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Bloomington Ordinance Found Unconstitutional

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An increasing number of municipalities across the country are using zoning ordinances to give universities the right to determine whether a given fraternity or sorority may occupy privately-owned property. Typically, zoning ordinances accomplish this task by allowing the use of property as a "fraternity or sorority house" in a given zoning district, and then defining "fraternity or sorority house" by reference to the occupants of the house being recognized or sanctioned as a fraternity or sorority by a specified institution of higher education. Such a scheme provides universities with the ability to allow private ownership of Greek houses (thereby alleviating the expense of maintenance and some of the potential liability risk that would otherwise derive from owning Greek houses directly), while still providing the ability to control the identity of the organizations that live in those houses. The universities, to some extent, are able to have their cake and eat it too.

The municipal governments that adopt these ordinances also benefit since these ordinances provide municipalities an easy solution for dealing with the challenges that sometimes arise when Greek organizations violate other local ordinances, such as noise or nuisance ordinances. For example, if the members of a Greek organization engage in problematic behavior, the university will likely withdraw recognition of that organization, causing the organization to cease being a "fraternity or sorority" for purposes of the zoning ordinance, which then gives the municipality an easy excuse for forcing the members of that organization to vacate the property.

Although these ordinances might seem acceptably symbiotic to the municipalities and institutions of higher education involved, they are legally problematic, as recently demonstrated by a case involving our client, UJ-Eighty Corporation. UJ-Eighty owns, among other properties, a fraternity/sorority house in Bloomington, Indiana near the campus of Indiana University. In 2002, when UJ-Eighty acquired this house, the house was considered a "Fraternity/Sorority House" under the local zoning ordinances, pursuant to the following definition:

> A building or portion thereof used for sleeping accommodations, with or without accessory common rooms and cooking and eating facilities, for groups of unmarried students in attendance at an educational institution. Shall also include any building or portion thereof in which individual rooms or apartments are leased to individuals, but occupancy is limited to members of a specific fraternity or sorority, regardless of the ownership of the building or the means by which occupancy is so limited.

In 2015, however, the City of Bloomington changed this definition to read as follows:

> "**Fraternity/Sorority House**" means a building or portion thereof used for sleeping accommodations, with or without accessory common rooms and cooking and eating facilities, for groups of unmarried students who meet the following requirements: all students living in the building are enrolled at Indiana University, Bloomington Campus; **and Indiana University has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such a sanction or recognition**. Shall also include a building or portion thereof in which individual rooms or apartments are leased to individuals, but occupancy is limited to members of a specific fraternity or sorority, regardless of the ownership of the building or the means by which occupancy is so limited, provided the two requirements noted in the first sentence of this definition are also met.

UJ-Eighty leased the house in 2016 to the Gamma-Kappa Chapter of Tau Kappa Epsilon, Inc. ("TKE Chapter"). In February 2018, the University revoked the TKE chapter's's official recognition and informed its members that they could no longer reside in UJ-Eighty's house. Most of the members vacated the house and moved into university dorms, but two remained.

UJ-Eighty then received two notices of violation from the City of Bloomington, alleging that the property was being used by two individuals as a dwelling in an Institutional zoning district and that the Property no longer meets the definition of a "Fraternity/Sorority House." UJ-Eighty challenged the alleged violations and appealed to the City of Bloomington Board of Zoning Appeals (BZA).

At the hearing before the BZA, we argued that the definition of "Fraternity/Sorority House" (1) violated the Indiana State Constitution; (2) violated the Due Process Clause of the 14th Amendment to the United States Constitution; (3) was interpreted incorrectly by Planning; and (4) constituted a taking of property without just compensation. The BZA found in favor of the City, and UJ-Eighty appealed that decision to the Monroe County Circuit Court. In our briefs and in oral argument before the court, we focused our efforts on the state and federal constitutional arguments.

First, we argued that granting Indiana University the unfettered right to determine whether a given organization is a fraternity or sorority for purposes of determining compliance with zoning ordinances is an unlawful delegation of governmental authority under the Indiana Constitution and the Indiana Code. The Indiana Constitution vests legislative authority in the General Assembly. Broadly speaking, the Indiana General Assembly, via the Indiana Code, has further delegated legislative authority in the realm of real property zoning to municipal governments and has instructed them to delegate enforcement and interpretation of local zoning ordinances to Boards of Zoning Appeal.

In effect, the City of Bloomington, in adopting its 2015 definition of "Fraternity/Sorority House," had delegated its legislative authority and zoning enforcement and interpretive authority to Indiana University. We argued that this definitional ordinance effectively gave Indiana University the ability to make zoning decisions and that this ordinance, therefore, violated the Indiana Code and the Indiana Constitution.

The City responded in a rather conclusory fashion and simply asserted that there is nothing in the Indiana Constitution or the Indiana Code that would suggest the definitional ordinance is impermissible and that no case law supported petitioner's position. The City also tried to shift focus away from the Indiana Constitution and Indiana Code by alleging that Bloomington was merely following a growing trend among its "sister university towns" in favor of requiring official sanction or recognition of fraternities or sororities by a university.

Next, we argued that the city's delegation of authority to make zoning decisions was an unlawful delegation of governmental authority, in violation of the Due Process Clause of the 14th Amendment. We relied primarily upon the seminal case of *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). At issue in *Roberge* was a local zoning ordinance that required the consent of at least two-thirds of certain real property owners in order to use property in a given manner. In striking down the ordinance and holding that the delegation of power to adjacent landowners violated the Due Process Clause of the 14th Amendment, the Supreme Court listed the following factors in support of its reasoning:

> The authority of the decision-making property owners was uncontrolled by any standard or rule prescribed by legislative action;
>
> The zoning authority was bound by the decision of the landowners;
>
> There was no provision for review under the ordinance, and the decision of the property owners was final;
>
> The decision-making property owners were not bound by any official duty; and
>
> The decision-making property owners were free to withhold consent for selfish reasons or arbitrarily and may subject a property owner to their own, self-interested caprice.

The ordinance at issue in our case also implicated each of these factors:

> The authority of the decision-making property owner, Indiana University, was not controlled by any standard or rule prescribed by legislative action;
>
> The BZA was bound by the decision of Indiana University and was bound to impose fines and to restrict land use based upon decisions made by the university;
>
> There was no provision for review of Indiana University's decision with respect to a given tenant, and the decision of the university was final;
>
> Indiana University was not bound by any official duty to private landowners;
>
> Indiana University was free to withhold its consent to a particular tenant for selfish reasons or arbitrarily and was free to subject a property owner to its own, self-interested caprice.

The ordinance at issue in our case was particularly egregious in that it overtly invited the University to act arbitrarily. The ordinance provided that the decision maker could use whatever procedures and whatever guidelines or standards it desires in determining whether a private landowner can use its property in a given manner.

Again, the city tried to shift focus from the specifics of the law by pointing to alleged bad behavior by the TKE Chapter and by suggesting that petitioner was paranoid for thinking that the university was trying to move students out of Greek houses and into University housing. The city also returned to its theme that Bloomington's definition is like many other definitions in other college towns and that the definition is merely descriptive.

Finally, we asserted a taking claim. We argued that the 2015 change to the definition of "Fraternity/Sorority House" constituted a taking of property without compensation, by interfering with the "distinct investment-backed expectations" of UJ-Eighty. We asserted that the definitional change, which occurred 13 years after UJ-Eighty had purchased the property, dramatically decreased the fair market value of the property, since potential purchasers will not desire to acquire property if the ability to earn income from it is controlled unilaterally by a third party that may exercise its control with unchecked capriciousness.

Briefs were filed in October and November of 2018, and oral argument was held on December 12, 2018. By an order issued on February 6, 2019, the Monroe County Circuit Court struck down the definitional ordinance, finding that the ordinance violated the Indiana Constitution and the Indiana Code, and that the ordinance violated the due process clause of the 14th Amendment to the United States Constitution, reiterating much of the reasoning set forth in petitioner's briefs. The Court declined to rule on the taking claim. Of course, a state trial court decision will not create binding precedent, but this decision does demonstrate that zoning ordinances designed to allow university control over private land use are vulnerable to constitutional attack.

The City of Bloomington filed a Notice of Appeal on February 27, 2019. We hope to provide an update on UJ-Eighty's success at the appellate level within the next few months.

Navigating Louisiana's Max Gruver Act

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Enacted in 2018, Louisiana Rev. Stat. § 14:40.8 addresses "Criminal hazing." It provides certain penalties if persons and/or organizations covered by the statute "knew and failed to report to law enforcement that one or more of the organization's members were hazing another person." It might also require the inter/national organization to complete any investigation within fourteen days of receiving a report of hazing as defined in the statute. The law is known as the Max Gruver Act, named for the LSU student who died in 2017, reportedly from alcohol poisoning following a ritual described as hazing.

Duty to report to law enforcement. The duty to report under the Act includes any person serving as a representative or officer of an organization, including any representative, director, trustee, or officer of any "national" organization covered by the Act. Organization includes fraternities and sororities. "Hazing" is defined in the Act.

The Act provides for fines, forfeiture of public funds received by the organization, and forfeiture of rights to operate at "the educational institution" for a period of time as determined by a court.

There are legal considerations for organizations who become aware of a report of hazing. They include the potential for a libel claim by the person who is the subject of any report. There is no clear immunity for, or privilege attached to, any statement or allegation made to a law enforcement agency under Louisiana law.

There is also the question of to what "law enforcement" should a report be made?

The location where the alleged act of hazing occurred will be within the jurisdiction of a law enforcement agency. If the asserted act occurred at a chapter facility, check to see if it is on university land and pursuant to a long-term ground lease. If so, the applicable law enforcement agency may be the university police department.

The Act does not require the name of the person or persons alleged to have committed a hazing act to be included in the report to law enforcement.

Care should be taken in any report made under the Act to not state more than what the reporting organization actually knows. What the inter/national organization knows is often based on what has been reported to it. It typically has no firsthand knowledge. What someone did or did not do, in many instances, can be the subject of disagreement and debate. In such situation, the notice could advise that the inter/national organization has received information that members of its chapter may have committed acts that constitute hazing as defined in Louisiana Rev. Stat. § 14:40.8. The notice could also provide the names of persons and their contact information. If a report on the incident has been provided to the inter/national organization and/or to the university, those reports could be noted and a copy enclosed with the letter.

Send the written notification by certified mail, return receipt requested, providing evidence it was sent and received.

A report sent for a chapter should cover all chapter officers who have information or knowledge of an act that might be hazing as defined in the Act. An example notification could include, "Please be advised that officers of the * Chapter of * * Fraternity, Inc. (and which chapter is associated with * University) received information that one of its members may have committed acts that constitute hazing as defined in Louisiana Rev. Stat. § 14:40.8. Based on information received by Chapter officers pursuant to an investigation, it is believed that a member of the chapter may have . . . ."

It would be wise to have legal counsel review draft notices before they are finalized and sent to (1) ensure that they do what is required by the Act and (2) avoid overstating what is known by the reporting party (inter/national organization and the chapter).

Investigation by the inter/national organization within 14 days. The Act provides that the national organization "may conduct a timely and efficient investigation to substantiate or determine the veracity of the allegations prior to making a report to law enforcement". An investigation is not required by the Act as it uses the term "may." If the inter/national organization does conduct an investigation, the Act requires it to be completed within fourteen days after the organization receives the report of hazing. There is no penalty provided in the Act for not completing the investigation within fourteen days. The Act also does not expressly state by when a report to law enforcement required by the Act must be made. Given these provisions in the Act, it might be interpreted by a court as requiring a report by the inter/national organization to be made to law enforcement within fourteen days of notice to the inter/national organization.

Timothy Piazza Anti-Hazing Law Passed in Pennsylvania

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It was neither surprising nor inappropriate when the Pennsylvania legislature adopted new legislation last year aimed at stopping hazing. The facts around the death of Timothy Piazza were particularly horrific. His death occurred during an epidemic of hazing tragedies. His parents and others became advocates for, among other things, stronger penalties for those who are found guilty of hazing.

The Timothy Piazza Anti-Hazing Law[1] established two levels of the crime of hazing which could be applied against individual wrongdoers. Hazing is a misdemeanor if it only "creates a reasonable probability of bodily injury to a minor or student." If the hazing results in "serious bodily injury or death," it becomes a felony. The law also defines organizational hazing and provides penalties for an organization that "intentionally, knowingly, or recklessly promotes hazing or aggravated hazing."

Upon its adoption, the law was called a model for consideration by other states. However in light of a recent decision by the Supreme Court of the United States, the constitutionality of one portion of the Pennsylvania law has been called into question.

On February 20, 2019, a unanimous Supreme Court, in a decision authored by Justice Ruth Bader Ginsberg, declared that the Eighth Amendment to the Constitution, which prohibits the imposition of "excessive fines," applies to the states, and that the prohibition applies to the forfeiture of property used in a crime.

In *Timbs v. Indiana,*[2] Timbs pled guilty to and was sentenced to one year of home detention and five years of probation for "dealing in a controlled substance and conspiracy to commit theft." Timbs was also fined and ordered to pay costs totaling $1,203. At the time of his arrest, the police had seized a Land Rover SUV valued at approximately $42,000 that Timbs had purchased with funds from an insurance policy from his father's death. The maximum fines the law allowed for the crimes Timbs had pled guilty to totaled $10,000. Nevertheless, the state of Indiana seized Timbs vehicle worth more than four times that amount.

The Pennsylvania Anti-Hazing law contains a provision that provides, upon conviction of an individual defendant for aggravated hazing, or an organization for organizational hazing, the court may "direct the defendant to forfeit property which was involved in

the violation."[3] Numerous media outlets have suggested that this provision might allow a court to order a fraternity house to be forfeited to the state, just as Indiana sought the forfeiture of Timbs' Land Rover.

The Supreme Court's decision notes that there is nothing particularly new about the prohibition of excessive fines, stating "The Excessive Fines Clause traces its venerable linage back to at least 1215" in the Magna Carta. The Court further observed that Blackstone's Commentaries on the Laws of England in 1769 also criticized excessive fines.

Justice Ginsberg pointed out abuses of the Excessive Finds Clause continued nonetheless:

> Following the Civil War Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating prescriptions on "vagrancy" and other dubious offenses.

In rejecting the seizure of Timbs' Land Rover, the Court makes clear why such an excessive fine is unconstitutional:

> For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history. Exorbitant tolls undermine other constitutional liberties.

The forfeiture provision in the Pennsylvania hazing law was problematic from the outset. When members engage in hazing in a fraternity house—which, in addition to being a crime, typically violates the rules of the chapter, the inter/national organization, and frequently the terms of the lease with the house corporation—their misconduct does not establish wrongdoing by the house corporation, the inter/national fraternity or sorority, or, generally speaking, the chapter. Criminal conviction of any of those entities is extremely rare and almost unheard of. Thus, the application of the forfeiture clause was going to be very difficult.

However, as written, there could be an attempt to apply the forfeiture provision even if the underlying hazing was only misdemeanor hazing. Certainly that is a crime, but not one that resulted in a serious injury or harm. Yet, theoretically, the house owner could under those circumstances be found guilty of organizational hazing as defined by the law and have the house seized. Fraternity houses can be valued into the millions of dollars while the maximum fine for organizational hazing is either $5,000 or $15,000, depending on if the underlying criminal conduct was misdemeanor or felony level hazing. Assume the house is worth a million dollars and the maximum fine was $15,000. The value of the house is more than 66 times greater than the fine. In *Timbs*, the court found a forfeiture worth just 4 times more than the maximum fine to be unconstitutionally excessive.

There appears to be little doubt that the forfeiture provision in the Pennsylvania law is constitutionally defective.

1. Timothy J. Piazza Anti-Hazing Law, 18 Pa. Cons. Stat. §§ 2801–2811 (2018).
2. Timbs v. Indiana, No. 17-1091, 2019 WL 691578 (Feb. 20, 2019).
3. 18 Pa. Cons. Stat. §2807 (2018).

Lawsuit Filed Against Yale Is An Attack on Greek Organizations

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On February 12, 2019, three female students at Yale filed suit against the University and nine fraternity chapters, their international organizations, and their house corporations in the United States District Court in Connecticut. The 311-paragraph, 85-page complaint is a direct attack on single sex fraternal organizations. It alleges nine separate causes of action, six of which are against Yale University. They allege, among other things, violations of Title IX creating a hostile educational environment, violations of Connecticut Public Accommodation laws, breach of contract, and unfair trade practices. The three claims against the fraternal organizations allege a violation of the Federal Fair Housing Act for not allowing women to live in the houses, and violations of the Connecticut Public Accommodations Law. Under the Connecticut statute, the complaint makes two separate claims against the fraternal organizations. First, that the denial of membership to women in the men's Greek organizations constitutes discrimination in places of public accommodation. Second, that sexual misconduct—which the complaint alleges the "defendant fraternities have a policy and practice of creating a hostile environment at their houses and events throughout Yale's campus" and the "prevalence of sexual harassment" at fraternities—creates a hostile educational environment in violation of the Connecticut Public Accommodations Law.

The lawsuit, which follows a failed complaint before the Connecticut Commission on Human Rights and Opportunity, seeks a court declaration that Plaintiffs are proceeding on behalf of themselves and as representatives of the class of all others who are similarly situated—in other words a declaration that this suit is a class action.

Make no mistake about it, this is a serious challenge to the structure of single sex social fraternities. But there are numerous defenses, beginning with the fact that the United States Congress has specifically recognized in Title IX that single sex social fraternities may exist on college campuses, even with the recognition of their host institution, without the college or university violating the provisions of Title IX.

The lawsuit details what it purports is Yale's "decades long history of fraternity-related sexual misconduct" and makes specific claims with regard to the three plaintiffs. Each alleges she was groped at fraternity parties or was "grinded from behind" on the dance floor at a fraternity party. Such conduct should never happen, and fraternity chapters and national organizations that become aware of such conduct need to punish the offenders. However, to convince a court that those individual incidents establish a fraternity "policy and practice of creating a hostile environment" will be a large hurdle for the plaintiffs to overcome.

Sarah Brown, writing in the Chronicle of Higher Education summarized the lawsuit this way:

> "The most eye-catching part of the new Title IX lawsuit against Yale University and nine of its all male fraternities is that it seeks to force the organizations to accept women as members.
>
> But the lawsuit, brought by three female students, also makes the interesting argument that Yale has abdicated its obligation to protect students by letting fraternities off the hook and ignoring repeated complaints about sexual misconduct at their parties.

A New York Times article describes the relief sought by the plaintiffs this way:

> The plaintiffs – a sophomore and two juniors – have demanded in the lawsuit that Yale and its fraternities rein in the parties. They have asked for a court order that would force the fraternities to admit women and allow them to share in the benefits of membership, like housing and powerful alumni networks that can lead to jobs, internships and social capital."

Fraternal Law will monitor this case as it develops.

1. Complaint, McNeil v. Yale Univ., No. 3:19-cv-00209 (D. Conn. Feb. 12, 2019).
2. Sarah Brown, *What Responsibility Does a University Have to Regulate Fraternity Culture*? CHRON. HIGHER EDUC., Feb. 12, 2019.
3. Anemona Hartocollis, *Women Sue Yale Over a Fraternity Culture They Say Enables Harassment*, N.Y. TIMES, Feb. 12, 2019.

Update: Harvard Files Answers to Lawsuits

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On February 8, 2019, Harvard College filed motions to dismiss two lawsuits against it, one in Massachusetts state court ("State Motion") and the other in the United State District Court for the District of Massachusetts ("Federal Motion"). Readers may recall that several fraternities, sororities, a house corporation and three student-members of Greek organizations sued Harvard challenging Harvard's policy of penalizing students that choose to join a single-sex social organization.

In the state case, the plaintiffs asserted violations of the Massachusetts Civil Rights Act ("MCRA") by arguing that the Harvard policy impermissibly interferes with the associational rights of the plaintiffs while also discriminating on the basis of sex. In the federal case, plaintiffs asserted that the Harvard policy violates Title IX in that it results in (i) *per se* disparate treatment discrimination based upon sex, (ii) associational discrimination based upon sex, (iii) unlawful sex discrimination based on sex stereotyping, and (iv) unlawful sex discrimination based on anti-male bias. The federal plaintiffs also alleged that the Harvard policy violates the MCRA by depriving plaintiffs of equal protection by way of sex discrimination.

Harvard moved to dismiss all claims in both complaints. The motions are lengthy, together reaching well over 100 pages. For those readers that are interested, we have linked the full motions in the footnote below. For purposes of this article, we will provide a summary of Harvard's central arguments.

Harvard's primary argument was based upon lack of standing. Because the Harvard policy is directed at its students, resulting only in consequences to students as opposed to organizations, Harvard argues that the organizational plaintiffs lack standing to bring these kinds of claims. In support of this argument, Harvard cited the MCRA itself, which permits suit only by a person who

"*institute[s] and prosecute[s] in his own name* and *on his own behalf*." State Motion, p. 7 (citing G.L. c. 12, § 111). With respect to the Title IX claims, Harvard argued that "[i]n the discrimination context, as in the law generally, "[i]njured parties usually will be the best proponents of their own rights," and "third parties are not normally entitled to step into their shoes." Federal Motion, p. 6 (citing *Domino's Pizza v. McDonald*, 546 U.S. 470, 479 (2006).

In arguing the freedom of association claims, Harvard set the legal backdrop noting that the Massachusetts and U.S. Constitution do "not protect just any form of association. [They] protect intimate associations and expressive associations." State Motion, p.13. Harvard then argued that because fraternities are neither intimate nor expressive associations, they are not legally protected associations.

Turning first to the intimacy question Harvard, citing *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of NY*, 502 F.3d 136, 147 (2d Cir. 2007), argued that based upon precedent, "[f]raternities and sororities are not intimate associations." Harvard also relies on *Jaycees,* urging that "[i]ntimate associations are 'distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.'" *Id*. (citing *Roberts v. US. Jaycees*, 468 U.S. 609, 620 (1984)). Applying the *Jaycees* definition of "intimate," Harvard argued that the complaint describes the plaintiff groups as large organizations as opposed to small, intimate groups, while failing to allege that the plaintiffs' "admissions policies, recruitment methods, or activities from which this Court could infer that [plaintiffs are] particularly selective or inward-facing." State Motion, p. 14.

With respect to the expressive nature of these organizations, Harvard noted that "Courts have consistently held that social groups are not expressive associations, absent some further expressive purpose." *Id* at 15. Harvard also argued that no allegations in the complaint allege any expressive purpose; "The Complaint does not allege that Iota Tau ever took a public stance on any issue of political, social, or cultural importance." *Id* at 16.

Finally, Harvard presented another very simple argument against the plaintiffs' sex discrimination claims. Harvard argued that "Harvard's policy treats male and female students exactly the same. Plaintiffs therefore cannot show the 'disparate treatment based on sex' that is the touchstone of both Title VII and Title IX claims. . . . Under Harvard's policy, all students face the same choice, regardless of sex: to remain eligible for the College's nominations and leadership positions covered by the policy, or to join a gender-exclusionary organization instead." Federal Motion, p.11.

Evaluating the motions, Harvard advanced simple, effective defenses. That said, it also appears that further factual development will be required to prevail upon those defenses. It is likely that at least some, and maybe all, of plaintiffs' claims will survive a motion to dismiss. We will watch with interest as the case unfolds. Of course, we will keep our readers updated.

1. A full summary of the complaints and the counts alleged can be found at this link (https://fraternallaw.com/wp-content/uploads/2019/02/Jan2019.pdf) (p.17/22 of linked document).
2.Readers may link to the state court motion to dismiss here: https://fraternallaw.com/wp-content/uploads/2019/03/StateDismiss.pdf
3.Readers may link to the federal court motion to dismiss here: https://fraternallaw.com/wp-content/uploads/2019/03/FederalMotionDismiss.pdf

Update: Court Agrees with DOJ, Rules Against the University of Iowa

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In the January 2019 Newsletter, the Department of Justice's (DOJ) intervention in a case against the University of Iowa was highlighted. Specifically, the DOJ took the position that the University had engaged in impermissible viewpoint discrimination when it cherry-picked which student groups' beliefs it wished to allow and which it sought to condemn. Last month, the District Court agreed with the DOJ, ruling in favor of the student group Business Leaders in Christ and granting a permanent injunction to prevent the University from rejecting or otherwise denying the group university recognition based on the University of Iowa's "human rights policy."

Business Leaders in Christ claimed that its constitutional rights of free speech and religious freedom were infringed upon when its university recognition was revoked because it refused to strike a faith statement to which all group members were required to subscribe.

The court did not take issue with the human rights policy on its face. Rather, it concluded that the University engaged in unlawful viewpoint discrimination because of the manner in which the policy was applied unevenly to various student groups. The court found highly problematic the fact that other groups—including the Chinese Students and Scholars Association that limits membership to Chinese students, along with the campus chapter of the National Lawyers Guild that excludes students with certain political viewpoints—were not similarly punished by the University.

Since the University did not apply consistent standards to all groups, strict scrutiny applied. Accordingly, despite acknowledging the University's interests in developing student leadership, providing a quality campus environment, promoting diversity, and ensuring that all students be granted equal access to educational opportunities, the court concluded that it had not narrowly tailored its means of accomplishing these interests. As such, the group was entitled to the permanent injunction and reinstatement of its University recognition.

New Hampshire Law Infringes on Voting Rights

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On behalf of two Dartmouth College sophomores, the ACLU has filed suit in United States District Court to block a New Hampshire state law that would require college students who register to vote in New Hampshire to also pay for a New Hampshire driver's license and a vehicle registration.

In a statement by Julie Ebenstein, Senior Staff Attorney for the Voting Rights Project of the ACLU, the cost of compliance with the law may require "people to pay up to hundreds of dollars in vehicle registration fees if they register to vote." Students who register to vote must pay those fees within 60 days of registering or they face up to a year in jail.

The lawsuit challenges the law under three legal theories: (i) that it violates the First and Fourteenth Amendments as well as the United States Civil Rights Act (42 U.S.C. Section 1983) as the complaint argues the new law "severely and unreasonably burdens the fundamental right to vote. . . particularly burdens young voters, college student voters, and voters who have recently moved to New Hampshire," (ii) that it violates the Twenty-sixth Amendment to the Constitution which guarantees "the right of citizens of the United States who are 18 years of age or older to vote shall not be denied or abridged by. . . any state on account of age," and (iii) that it violates the Twenty-fourth Amendment which guarantees that the right to vote shall not "be denied or abridged by reason of failure to pay any poll tax or any other tax."

One of the Plaintiffs, Maggie Flaherty, writing on an ACLU blog site, explained why she opposes the new law and is a Plaintiff in the lawsuit this way:

> Make no mistake: this is meant to deter young people from participating in our elections. For me, the importance of voting of New Hampshire comes down to two factors: the fact that I now spend more time here than anywhere else, and that state and local politics can effect anything from my access to health care and my access to the quality of air I breathe. I vote for candidates that are concerned about climate change and my access to reproductive health care because their actions in office will affect my daily life. Despite the fact that I care deeply about exercising my right to vote, I also recognize that as a busy student, any barriers to registration would be a significant burden.

> So with the help of the ACLU and along with my fellow students, I am suing the New Hampshire Secretary of State and Attorney General to declare HB 1264 unconstitutional. HB 1264 creates an unconstitutional barriers for students like me who are engaged in pour local political community and comprise an important voting bloc in the state.
> Voting is our right, and we should not have to jump through hoops or pay hundreds of dollars to be able to exercise it.

The right of college students to register and vote where they attend college has long been recognized in the courts.[3] It is of benefit to Fraternities and Sororities to advocate in support of protection of those rights and support non-partisan voter registration drives.

The March 2019 American Bar Association Journal begins with an article on the work of attorneys specializing in election law. The article includes comments from John Hardin Young, the past chair of the American Bar Association's Standing Committee on Election Law, summarizing them this way:

> While the Jim Crow days of literacy tests and poll taxes are in the past, Young points to the prevalence of more subtle voter suppression techniques, such as closing polling locations and making it difficult to figure out where to vote; instigating a heavy police presence; or requiring burdensome proof of residency.[4]

The New Hampshire law is just the kind of "burdensome proof of residency" that Young speaks to, but the ACLU believes it is also the equivalent of the poll taxes that were previously used to discourage those the powers that were did not want to vote at all. The majority in the New Hampshire legislature seem to be reprising that role.

When it comes to protecting the constitutional rights of Greek organizations, advocating for college student voter registration rights and encouraging voter registration programs helps to establish Greek organizations as expressive associations under the First Amendment. Being publicly active in voter registration campaigns cannot help but attract the attention of elected office holders, who may as a result be more responsive to the issues of fraternities and sororities.

1. Complaint, Casey v. Gardner, No. 1:19-cv-00149-JL (D. N.H. Feb. 13, 2019).
2. H.B. 1264, Reg. Sess. (N.H. 2018).
3. *See, e.g.*, Anderson v. Brown, 332 F.Supp. 1195 (D. Ohio 1971) (holding that college students may not be treated differently from others seeking to register to vote).
4. Liane Jackson, *Opening Statements: Keeping it Fair*, 105 A.B.A. J. 9, 9–10 (Mar. 2019).

Tim Burke, the author of this article, has long been an advocate for the protection of voter rights and voter participation. He has taught election law throughout the state of Ohio, appeared as an election rights expert in half a dozen federal court cases, served as an international elections monitor in the first post war municipal election in Bosnia and Herzegovina, held Get Out The Vote training in Slovakia under a contract with the United States Department of State, and at the end of February concluded 26 years on the Hamilton County Board of Elections (20 of those years as its chair).

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