this question directly when it held that "the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment." *Eastwood Mall v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994). Plaintiffs disagree with this holding, but certification from a federal court is not an appropriate vehicle to ask a state court to reconsider a prior holding. Plaintiffs offer no authority that would support certifying a question to the Ohio Supreme Court that the court has already conclusively resolved. Doing so would only waste the time and resources of this Court, the Ohio Supreme Court, and the parties.

Finally, the timing of Plaintiffs' Motion to Certify is conspicuous. Although Plaintiffs alluded to the potential certification of their free-speech claim to the Ohio Supreme Court in opposing Defendants' Motion to Dismiss on April 22, 2024, they did not so much as mention the possibility of certifying any questions related to the derivative claims. Then, on June 3, 2024, the Court *sua sponte* issued an Order directing Plaintiffs to address three questions relevant to the disposition of their derivative claims under existing Ohio law. (*See* Order, ECF No. 28.) Plaintiffs

were unable to provide the Court with requested pincites or directly answer any of the Court's questions. (*See* Notice, ECF No. 32.) On July 22, 2024, Plaintiffs filed their Motion to Certify. Courts have previously denied motions to certify questions to state supreme courts when the timing of the motions suggest they are motivated by the way the federal court may address the question to be certified.

For these reasons, as explained in more detail below, the Court should deny Plaintiffs' Motion to Certify and proceed to ruling on the pending Motion to Dismiss.

II. RELEVANT BACKGROUND

By now, the Court is familiar with the allegations and arguments at issue in this case. To be brief, Plaintiffs object to a nine-year-old interpretation[1] of Defendant Kappa Kappa Gamma's ("Kappa") Fraternity Council that the term "woman" in Kappa's Bylaws includes transgender women. Plaintiffs assert various legal claims challenging the Fraternity Council's authority to interpret Kappa's governing documents to allow for the admission of transgender women as well as Kappa's expulsion of Plaintiff's Levang and Tuck-Smith for violating Kappa policies. These claims included derivative claims related to the policy of admitting transgender women and a claim for the violation of Levang and Tuck-Smith's free-speech rights under the Ohio Constitution.

Defendants filed a Motion to Dismiss Plaintiff's Complaint. Relevant here, one of the bases Defendants advanced for dismissing Plaintiffs' derivative claims is Ohio's well-established rule of judicial non-interference in a voluntary association's interpretation of its own governing documents. As Defendants have argued, the term "woman" is not defined in Kappa's governing documents; Kappa's Fraternity Council is tasked with interpreting Kappa's governing documents; and the interpretation of "woman" to include transgender women is a reasonable interpretation.

[1] Plaintiffs' Motion to Certify once again suggests that it is "questionable" whether Kappa issued a statement stating this interpretation in 2015. (Mot. to Certify, ECF No. 35, PageID 585.) This contention remains odd, as Plaintiffs' own Complaint alleges that Kappa issued the interpretation in 2015. (Complaint, ECF No. 1, ¶50.)

In responding to the Motion to Dismiss, Plaintiffs did not contest that the term "woman" is undefined in the governing documents. Instead, they maintained that the Fraternity Council was required to submit its interpretation of the term to a vote by the membership based on a vague duty of transparency. Plaintiffs also argued that the Fraternity Council had changed the organization's nature from a "single sex" organization to a "single gender" organization.

Once briefing on the Motion to Dismiss concluded, the Court asked Plaintiffs to provide pincites to the governing documents (1) defining the term "woman"; (2) establishing that Kappa was dedicated to being a single-sex, as opposed to a single-gender, organization; and (3) requiring that Fraternity Council submit its interpretation of the governing documents to a vote by membership. (Order, ECF No. 28, PageID 544.) In the event Plaintiffs were unable to provide such pincites, the Court ordered Plaintiffs to concede that the governing documents did not contain the identified provisions. (*Id.*)

On July 5, 2024, Plaintiffs failed to provide a pincite to the governing documents for any of the three issues the Court identified. On the definition of "woman" as a term in the Bylaws, the Plaintiffs conceded that the term was undefined and proceeded to provide additional arguments as to why Fraternity Council was nonetheless prohibited from adopting an inclusive definition of the term. (Notice, ECF No. 32, PageID 573–74.) On the restriction to Kappa as a single-sex organization, Plaintiffs could not identify any provision in the governing documents that states Kappa is dedicated to being a single-sex organization. (*Id.* at PageID 574.) Indeed, the governing documents state Kappa is a single-gender organization. (*See* Bylaws, ECF No. 1-2, PageID 66.) Rather than acknowledge that there is nothing in Kappa's governing documents that state that Kappa is dedicated to being a single-sex organization, the Plaintiffs pointed to the Unanimous Agreements of the National Panhellenic Council, which only state that member organizations "shall

defend their right to exist as single-sex organizations." (Notice, ECF No. 32, PageID 574.)[2] On the requirement to submit interpretations for a membership-wide vote, Plaintiffs neither identified a requirement in the governing documents nor conceded that no such requirement exists. (*Id.*) Instead, they made the conclusory statement that the "governing documents do not permit amendments through interpretation" and cited to provisions of the governing documents addressing changes to the governing documents. (*Id.*)

Seventeen days after responding to the Court's Order, Plaintiffs filed the instant Motion asking the Court to certify the question of how the non-interference rule applies to this case to the Ohio Supreme Court.

III. DISCUSSION

A. Standard for Certification

The Ohio Supreme Court accepts certification of questions of Ohio law when those questions "may be determinative of the proceeding" and "there is no controlling precedent in the decisions of this Supreme Court." Ohio Supreme Court R. Prac. 9.01. "Whether to certify a question to a state court 'rests in the sound discretion of the federal court.'" *Bartell v. LTF Club Operations Co.*, No. 2:14-cv-401, 2016 U.S. Dist. LEXIS 203364, at *5 (S.D. Ohio Mar. 22, 2016) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). In exercising that discretion, "federal courts generally will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks." *Id.* (quoting *City of Columbus, Ohio v. Hotels.com LP.*, 693 F.3d 642, 654 (6th Cir. 2012)). To this end, "[s]imple difficulty in ascertaining local law provides an insufficient basis for certification." *Tri County Wholesale Distribs. v. Labatt USA Operating*

[2] Every one of the National Panhellenic Conference member organizations can admit transgender women to their membership. (*See* 2022 FAQ Document, ECF No. 1-9, PageID 127 (quoting National Panhellenic Conference policy that "[f]or purpose of participation in Panhellenic recruitment, woman is defined as an individual who consistently lives and self-identifies as a woman."))

Co., No. 2:13-CV-317, 2014 U.S. Dist. LEXIS 904, at *5 (S.D. Ohio Jan. 6, 2014) (quotation omitted). When available precedent from state courts illuminates a "reasonably clear and principled course," federal courts will answer questions of state law without certifying them to the state supreme court. *Id.*, at *5–*6 (citations omitted).

B. Ohio Law on Non-Interference in Voluntary Organizations' Interpretations of Their Own Bylaws Is Clear and Certification is Unnecessary

The first question Plaintiffs present for certification is premised on the Court and, presumably, the Ohio Supreme Court accepting Plaintiffs' framing that interpreting a term "woman" to include transgender women "effectively amend[ed]" Kappa's Bylaws. As Defendants have argued previously, Kappa's governing documents *require* Fraternity Council to interpret the governing documents, and Fraternity Council doing so in a manner that displeases a segment of the organization's overall membership does not amount to rewriting the Bylaws. Such a framing has no basis in the record. Moreover, if the Court were to somehow find that Fraternity Council *did* rewrite the Bylaws improperly—which, again, is a necessary determination to accept Plaintiffs' basis for certifying to the state court—it would have already determined that Fraternity Council had acted outside of its authority, in which case the rule of non-intervention in the affairs of a private organization would not apply, meaning the question certified would not be determinative of the proceeding. Plaintiffs' question is, therefore, effectively a factual question, not a legal one.

If the Court considers a more neutral framing than the one Plaintiffs present, such as whether courts should defer to Fraternity Council's interpretation given the facts alleged in this case, the Court has significant authority it can use to reach a decision on its own and certification is unnecessary. Finally, the timing of Plaintiffs' Motion suggests an intent to move the consideration of this case to a different court in light of this Court's Order for the Plaintiffs to provide citations to the governing documents to support their claims and Plaintiffs' subsequent inability to do so.

i. Plaintiffs' Slanted Framing of the Question Presented Necessarily Obviates Any Need that May Exist for Certification

The first question Plaintiffs present for certification is "[c]an the board of an Ohio nonprofit corporation effectively amend its governing documents other than through vote of the membership where the governing documents expressly require one[?]" (Mot. to Certify, ECF No. 35, PageID 580.) Plaintiffs appear to have developed the term "effective amendment" for this Motion, as they did not use the term in their Response to the Motion to Dismiss. (*See* ECF No. 26.) It is not clear exactly what Plaintiffs mean by this term, as they repeatedly say this is not a case about defining what a woman is, but also argue there was an effective amendment of Kappa's Bylaws based entirely on how Fraternity Council interpreted the term, which the Bylaws do not define.

Plaintiffs' Motion to Certify, in many respects, doubles as an unapproved sur-reply to the Motion to Dismiss, as it contains significant argument about the underlying claims beyond what is necessary to address the certification question presented in the present Motion. The parties have already submitted their arguments on whether Fraternity Council was interpreting an undefined term or rewriting the governing documents in the briefing on the Motion to Dismiss, which was completed in early May, and Defendants will not use this brief to continue the litigation of that dispute. In any event, this slanted framing of the question presumes that the Court would adopt Plaintiffs' view that interpretation of the undefined term "woman" to include transgender women effectively amends Kappa's governing documents in certifying this question.

It is important to note, however, that Plaintiffs' framing of the question for certification *depends* on the Court agreeing with the Plaintiffs and finding that Fraternity Council went beyond its delegated authority when it included transgender women in its interpretation of the term "woman." This point is crucial, because no matter how the Court resolves that dispute, it will be left without any need to certify the question that Plaintiffs present. If the Court finds that Fraternity Council was interpreting an undefined term consistent with the authority delegated to it by the

governing documents and not "effectively amending" the documents, then the Ohio Supreme Court's answer to whether the non-interference doctrine applies when the board of a nonprofit corporation "effectively amends" the corporation's governing documents would have no bearing on the determination of this case.

If, alternatively, the Court finds that Fraternity Council *did* amend the governing documents without following the procedure for such amendments, it would have already determined that Fraternity Council acted outside its authority and the principles of the nonintervention doctrines would not apply. *See Strah v. Lake Cnty. Humane Soc'y*, 631 N.E.2d 165, 171 (Ohio Ct. App. 1993) ("[c]ourts will not interfere with the internal management of a corporation not for profit *in the absence of proof that the managing officers are acting in excess of their corporate power . . .*") (emphasis added). There would be ***no value*** in hearing from the Ohio Supreme Court on whether judicial non-intervention applies in cases of "effective amendment" if the Court has already determined that a necessary predicate for the application of that doctrine is absent.

For these reasons, whether the judicial non-intervention doctrine covers instances of "effective amendment" in violation of the requirements of the governing documents will not be a legal question that has any significant relation to this case. Either Fraternity Council's actions violated the governing documents by amending their governing documents, or they did not violate the governing documents because they interpreted an undefined term in the governing documents.

ii. <u>There Is Ample Authority from Ohio Courts that this Court Can Use to Resolve Legal Issues Concerning a Private, Voluntary Organization's Right to Interpret Its Governing Documents</u>

There is no basis to certify any question concerning judicial non-intervention in the affairs of private voluntary organizations to the Ohio Supreme Court. Federal courts do not certify questions of state law to the state supreme courts every time a case presents facts that a party argues warrant a departure from existing state law or the creation of an exception to a general rule. When

there is "adequate guidance" from state courts on how to resolve a question that has not been precisely answered by the state high court, this Court has declined to certify questions. *See Bellas Co. v. Pabst Brewing Co.*, No. 15-cv-873, 2017 U.S. Dist. LEXIS 221095, at *16–*18 (S.D. Ohio Mar. 27, 2017) ("If the Court believes it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, certification is unwarranted") (quotation omitted). "Only if the Court finds that there is a genuine dearth of guidance from state court precedent, so much so that it would be extremely difficult to examine properly the questions presented, will the Court then decide to certify questions to the Ohio Supreme Court." *Id.* at *17; *See also Shaheen v. Yonts*, 394 F. App'x 224, 233 (6th Cir. 2010) ("We are mindful that in the context of a request for certification, the state court need not have addressed the exact question at issue, so long as well-established principles exist to govern a decision.").

Plaintiffs essentially argue that the Ohio Supreme Court may hold that non-interference principles do not apply in this case because the interpretation in question goes to the "core" of Kappa's organization. Plaintiffs do not, however, cite any authority where the Ohio Supreme Court or any other court suggested that different types of organizational decisions might be entitled to different degrees of deference. Plaintiffs' belief that such a carveout should exist in the general rule does not provide a basis for certification, especially in the absence of a single citation to any court in any jurisdiction that has recognized an exception to a non-interference rule for "core" organizational decisions or because of the importance of the term being interpreted.

Furthermore, this Court is able to review the authorities the parties presented in the motion to dismiss briefing and determine whether this Court believes there is any basis under Ohio law that supports creating a new carveout from the non-interference rule for "core" decisions. Defendants submit that neither Ohio law nor judicial-non-interference precedent from other jurisdictions supports this novel theory that Plaintiffs seek to advance. Indeed, the new law Plaintiffs would ask

the Ohio Supreme Court to make would require a Court to weigh the importance or "core" of the term at issue or decision at issue whenever there was a challenge to organizational decision making, and members challenging the decision would simply claim that this is important or "core" to the organization to avoid dismissal. This would gut the purpose and protections of judicial non-interference for non-profit organizations.

Regardless, that the Ohio Supreme Court ***might theoretically*** entertain Plaintiffs' argument to create an exception to this well-established rule for the first time is not a basis for certifying a question that this Court can resolve on its own. This Court is capable of making that determination itself.

iii. The Timing of Plaintiffs' Motion Further Cautions Against Certifying This Question to the Ohio Supreme Court

This Court has previously recognized that the timing of a motion to certify questions to the state supreme court is relevant. *See O'Donnell v. Fin. Am. Life Ins. Co.*, No. 2:14-cv-1071, 2017 U.S. Dist. LEXIS 133377, at *25 (S.D. Ohio Aug. 21, 2017) (citing *Gasho v. Glob Fitness Holdings, LLC*, 918 F. Supp. 2d 708, 713 (S.D. Ohio 2013)) (denying motion to certify and noting that the fact that the motion had been filed after this Court rejected identical arguments to the ones for which certification was sought weighed against certification). In addition to observing that certification after the Court had already rejected the argument to be certified would allow for a "second bite at the apple," the Court recognized that certifying at a later stage would "unnecessarily duplicate judicial effort." *Id.* at *25–*26.

Although the Court has not yet ruled on Defendants' pending Motion to Dismiss, the Court's June 3, 2024 Order requiring Plaintiffs to provide pincites to the governing documents defining the term "woman," establishing Kappa as a "single-sex" organization, and requiring the Fraternity Council to submit its interpretations of the governing documents to a vote by the membership at least suggested that it considers these issues to be relevant to the pending Motion. It was only after

Plaintiffs were unable to fully respond to this Order that they decided to seek certification of this question to the Ohio Supreme Court, even though they could have sought the relief immediately following Defendants' Motion to Dismiss.

Notably, the question Plaintiffs ask the Court to certify—whether the judicial-non-interference doctrine applies to an "effective amendment" of organizational bylaws by interpretation—was not one that even Plaintiffs themselves argued in their Response to the Motion to Dismiss. (*See* ECF No. 26.) The Court should not permit Plaintiffs to attempt to advance a new argument after briefing on the Motion to Dismiss closed and the Court issued an order for the Plaintiffs to provide record citations in support of the only positions they did argue in their Response, and then claim that this new argument is dispositive of the case.

Additionally, another federal court has already ruled on this issue, finding Ohio law is highly deferential to associational interpretation and Ohio courts are unwilling to interfere with the management and internal affairs of a voluntary organization. *Westenbroek v. Kappa Kappa Gamma Fraternity*, No. 23-CV-51-ABJ, 2023 U.S. Dist. LEXIS 152458, *30 (Dist. Wyo. Aug. 25, 2023). The Wyoming district court specifically recognized the right of a voluntary organization to adopt and interpret bylaws without direction or interference by the courts. *Id.* at *30–*31 (citations omitted). The plaintiffs in the *Westenbroek* case did not seek certification to the Ohio Supreme Court. The same legal counsel is representing Plaintiffs in this case as is representing plaintiffs in the *Westenbroek* case.

> Certification is disfavored where a plaintiff files in federal court and then, after an unfavorable judgment, seek[s] refuge in a state forum. The Sixth Circuit has further enumerated: the view that state-law issue certification should be sought before, not after, a district court resolves the issue, is shared by many of our sister circuits.

Bartell v. LTF Club Operations Co., 2016 U.S. Dist. LEXIS 203364, *4-5 (S.D. Ohio Mar. 22, 2016) (citing *Pipefitting Indus. Pension Fund v. Buck Consultants, LLC*, 311 F. App'x 827, 831 (6th Cir. 2009)) (internal citations omitted).

C. The Ohio Supreme Court Has Squarely Rejected the Idea that the Ohio Constitution Confers a Free-Speech Right that Can Be Enforced Against Private Actors

The Ohio Supreme Court has already conclusively resolved the second question that Plaintiffs seek to certify. Plaintiffs ask the Court to certify to the Ohio Supreme Court the question of whether "the Ohio Constitution's guarantee of the right to 'speak freely' provide[s] protections broader than those provided by the First Amendment[.]" (Mot. to Certify, ECF No. 35, PageID 580.) The Ohio Supreme Court held that it does not: "while Section 11 [of Article I of the Ohio Constitution] has an additional clause not found in the First Amendment, the plain language of this section, when read in its entirety, bans only the passing of a law that would restrain or abridge the liberty of speech," and its protections are "no broader than the First Amendment." *Eastwood Mall*, 626 N.E.2d at 61.

Plaintiffs nonetheless argue that *Eastwood Mall* is not controlling precedent, relying heavily on the dissenting opinion in that case and other sources that support Plaintiffs' view that the case was wrongly decided. Notably, the only majority opinion from an Ohio case that Plaintiffs cite is a decision from an intermediate court of appeals from 1951. (*See* ECF No. 35, PageID 600.) Plaintiffs appear to argue that an intermediate appellate court's decision allowing a free-speech claim against a private actor was not overruled by a subsequent Ohio Supreme Court case that held that Ohio's free-speech protection does not extend to claims against private actors solely because the Ohio Supreme Court did not explicitly state that it was overruling the 1951 appellate case. Of course, neither Ohio nor federal law hold that a subsequent decision by a higher court must explicitly overrule every lower-court decision that is no longer good law by name.

Plaintiffs conclude by saying that "*Eastwood Mall* does not address the issues present here" because this case concerns "expressing the idea that a woman means only a biological woman." It is difficult to conceive of a more perverse reading of the freedom of speech than that its protections extend to a greater or lesser degree depending on the message being conveyed. But regardless of Plaintiffs' view that their speech is entitled to greater protection than that of others, *Eastwood Mall did* address precisely these issues when it held that the Ohio Constitution protects the freedom of speech to the same degree as the First Amendment. It is beyond dispute that the First Amendment only protects individuals from state action. *See, e.g.*, *Lindke v. Freed*, 601 U.S. 187, 191 (2024) ("the First Amendment binds only the government"); *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) ("we must remember, First Amendment violations require state action").

The Ohio Supreme Court does not accept certification of questions that it has already decided. *See* Ohio Supreme Court R. Prac. 9.01 (stating that the Supreme Court may accept certification when "there is no controlling precedent in the decisions of this Supreme Court"). There is no exception for controlling precedent that parties believe should be, could be, or might be overruled. Otherwise, state supreme courts would be inundated with certification requests asking them to overturn established precedent. And even if there were such an exception, the Ohio Supreme Court has reaffirmed *Eastwood Mall*'s holding multiple times since it was issued. *See State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 187 (Ohio 2002); *City of Cleveland v. Trzebuckowski*, 709 N.E.2d 1148, 1152 (Ohio 1999).

This Court should decline to waste its time and the time of the Ohio Supreme Court by certifying to it an Ohio constitutional question that it has already resolved.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion to Certify and proceed to issuing an order on the pending Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on August 12, 2024, and served upon all parties of record via the Court's electronic filing system.

/s/ *Brian W. Dressel*
Brian W. Dressel