Brief of Amicus Curiae
Indiana University

IN THE
INDIANA SUPREME COURT

CASE NO. 19A-PL-00457

City of Bloomington Board of Zoning Appeals, Appellant (Respondent below)	)))	Appeal from the Monroe Circuit Court I Trial Court Case No. 53C01-1806-PL-001240
	)	The Honorable Frank M. Nardi, Special Judge
v.	)	
	)	Indiana Court of Appeals
UJ-Eighty Corporation, Appellee (Petitioner below)	))	Case No. 19A-PL-00457

BRIEF OF AMICUS CURIAE TRUSTEES OF INDIANA UNIVERSITY, IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER

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III. STATEMENT OF INTEREST

Indiana University ("IU" or the "University") is a state of Indiana public university located in Bloomington, Indiana and is a statutory body politic of the State. IU has an interest in the outcome of this appeal to ensure its continued ability to protect student health, safety, and well-being, and that of the entire campus and Bloomington communities. The University respectfully refers the Court to its Amicus Brief filed with the Court of Appeals for a full statement of its interest in this case. Pursuant to Ind. App. R. 46(E)(2), undersigned counsel for Indiana University have consulted with counsel for the Appellant/Respondent, whose position Amicus supports, before completing the preparation of this Brief, to ascertain the arguments made in Appellant's Brief to avoid, where possible, the repetition or restatement of arguments.

IV. SUMMARY OF ARGUMENT

IU was granted leave to appear as amicus curiae before the Court of Appeals in support of the City of Bloomington Board of Zoning Appeals. On January 30, 2020, a divided opinion of the Court of Appeals declared the City of Bloomington's ordinance facially invalid and struck down the definition of fraternity house. IU supports Judge Bailey's dissent as a proper application of the law in this case, including that UJ-Eighty has not met its considerable burden of demonstrating that the ordinance is facially invalid.

Contemporaneous with its decision, the Court also granted Appellee's Motion to Strike Portions of IU's Amicus Curiae Brief in Support of the City of Bloomington Board of Zoning

Appeals. Pursuant to Indiana Trial Rule 41,[1] IU files this Brief in support of Appellant's Motion to Transfer to the Indiana Supreme Court.[2]

V. ARGUMENT

1. Permitting the Court of Appeals decision to stand results in increased dangers and safety concerns to IU students and the Bloomington community.

Fraternities, sororities, and other student organizations are fundamentally connected to the colleges and universities that their members attend and are subject to approval and oversight from the college or university. It is critical that an educational institution be able to exercise oversight responsibility over student organizations and their members to try to ensure the continued health and safety of students, the university community, and the larger community in which a college or university is located. Research demonstrates that unregulated fraternities are the sites of hazing, sexual assault, and even fatalities; they pose a clear danger to the safety of students.[3] If the Court

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[1] Indiana Trial Rule 41 states that "if an entity has been granted leave to appear as an *amicus curiae* in a case before the Court of Appeals or Tax Court, that entity need not again seek leave to appear as an *amicus curiae* in any continuation of that case before the Supreme Court." Ind. R. Trial. P. 41.

[2] Although IU is mindful of the fact that the Court of Appeals issued an order striking portions of its Amicus Curie Brief, the order did not cite any support or analysis for its decision. IU is respectfully asking the Supreme Court to review the order of the Court of Appeals that struck potions of the Amicus Brief. To facilitate this review by the Supreme Court, IU is including portions of the Amicus Brief that were stricken by the Court of Appeals. There is currently no clear guidance on the content of an amicus brief as compared to a party brief.

[3] *See* Stuart Rosenberg & Joseph Mosca, *Risk Management in College Fraternities: Guidance from Two Faculty Advisors*, CONTEMPORARY ISSUES IN EDUCATION RESEARCH, Vol. 9, No. 1 (2016); Katherine Mangan, *When Fraternities Go Underground, Problems Surface*, THE CHRONICLE OF HIGHER EDUCATION, June 7, 2017.
See also Risk Research Bulletin, *Greeks and Risk: Lessons from Claims*, *available at* https://www.ue.org/uploadedFiles/RRB%20Greeks%20and%20Risk.pdf
IU respectfully requests that the Court take judicial notice of the above publications. In presenting policy concerns for the Court's consideration, it is inherently necessary to provide facts, information, and insights that are not available to the Court through the record or the parties' briefs because they provide the foundation for IU's policy arguments. The Court can generally take judicial notice of such publications. Ind. R. Evid. 201(a) ("The court may judicially notice: 1) a fact that: (A) is not subject to reasonable dispute because it is generally

of Appeals decision stands, IU is stifled in its ability to facilitate accountability and to help ensure the safety of students and the campus.

The University respectfully refers the Court to its Amicus Brief filed with the Court of Appeals for a full discussion of this argument.

2. The City of Bloomington's (the "City") ordinance is not arbitrary or unreasonable, and it satisfies substantive due process requirements.

In the context of zoning ordinances, substantive due process requires that a zoning ordinance bear a "rational relationship to permissible state objectives." Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 498 (1977) (citing Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)). As the dissent in the Court of Appeals' opinion correctly points out, "the [Bloomington] ordinance—which regulates housing for university students—rationally relates to the permissible objective of protecting students" and therefore satisfies substantive due process requirements.

In concluding that the amendment to the ordinance was arbitrary and capricious, the Court of Appeals opined that UJ-Eighty properly leased its property to a fraternal organization and took no action to otherwise violate the ordinance. What the Court of Appeals fails to consider, however, is that UJ-Eighty properly leased its property to a fraternal organization that was recognized *at the time such lease was signed*. UJ-Eighty had actual or constructive knowledge of the governing City ordinance and the university's requirements when it entered into its lease with TKE; thus UJ-Eighty's "woe is me" position is unpersuasive.[4] If TKE had not

known within the trial court's territorial jurisdiction, or (B) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.")

[4] TKE resided in the property at issue in this case from Fall 2016 until the time of its suspension in February 2018.

been recognized by IU at the time the lease was signed, UJ-Eighty would not have been able to enter into the lease with TKE.

3. The City has not delegated any zoning authority to IU.

The Court of Appeals concluded that the City improperly delegated authority to IU to "determine whether the Property was being used by students in a sanctioned fraternity." This conclusion is in error because the City did *not* delegate any zoning or planning authority to IU. The City enacted the ordinance and the City, not IU, decides whether use of the property complies with the ordinance.

IU has no authority or ability to make zoning or planning decisions or to determine how property owners use their property within the City or elsewhere. The fact that the City's Ordinance's definition of "fraternity/sorority house" includes reference to IU does not constitute delegation of authority to IU, and any such inference or determination is misplaced. The City is still charged with enforcing the ordinance and ultimately ensuring proper land use within its confines. After TKE was suspended and former members continued to reside in the chapter house, IU had no ability to enforce the City's ordinance. IU could only notify the City that individuals were residing in the house following the chapter's suspension. It was the City's responsibility to determine whether the property met the definition of "fraternity/sorority house" and to issue a notice of violation if it did not.

The Court of Appeals' decision relied on Washington ex. Rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), in holding that the City's delegation of authority was unconstitutional. The Court of Appeals' reliance on Roberge is flawed. The Court of Appeals inaccurately depicts the basis for the Supreme Court's decision. The Court of Appeals discusses the case in terms of procedural due process and delegation of authority,

rather than substantive due process and arbitrary government action. As the dissent correctly notes, the constitutional defect of Roberge "was not that the ordinance contained a neighbor-consent provision. Instead, the defect was that the provision did not rationally relate to a permissible state objective." Here, the City ordinance rationally relates to such an objective. Consequently, this Court should disregard Roberge. However, if the Court does consider Roberge, it can be, and should be, distinguished from UJ-Eighty.

In Roberge, the Supreme Court considered an ordinance that permitted the construction of a home for the elderly poor in a particular district only if two-thirds of the property owners within 400 feet of the proposed building site gave written consent. Id. at 117-18. The Supreme Court noted that "'[z]oning measures must find their justification in the police power exerted in the interest of the public…' The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and . . . such *restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."'* Id. at 120-21 (internal citations omitted) (emphasis added). The Supreme Court held that the zoning restriction violated the Constitution because the zoning regulation was *not* consistent with public health, safety, morals, or general welfare. Id. at 121. Moreover, the property owners in Roberge were "free to withhold consent for selfish reasons or arbitrarily," and made the plaintiffs subject to their "will or caprice." Id. at 122.

In Cusack Co. v. City of Chicago, 242 U.S. 526 (1916), , an ordinance prohibited the construction of any billboard in a residential district without the consent of owners of a majority of the frontage on both sides of the street in the block where the board was to be erected. Id. at 527. The Supreme Court held the restriction was constitutional because it was consistent with

public health, safety, morals, or general welfare. Id. at 529-30. The Supreme Court determined the zoning restriction was "not a delegation of legislative power, but [was] a familiar provision affecting the enforcement of laws and ordinances." Id. at 531.

The Supreme Court in Roberge did not overrule Cusack but distinguished the two cases by pointing out that billboards were likely "to endanger the safety and decency of such districts" while a home for the elderly would not. By making this significant distinction, the Supreme Court revealed that the basis of the Roberge decision was not "the attempted delegation of power," but the arbitrary application of the ordinance to the elderly persons' home.[5]

A primary consideration of the Supreme Court in both cases was the relation of the ordinances to matters properly within the purview of government regulation. In Cusack, the facts were "sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts." Cusack, 242 U.S. at 529. However, in Roberge, the evidence did not show any conceivable relationship between the proposed home and the public health, safety, morals, and general welfare of the public. The proposed home did not affect public health, morals, safety, or public welfare, unlike the billboards, which afforded a "convenient concealment and shield for immoral practices, and for loiterers and criminals." Roberge, 278 U.S. at 121.

In this case, the City's ordinance unequivocally relates to the public health, safety, and

[5] Notably, the Court in Hornstein v. Barry, 560 A.2d. 530, 536 (D.C. 1989) also highlighted the fact that Roberge is distinguishable from Cusack "because the regulation there invalidated served no such permissible purpose." Additionally, besides the lack of connection to public health, safety, morals, or general welfare in Roberge, the decision to withhold consent was being made by private property owners. Any role in the current UJ-Eighty situation is by IU, a public entity.

general welfare of the public as it serves to help prevent high risk behavior, like alcohol or drug use, hazing, sexual assault, destruction of property, or the type of behavior that led to TKE's suspension and gave rise to this case, which is likely to occur if members of unrecognized fraternities or sororities are permitted to reside in their chapter houses Additionally, unlike in Roberge, and as discussed more fully below, IU is bound by both state and federal constitutional due process tenets and is not "free to withhold consent for selfish reasons or arbitrarily." It is wholly inaccurate to imply or assume that UJ-Eighty, or any similar landlord, is subject to IU's "will or caprice."

Central to promoting a healthy and safe Greek community is instituting protective measures, like requiring that a Greek chapter be recognized by the institution. The likelihood of dangerous or unhealthy behavior occurring and going unchecked threatens the health and safety of the students, and of the greater campus and Bloomington communities. Because of the necessary and tenable relationship to the public health, safety, morals, and welfare, similar to the ordinance in Cusack, the City's restriction is "not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances." Cusack, 242 U.S. at 531.

4. Even if the City delegated zoning authority to IU, such delegation was proper because IU has a necessary role in oversight of its student organizations, and because of the procedural safeguards and review mechanism in place.

Even if this Court were to determine that the City delegated zoning authority to IU because of the University's role in recognizing fraternities and sororities, such delegation is not improper. It would be illogical and improper for another entity—such as the City or a property owner—to be charged with making the determination about whether a fraternal organization qualified as such, and the City reasonably relies on IU to determine whether a sorority or

fraternity chapter should be recognized. Based on the inherent connection fraternities and sororities have to the university community, IU has a significant interest in overseeing student organizations' conduct and activities so that it can provide a safe, secure environment for its students, campus, and the greater community. IU has the expertise in student affairs and Greek life, and IU is therefore uniquely positioned to establish recognition requirements that serve to promote the health, safety, and overall welfare of its Greek and campus community members.

The City also has a strong interest in ensuring that large groups of unaffiliated students do not reside in common houses to avoid such houses becoming a common nuisance, and to mitigate legitimate concerns related to public health, safety, or general welfare. That interest is expressed in the City's regulation of occupancy of common houses by more than five unrelated adults.[6] The exception to this policy is for fraternal organizations sanctioned by IU. The City only allows large groups of unrelated adults to live together because of the expertise and role of IU in helping to regulate concerns related to the public health, safety, and/or general welfare, and there is a clear relationship between the ordinance and public health, safety, or general public welfare. Without the exception for a "fraternity/sorority house," the TKE house, like other privately-owned fraternity and sorority houses, would not be permitted to exist.

A Greek organization's national headquarters may, in coordination with IU or independently, also suspend its chapter's charter, which would preclude the organization from being recognized by IU. If this Court were to adopt the ruling of the Court of Appeals,

[6] The City of Bloomington's over-occupancy policy is available at: https ://bloomington.in .gov/housing /landlords/over-occupancy. IU would respectfully request the Court take judicial notice of this municipal policy, pursuant to Ind. R. Evid. 201(a).

this would permit a group of students to continue to be housed together even though the group's headquarters determined the group should not exist.[7] It may also be the case that a fraternity or sorority, with the support of its national headquarters, chooses to forego recognition by IU because they do not want to comply with the University's requirements for recognition. In this case, a group of students who acknowledged they do not want to be subject to or follow IU's health and safety measures would be allowed to continue to reside together. If the City is unable to rely on IU's determination as to which fraternal organizations are recognized in order to appropriately enforce its ordinance and thereby mitigate the types of concerns that necessitated the ordinance in the first place, the ability to promote public health and safety is stifled and endangers the campus and Bloomington communities.

Additionally, if the Court finds that the City did delegate authority to the University, such delegation was proper because of the procedural safeguards in place. In holding that the City improperly delegated authority to the University, the Court of Appeals relied on Counceller v. City of Columbus Plan Comm'n, 42 N.E.3d 146, 150-51 (Ind. Ct. App. 2015), *trans. denied*, in addition to Roberge. In Counceller, an ordinance required 75% of property owners in a subdivision to approve further subdivision of a lot within the subdivision. The Court held the ordinance was not an improper delegation of authority because the planning commission possessed the power to waive the provision requiring the approval of the property owners. Id. at 151.

However, the Court of Appeals failed to make a critical distinction between this

[7] This may be in the case in instances where the landlord and national headquarters are not the same entity—that is, a chapter's national headquarters may not be able to require students to vacate the house if they do not otherwise own or control it.

case and Counceller and Roberge. Unlike Counceller and Roberge, which involve the delegation of authority to property owners, if the City did delegate authority, it delegated only limited authority to IU, a statutory body politic that is obligated to comply with both the state and federal constitutions. Unlike the property owners in Counceller and Roberge, IU has constitutionally-sound procedural safeguards, including a right to appeal, to protect students' and student organizations' due process rights.[8]

Due to these procedural safeguards, a review mechanism by the City is not necessary. As the dissent correctly points out, a review mechanism "would burden the City—requiring the expenditure of public resources on matters another arm of government already addressed." The dissent highlights the fact that the "[o]rdinance also ties the definition of a fraternity house to whether all residents are 'enrolled at the Indiana University Bloomington campus.' Bloomington Mun. Code § 20.11.020." Thus, under UJ-Eighty's and the Court of Appeals' reasoning, the City would be required to undertake the considerable burden of reviewing IU enrollment decisions.

UJ-Eighty asks this Court for the benefit of the exception from the zoning restrictions on unrelated adults living within fraternity and sorority houses without having to comply with the requirement set out by the ordinance. UJ-Eighty would require that the status of the organization with the University be deemed irrelevant, or that the City take on the obligation of regulating the more than 4,000 IU students who live in Greek houses on IU's campus. This result is illogical and would create poor public policy as the university is in the best position

[8] A discussion of the safeguards IU has developed to protect students' and student organizations' due process rights is set forth herein in Section VI(6).

to regulate its students, and the City does not have the resources, ability, or expertise in student affairs to effectively regulate those students.

5. **The property at issue in this case has long been tied to Indiana University, and it is appropriate for IU to exercise some degree of control over the property.**

The University respectfully refers the Court to its Amicus Brief filed with the Court of Appeals for a discussion of this argument.

6. **The Court of Appeals' decision fails to recognize the University-level procedures that govern student organizations, including factors that would cause IU to cease to recognize a student organization as such, and a process for the organization to appeal a determination.**

The Court of Appeals concluded that the City's definition of fraternity/sorority house gives IU the authority "to determine whether the Property was being used by students in a sanctioned fraternity," which is unconstitutional and not in accordance with law. The Court noted that under the City's definition, IU can make the decision to recognize or sanction a fraternity "through whatever procedures Indiana University uses to render such a sanction or recognition" and that "the City provided no mechanism for reviewing Indiana University's decision."

The Court's suggestion that IU can decide to sanction a fraternity on any basis or without a basis inexplicably ignores the fact that IU, as a statutory body politic, is bound by the basic tenets of both state and federal constitutional due process. IU must respect and adhere to students' and student organizations' due process rights, which is what IU's conduct procedures are designed to do.

All student organizations at IU are responsible for adhering to IU policy, the Code of Student Rights, Responsibilities and Conduct ("Code"), and other agreements between the

student organizations and IU. The Code[9] sets forth twenty-eight acts of personal misconduct for which IU may discipline a student when such acts occur on IU property, including university-serviced property such as fraternities and sororities. All students and student organizations are provided with notice of their obligation to comply with University policy, the Code, and any other applicable agreement, as well as the potential consequences for non-compliance.

When an allegation is made that a student organization has engaged in misconduct in violation of the Code, IU policy, or another applicable agreement, the IU Office of Student Conduct follows identified procedures (Student Organization Accountability Procedures, hereinafter referred to as "Procedures")[10] to investigate and adjudicate such allegations for all student organizations. The Procedures set forth the process by which allegations of misconduct are investigated; the factors and standard of proof used when determining whether a student organization violated the Code;; the process for disciplinary proceedings; possible sanctions for a violation; and an appeal process.

Although the Court of Appeals bases its decision, in part, on the fact that a property owner cannot appeal a sanction implemented by the University against a student organization, the student organization itself can, as set out in the Procedures. Importantly, pursuant to these formalized procedures, a student organization can have an "advisor"[11] who accompanies the

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[9] The Code is available at: https://studentaffairs.indiana.edu/get-involved/student-organizations/manage-organization/policies/organizational-misconduct.html. Section "H" addresses the responsibility of students to be responsible for their behavior, and to respect the rights and dignity of others within and outside the university community. IU respectfully requests that this Court take judicial notice of the Code, pursuant to Ind. R. Evid. 201(a).

[10] These procedures are available at: https://studentaffairs.indiana.edu/doc/ethics/student-organi zation-procedures.pdf.

[11] According to IU policy, "the student organization may, at its own expense, be accompanied by an advisor or support person of its choice during the disciplinary process."

organization throughout the disciplinary process. Accordingly, nothing precludes a landlord or any other individual from accompanying the organization through the disciplinary process. Moreover, outside from the University's appeal process, any alleged due process violations could be challenged in court. As the dissent appropriately notes, UJ-Eighty has "failed to demonstrate how standards set by the City—as opposed to those adopted by Indiana University in view of its constitutional obligations—would better protect against erroneous deprivation." UJ-Eighty does not suggest what standard(s) the City should have included to guide IU, how such standards should differ from IU's requirements for recognition, or how any such standard would have affected the outcome in this case.

7. The implications of the Court of Appeals' decision reach far beyond Bloomington.

The issues before the Court in this case have implications far beyond Bloomington. Zoning ordinances of other Indiana towns and cities in which colleges and universities are located that define "fraternity" or "sorority" *all* require that a fraternity or sorority have an affiliation with an educational institution[12]. These municipalities recognize the significant connection between fraternities and sororities and the educational institution where their members attend.

Upholding the Court of Appeals' decision would threaten the validity of ordinances of cities and towns across Indiana, all of whom believed it prudent and necessary to require a fraternity or sorority be affiliated with an institution of higher education in order to be recognized as such for zoning purposes. If all of these ordinances are held invalid, that would

[12] IU would refer this Court to its Amicus Brief filed with the Court of Appeals, as well as the Brief filed in the Court of Appeals by the City of Bloomington, for details on other ordinances.

jeopardize the ability of educational institutions across the state to protect the health, safety, and general welfare of the students, campus, and larger community.

VI. CONCLUSION

WHEREFORE, *Amicus Curiae* Trustees of Indiana University respectfully requests that the Court grant transfer, reverse the decision of the Court of Appeals; reverse the decision of the trial court; deny UJ-Eighty Corporation's Petition for Judicial Review; uphold the definition of "Fraternity/Sorority House" as lawful; uphold the decision of the Board of Zoning Appeals; and grant all other just and proper relief in the premises.

Respectfully submitted,

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VII. WORD COUNT CERTIFICATE

I verify that this Brief contains no more than 4,200 words. To the best of my knowledge and belief, this Brief contains 4,177 words, excluding those items excluded by Ind. Appellate Rule 44(C).

/s/Kathryn E. DeWeese
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VIII. CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed the foregoing document using the Indiana E-filing System (IEFS) and that the foregoing document was served upon the following person(s) using the service contact entered in the IEFS via IEFS on the 1st day of May, 2020:

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