



FRATERNAL LAW™

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NPC Files Amicus Curiae Brief in KKG Transgender Appeal

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On January 10, 2024, the National Panhellenic Conference (NPC) filed an amicus curiae brief in the U.S. Court of Appeals for the Tenth Circuit supporting Kappa Kappa Gamma (KKG) and urging the appellate court to affirm the dismissal of the underlying lawsuit against KKG.¹ That suit had challenged the admission of a transgender female as a member of the KKG chapter at the University of Wyoming.

An amicus curiae brief is also known as a “friend of the court” brief. Anyone not a party to the case but who may have an interest in it may seek to file such a brief. In this case, the parties agreed on, and the court approved, the filing of amicus briefs.

The NPC Brief² describes NPC as an umbrella group for twenty-six (26) national and international women’s-only social sororities. It impressively describes that “NPC sororities are located on more than 670 college and university campuses in all 50 states, with more than 340,000 current undergraduate members across 3,281 chapters.”³

The Brief highlights NPC’s concern that if the lower court’s decision dismissing the Complaint against Kappa Kappa Gamma were to be reversed, it could “strike at the core of

¹ Brief of Nat’l Panhellenic Conf. as Amicus Curiae Supporting Defendants-Appellees, *Westenbroek v. Kappa Kappa Gamma Fraternity*, No. 23-8065 (10th Cir. Jan. 10, 2024) [hereinafter “NPC Brief”].

² The NPC brief was authored by counsel from the prominent Washington D.C. law firm of Arnold & Porter Kaye Scholer LLP.

³ NPC Brief at 1.

sororities' organizational independence and autonomy.”⁴ The Briefs warns that accepting Plaintiffs' legal theories would “severely undermine sororities' independence as private organizations and infringe on their members' constitutional freedom of association.”⁵

The NPC Brief makes three legal arguments providing substantial case law support for each:

1. The First Amendment's freedom of association guarantees the fundamental rights of private organizations to establish their own membership criteria and to choose their own members.
2. Private organizations have a settled right to interpret their own bylaws and other governing documents and rules.
3. The Plaintiffs' theory of liability would seriously undermine the organizational autonomy of NPC and its member sororities.

That last point is well captured in the Brief's argument that:

NPC and its member organizations have played an important role in promoting the advancement and development of women in America. Sororities were arguably the very first “women's groups,” originally founded over a century ago in the mid-1800s to provide women with a support system on college campuses that had only recently begun to admit women, and to provide women opportunities to advance themselves socially and academically in a world dominated by men. That tradition remains to this day, where sorority members encourage one another to become the best versions of themselves and to make the communities and the world a better place.⁶

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 17.

It is that strong tradition, the Brief argues, which would be jeopardized if the Court concludes that KKG does not have the right to interpret its own governing documents and define its own membership, a decision that would expose NPC member sororities to the same result.

Three groups have filed separate amicus briefs supporting the Plaintiffs-Appellants seeking to overturn the dismissal of the case against KKG: the Women's Declaration International USA, Over 450 Kappa Kappa Gamma Alumni, and the Women's Liberation Front. Several groups have joined in a second amicus brief supporting KKG: the Nathaniel R. Jones Center for Race, Gender, and Social Justice; the National Center for Transgender Equality; the Women's City Club of Greater Cincinnati; the American Civil Liberties Union of Ohio Foundation; and Jim Obergefell.⁷

The Appellants now have until January 24, 2024, to file their optional reply brief, and then the appeal will be fully briefed. The case will then be assigned to a three-judge panel of the Court to conduct an oral argument and ultimately issue a decision. As such, a decision is not expected for at least a few months.

In the meantime, Kappa Kappa Gamma and its President, four Vice Presidents, Treasurer, and Panhellenic Delegate now face another lawsuit. On January 25, 2024, two former alumnae members of KKG, along with three other alumnae members filed suit in the U.S. District Court for the Southern District of Ohio, where KKG is incorporated and its headquarters located.⁸ The

⁷ It was Jim Obergefell's case in the U.S. Supreme Court that established same sex marriage as a constitutional right. At the time of that case, Obergefell was a citizen of the City of Cincinnati, which may explain why the Nathaniel R. Jones Center (located at the University of Cincinnati College of Law), and the Women's City Club of Greater Cincinnati joined in that amicus brief.

⁸ *Complaint*, Levang v. Kappa Kappa Gamma Fraternity, No. 2:24-cv-00316-MHW-KAJ (S.D. Ohio Jan. 25, 2024).

two former members had been terminated as members of KKG for activities related to supporting the original lawsuit now on appeal.

The new complaint, spread over 241 paragraphs, states ten (10) causes of action, including breach of fiduciary duties; violation of the Ohio Constitution's freedom of speech protection; wrongful termination; and defamation. Many of the claims are like those made in the original case, but these are different plaintiffs and some significantly different claims.

Beneficial Ownership Information Reports: What You Need to Know

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A new federal reporting requirement rolled out with the new year. Effective January 1, 2024, the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) will now collect "beneficial ownership information" (BOI) about the individuals who own or control an entity.

The new requirement stems from the 2021 bipartisan Corporate Transparency Act, passed with the intent of identifying "bad actors who exploit anonymous shell companies to engage in money laundering, corruption...and a host of other criminal offenses with impunity."¹

The good news for fraternal organizations is that **tax-exempt entities are also exempt from these BOI reporting requirements.** National fraternal organizations, collegiate chapters, house corporations, alumni associations, and educational foundations are generally organized as 501(c)(2), (c)(3), and (c)(7) organizations and exempt from federal taxation.

¹ *FinCen Issues Final Rule Regarding Access to Beneficial Ownership Information*, FINANCIAL CRIMES ENFORCEMENT NETWORK (Dec. 21, 2023).

Unfortunately for many small organizations, especially collegiate chapters, tax exemption can be revoked by the Internal Revenue Service (IRS), most commonly for failure to file a federal tax return. If an organization's tax-exempt status is revoked by the IRS for more than 180 days, it also loses its exemption from BOI reporting requirements. Entities that are no longer exempt must file a BOI report and disclose senior officers with "substantial control" over the organization. A pending Form 1023 or 1024 for recognition of exemption is not sufficient to avoid BOI reporting requirements.

Whether or not your organization must file a BOI report – and whose information is required to be reported – is a serious question for a company's ownership team, board, or other accounting professional. While financial information does not need to be reported on a BOI report, personal information like dates of birth, home addresses, and passport or driver's license numbers and images must be submitted for each owner or incorporator. However, social security numbers are not required to be reported. **DO NOT release your SSN to any business or individual filing a report on you or your company's behalf.**

Fraternal Law Partners and Manley Burke Compliance, LLC have compiled an FAQ of some of the most common BOI-related questions, which follows this article.

For more on beneficial ownership information, visit <https://www.fincen.gov/>.

Beneficial Ownership Information: Fraternal Organization FAQ

We always file our tax return on time. Does this satisfy the BOI report requirement?

No. BOI reports are independent of IRS federal tax returns and have a separate filing requirement.

We recently filed our annual business report with the Secretary of State where we are organized or headquartered. Does this satisfy the BOI report requirement?

No. Beneficial ownership information is a federal reporting requirement. No information provided to state or local regulators will satisfy the federal BOI reporting requirement. Do not confuse notices from the Secretary of State about these new federal requirements as the states’ own reporting obligation.

Does my organization need to file a report?

All entities should review BOI reporting requirements and consult with an accounting or legal professional whether a BOI report is required. There are twenty-three (23) types of businesses that are exempt from the reporting requirements.² Tax-exempt entities fall under one of those exemption categories.

Tax-exempt entity (Exemption #19)

An entity qualifies for this exemption if **any** of the following four criteria apply:

1. The entity is an organization that is described in section 501(c) of the Internal Revenue Code of 1986 (Code) (determined without regard to section 508(a) of the Code) and exempt from tax under section 501(a) of the Code .	<input type="checkbox"/> Yes <input type="checkbox"/> No
2. The entity is an organization that is described in section 501(c) of the Code , and was exempt from tax under section 501(a) of the Code , but lost its tax-exempt status less than 180 days ago.	<input type="checkbox"/> Yes <input type="checkbox"/> No
3. The entity is a political organization, as defined in section 527(e)(1) of the Code , that is exempt from tax under section 527(a) of the Code .	<input type="checkbox"/> Yes <input type="checkbox"/> No
4. The entity is a trust described in paragraph (1) or (2) of section 4947(a) of the Code .	<input type="checkbox"/> Yes <input type="checkbox"/> No

Source: *Small Entity Compliance Guide, Beneficial Ownership Requirements (December 2023)*, https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf.

² 31 CFR § 1010.380(c)(2).

Organizations described in section 501(c) of the Code include, but are limited to, 501(c)(3) educational foundations at the national and local levels, 501(c)(2) title holding companies owning and collecting rent on fraternity houses, and 501(c)(7) fraternal chapters and alumni associations.

Great, my organization is exempt. Do I need to do anything to claim this BOI exemption?

No. Entities that are exempt from BOI reporting requirements do not need to apply for or claim the exemption.

Many of our fraternal chapters are unincorporated. Where do they stand?

Unincorporated entities are not reporting companies, and therefore not required to file a BOI report. Even if an unincorporated chapter files a federal tax return (which, they should!) the chapter does not need to file a BOI report.

I'm on the board of a nonprofit entity, but the organization's tax-exempt status was revoked for failure to file a tax return. Does the organization need to file a BOI report now that the organization is no longer tax-exempt? If so, do directors or members of a previously exempt corporation need to be reported as beneficial owners?

Identify when the organization lost its exempt status. If the previously held exemption was revoked less than 180 days ago, then the organization still meets the BOI exemption eligibility criteria.

However, if the tax-exempt status was revoked more than 180 days ago, then the entity may be required to file a BOI report with information. The organization will have 30 days after it is no longer eligible for the exemption to file a BOI report. Although nonprofits have no "owners" claiming an ownership interest in the organization, certain officers and directors still have "substantial control" of the organization's operations and therefore must be reported. All "senior

officers”, including the President, Chief Executive Officer, Chief Financial Officer, or any other officer regardless of titled position should be included as beneficial owners.

What information is actually reported?

Each reporting company must file the following information about the entity itself:

- Full legal name of the entity;
- All trade names or “doing business as” names;
- Principal place of business address. This must be a physical address, not a PO Box;
- State of formation (or tribal or foreign jurisdiction);
- [Non-U.S. companies only] State or tribal jurisdiction of first U.S. registration; and
- Taxpayer identification number/employer identification number.

For example:

- Example, Inc.
- D/B/A: Examples Unlimited
- 123 Apple Street, Cincinnati, OH 45202
- Ohio
- EIN: 12-123457

After the identifying information for the company has been reported, the following information for each beneficial owner or company applicant must be reported:

- Full legal name;
- Date of birth;
- Current residential address (exception: business street address accepted for third-party company applicants); and
- Unique identifying number, jurisdiction, and image of one of the following: U.S. passport, state driver's license, identification document issued by a government entity, or foreign passport.

Beneficial owner example:

- Beneficial Owner: Jane Doe Smith
- 01/01/1985
- 12 Home Lane, Cincinnati, OH 45202

- Passport #1234567, United States (image attached)

Company applicant example:

- Company Applicant: Jonathan Robert Smith, Direct Filer
- 01/02/1985
- 123 Business Street, Cincinnati, OH 45202
- Ohio driver's license #TT012345 (image attached)

Note that beneficial owners do NOT have to report the amount of his or her ownership share, although any person with more than a 25% ownership interest must be reported.

Are BOI reports public record?

Only to certain government officials in certain circumstances. Unlike other IRS 990 records or certain Secretary of State business filings, there will not be a publicly searchable database of beneficial ownership information for reporting companies.

Beneficial ownership information will be stored on a secure, non-public database and may only be accessed by federal, state, local, or Tribal officials for “authorized activities related to national security, intelligence, and law enforcement.” Note that foreign officials may also request BOI report information upon written request to a U.S. federal agency.

Companies who submit a BOI report can also consent to share their information with a financial institution. If a company consents to sharing its BOI report with a financial institution, it also allows any body regulating that financial institution access to its BOI report.

What is the cost to file?

There is no filing fee assessed by the U.S Department of Treasury or FinCEN to file a BOI report. Be wary of third-party mailings that purport to be from a government entity requesting a filing fee.

When do I need to file, and how often must I renew?

Entities created or registered to do business before January 1, 2024, will have until January 1, 2025, to file their initial BOI report. If an entity was formed during calendar 2024, it must file its initial BOI report within ninety (90) days of the date the entity received actual notice that its registration was effective, or upon public notice of a secretary of state filing approval, whichever is earlier. Starting January 1, 2025, new entity initial BOI reports are due within thirty (30) days.

Entities do not need to file BOI reports on an annual basis. BOI reports should be submitted with updated or corrected information as necessary, which means that some companies may need to submit an updated BOI report more than others.

What is the penalty for failure to file?

The willful failure to file or update a BOI report carries the potential of a civil fine of up to \$500 per day, or criminal penalties including imprisonment for up to two years and/or a fine of \$10,000. Senior officers of an entity will be held responsible for the failure to file, so be cautious of how initial filing and update responsibilities are delegated.

Persons who willfully withhold information or provide intentionally incorrect information may be held civilly or criminally liable for the failure to accurately and timely file as well.

Court Refuses to Find “Duty of Care” Based on “Beer Run”

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On September 15, 2018, a motor vehicle driven by Jacob Heil struck pedestrian Benjamin Shemwell and Shemwell’s two sons, M.G. and Marco, as they were leaving a University of Kentucky football game.¹ While Benjamin and M.G. sustained minor injuries, 4-year-old Marco was fatally injured, passing away on September 18, 2018.² Heil, a member of the Alpha Tau Omega Fraternity (ATO) at the University of Kentucky, was found guilty of operating a motor vehicle while under twenty-one years of age with a blood alcohol concentration of .02 or above.³

Marco’s father filed a civil lawsuit against ATO, along with numerous other defendants, including eleven individual fraternity members.⁴ One named ATO member was Andrew Thompson. The claims against Thompson were based on the theory that he “facilitated the acquisition of large amounts of beer for a tailgating party attended by Heil on the morning of the accident.”⁵ Thompson, however, asserted that his only participation was 24-hours prior to the accident when he drove another ATO member to a liquor store and that member purchased beer for the party.⁶ Thompson admittedly contributed funds for the purchase of the alcohol and attended the party, but claimed he never met Heil, nor did he see or interact with him at the gathering.⁷

¹ Haellie Gordon is a law clerk at Manley Burke and is a third-year law student at the University of Cincinnati.

¹ *Shemwell v. Thompson*, No. 2023-CA-0021-MR, 2024 WL 56922 (Ky. Ct. App. Jan. 5, 2024), at *2.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.*

Further, the fatal collision occurred two and a half hours after he left the party.⁸ During that time, Heil attended other events where he consumed additional alcohol.⁹

Thompson filed a motion for summary judgment in October 2022 seeking dismissal of all claims against him.¹⁰ Thompson argued he did not owe a duty to Marco and did not furnish alcohol to Heil, and therefore could not be held liable for negligence per se, and his conduct was not the proximate cause of Marco's death.¹¹ The trial court ultimately granted Thompson's motion and dismissed Shemwell's case against him, finding Thompson owed no duty of reasonable care because there was "no evidentiary basis... to conclude Thompson had the ability to control Heil."¹² Further, the court held that no reasonable juror could find that Thompson's actions were the proximate cause of Marco's death due to the two and a half hours between the tailgating party and the fatal collision.¹³ Shemwell filed a timely appeal.

On January 5, 2024, the appellate court affirmed the trial court's dismissal, concluding there was no evidentiary basis to conclude Thompson "could control Heil or had a 'special relationship' with Heil."¹⁴ Because Thompson did not know Heil or supervise him on the day of the accident, Thompson could not control his fellow fraternity brother's behavior.¹⁵

The appellate court emphasized that because Thompson did not hold an office within the Fraternity, nor was he involved in "any Fraternity committees that would have conferred upon him the ability to control Heil's conduct during or after the tailgating party" or otherwise "control the conduct at the Fraternity's social functions," no special relationship existed that would give rise to

⁸ *Id.*

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 8-9.

a legal duty.¹⁶ Likewise, no duty was created simply by Thompson transporting the alcohol provided at the tailgating party.¹⁷ Further, Thompson’s alleged negligent act of picking up and transporting the alcohol was the day prior to the accident and “too remote to constitute the proximate cause” of Marco’s death.¹⁸ And there was “no evidence that Thompson either directly handed an alcoholic beverage to Heil or was authorized to exercise complete control over the direct dispensing of alcohol to the guests.”¹⁹

In sum, and as many readers already know, while parties may not be *directly* involved in an incident, their ability to control an involved party, whether directly or pursuant to a special relationship, plays a significant role in evaluating whether a duty of care is owed. Although this particular case concerned potential liability of an *individual* member, it serves as an important reminder to fraternal organizations, as well, to remain cognizant of the ways in which seemingly innocuous conduct, oversight, or involvement could be used to impose legal obligations in unforeseen ways.

New Lawsuit Stems from Alleged Rape in 1991

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Statutes of limitation typically prohibit lawsuits from alleged incidents that occurred thirty-three (33) years ago. However, in late 2022, the State of New York enacted the New York Adult Survivors Act, which allowed for a one-year window for Plaintiffs to raise sexual assault and rape claims, regardless of if the statute of limitation had previously lapsed. It was because of this law

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 10.

¹⁸ *Id.*

¹⁹ *Id.*

that E. Jean Carroll was able to bring suit against Former President, Donald Trump, which has made national headlines of late.

Just prior to the expiration of this one-year window, a former Syracuse University student filed a lawsuit against Syracuse University, Sigma Chi Fraternity, and its local chapter at Syracuse University, Delta Delta Delta, and individual chapter officers (none of whom were even born at the time of the alleged incident).³⁰

The Plaintiff alleges that the Defendants are responsible for a September 1991 evening where the Plaintiff claims she was raped by a member of Sigma Chi at the Sigma Chi house during a celebration of the new Delta Delta Delta pledges. The Complaint includes allegations of 190-proof alcohol, drinks spiked with ecstasy, rape, and conspiracy.

While this lawsuit is in the earliest of stages, it will likely be challenging for all parties to identify and produce reliable evidence that is more than three decades old. The burden of proof will be on the Plaintiff to demonstrate that the available evidence supports her claim. We will continue to monitor this case and update Fraternal Law readers when the case progresses.

The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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