No. 21-

In the Supreme Court of the United States

UJ-EIGHTY CORPORATION, PETITIONER

v.

CITY OF BLOOMINGTON BOARD OF ZONING APPEALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Indiana University (IU) holds outsized political influence in the City of Bloomington, Indiana. It is the City's largest employer with nearly 10,000 employees. Its annual budget totals nearly $1.7 billion. And at 1,933 acres, its campus occupies over 12 percent of the City's entire land area, making it the largest landowner, too. IU is also a fierce competitor in the market for student housing—fully one third of IU's roughly 33,000 undergraduates live in IU-owned, -operated, or -affiliated housing. IU tells its students: "On-campus housing is where you belong."

At all times relevant to this case, Bloomington's zoning ordinance effectively restricted the residential use of certain properties near IU to "fraternity/sorority house[s]." Key here, the ordinance provided that such properties could be occupied only by students "sanctioned or recognized" by IU "as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such a sanction or recognition." In effect, IU got to determine which of its students, if any, a neighboring property was allowed to house. Petitioner owns a fraternity house across the street from IU's campus. After IU derecognized the fraternity whose members lived in petitioner's house, the City cited petitioner for violating the zoning ordinance when two of the students failed to move out of the house and into IU's own student housing.

The question presented is whether the Due Process Clause prohibits the government from vesting an economically self-interested entity with regulatory power over its rivals, as the D.C. Circuit has held, or whether it does not, as the Delaware Supreme Court and now the Indiana Supreme Court have held.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *City of Bloomington Board of Zoning Appeals v. UJ-Eighty Corp.*, No. 21S-PL-77 (Ind.), judgment entered on February 23, 2021;
- *City of Bloomington Board of Zoning Appeals v. UJ-Eighty Corp.*, No. 9A-PL-457 (Ind. Ct. App.), judgment entered on January 30, 2020, rehearing denied April 1, 2020; and
- *UJ-Eighty Corp. v. City of Bloomington Board of Zoning Appeals*, No. 53CD1-1806-PL-01240, judgment entered on February 6, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Imagine a powerful corporation—the most powerful in a city—was granted the legal power to exercise governmental authority over its competitors and seize commercial advantage by limiting how they could use their property to compete. No one would dispute that such a grant of governmental power, enabling an economically self-interested actor to control its own rivals, would violate the Due Process Clause. Almost a hundred years of unbroken precedent, dating back to *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936), holds that such a delegation—with its immense likelihood of bias and arbitrary self-interested action—plainly violates due process. The D.C. Circuit just recently reaffirmed it: "We conclude, as did the Supreme Court in 1936, that the due process of law is violated when a self-interested entity is 'intrusted with the power to regulate the business . . . of a competitor.'" *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016) (quoting *Carter Coal*, 298 U.S. at 311). "'[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property' and transgresses 'the very nature of [governmental function].'" *Id.*

Yet that type of delegation is precisely what the City of Bloomington made in this case and precisely what the Indiana Supreme Court permitted in the decision below. Bloomington enacted a zoning ordinance that allowed Indiana University (IU) to determine, for any reason and using "whatever procedures" it wanted, whether neighboring private property owners could compete against IU in the market for housing IU students. *Bloomington Unified Development Ordinance* ("UDO") § 20.11.020. To tighten the vise, Bloomington made renting to IU students the *only* permitted residential use under the zoning ordinance (other than a group care home

or "university"). In essence, Bloomington gave IU—by far the richest and most politically powerful entity in the City—absolute authority to destroy the livelihoods of its neighboring property owners who are IU's own direct competitors in the market for student housing.

The result below is inconsistent with this Court's precedents and deepens a split with the D.C. Circuit's opposite holding about the proper interpretation of the Due Process Clause. This issue is also recurring and important. The same drama plays out every year in university towns across the United States. Dozens, likely hundreds, of zoning ordinances nationwide delegate the power to regulate neighboring land use to local universities in derogation of the requirements of the Due Process Clause. And state appellate and supreme courts are divided over their constitutionality. When the city of University Park, Pennsylvania tried to delegate a similar power to regulate neighboring property owners to Pennsylvania State University (another large school with outsized power in its city), the Pennsylvania Court of Appeals said it was an unconstitutional delegation. *425 Prop. Ass'n of Alpha Chi Rho, Inc. v. State Coll. Borough Zoning Hearing Bd.*, 223 A.3d 300, 313 n.9 (Pa. Commw. Ct. 2019). By contrast, when the city of Newark, Delaware delegated the same power to the University of Delaware, the Delaware Supreme Court concluded it posed no constitutional problem. *Schweizer v. Bd. of Adjustment of City of Newark*, 980 A.2d 379, 383-85 (Del. 2009).

This case is enormously important to fraternities and sororities nationwide, organizations that this Court has recognized have a long tradition of providing students with a degree of autonomy and independence from the universities those students attend. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690-91 (2010) (noting that

fraternities and sororities "commonly maintain a presence at universities without official school affiliation" that provides a "substantial alternative channel[]" for the exercise of students' First Amendment rights). In addition to the significant economic harms that these zoning ordinances inflict, the ordinances seriously undermine the autonomy and independence crucial to the fraternity and sorority experience.

This Court's intervention is necessary to resolve a conflict on a frequently recurring issue, to reaffirm the Court's bedrock century-old precedent setting forth the basic requirements of due process, and to protect the fraternity and sorority experience for tens of thousands of students across the United States from overreach by politically powerful, economically self-interested colleges and universities. The Court should grant certiorari.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (Pet. App. 1a-13a) is reported at 163 N.E.3d 264. The opinion of the Indiana Court of Appeals (Pet. App. 14a-37a) is reported at 141 N.E.3d 869. The opinion of the trial court (Pet. App. 38a-44a) is unreported.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on February 23, 2021. Pet. App. 1a. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

At all relevant times, the City of Bloomington, Indiana's *Bloomington Unified Development Ordinance* ("UDO") in § 20.02.500 permitted the following uses of properties located in the City's "Institutional" zoning district:

Institutional (IN); Permitted Uses

* cemetery/mausoleum
* communication facility
* community center
* fraternity house/sorority house
* golf course
* government office
* government operations (non-office)
* group care home for developmentally disabled
* group care home for mentally ill
* group/residential care home
* library
* license branch
* museum
* outdoor storage
* park
* parking structure
* place of worship
* police, fire, or rescue station
* post office
* recreation center
* school, preschool
* school, primary/secondary
* school, trade or business
* transportation terminal
* university or college
* utility substation and transmission facility

The City of Bloomington's UDO in § 20.11.020 included the following definition:

> **Fraternity/Sorority House:** 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 the 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.

Bloomington UDO, § 20.11.020.

STATEMENT OF THE CASE

A.1. Bloomington, Indiana is an archetypal college town. It is the county seat of Monroe County in central Indiana. A group of settlers established the city in 1818. They were so impressed with what they saw as "a haven of blooms" that they named their city "Bloomington." Bloomington spans 23.42 square miles, with an estimated population of 85,755, and an annual budget of $166 million. Bloomington is home to Indiana University Bloomington, the flagship university of the Indiana University system of 8 campuses, often referred to simply as Indiana University (IU). It is the largest university in the state of Indiana. IU's campus spans just over 3 square miles, constituting one-eighth of the land area in the city. Its approximately 50,000 students comprise more than half of the city's residents. And IU's annual budget of $1.7 billion is ten times larger than the city's.

2. IU was established in 1820 as the State Seminary. The school later expanded to become Indiana College in 1828 and then Indiana University in 1838. The Indiana Code establishes IU's Board of Trustees as a "body politic" (i.e., a corporation) of the state of Indiana. IND. CODE ANN. § 21-20-2-2; *State ex rel. Robinson v. Carr*, 12 N.E. 318, 319-20 (Ind. 1887) (noting IU's Board is a "technically private" "corporate body"). The Board "is invested with the power to possess, take, and hold, in their corporate name, all the real and personal property of the university, for its benefit, and is authorized to expend the income thereof for the benefit of the institution. It is authorized to make all by-laws necessary to carry into effect the general purposes for which the institution was organized." *Id.*; *accord* IND. CODE § 21-14-2-1(b) (Board may set fees, tuitions, and charges); IND. CODE § 21-29-2-1(b) (invest funds); IND. CODE § 21-31-2-1(b) (control and dispose of property); IND. CODE § 21-31-2-4 (similar); IND. CODE § 21-36-3-3 (similar); IND. CODE § 21-36-3-4 (similar).

3. IU competes with other local property owners in the market for student housing in Bloomington. IU bills itself as "the flagship residential" campus of the Indiana University system. IU, *Mission*, https://bit.ly/3j4EWbU. It operates 14 residence halls and 9 apartment complexes. IU, *Residential Programs and Services — Locations* (2020), https://bit.ly/3wMbWtr. Approximately 10,000 students live in IU properties on IU's campus. Raiha Zainab, *Living on Campus? Here's What to Expect*, IND. DAILY STUDENT (July 23, 2020), https://bit.ly/3gWcKoZ. In competition for student housing, IU tells its students that "[o]n-campus housing is where you belong." IU, *Residential Programs and Services — Housing* (2020), https://bit.ly/3gNYboA. IU further touts that its own housing offers its students "competitive pricing compared to our peer institutions and the local rental housing

market." Bethany Nolan, *On-Campus Residence Hall Rates Approved for 2021-22*, NEWS AT IU (Feb. 5, 2021), https://bit.ly/2U1uya8. Meanwhile, the University earns tens of millions of dollars annually from student housing. *See id.* IU has even issued "consolidated revenue bonds": "unsecured obligations of the university that carry a promise of repayment that will come first from net income generated from housing facilities" and other auxiliary revenue sources. IU, *Annual Financial Report 2019-2020* at 46 (2020), https://bit.ly/3gPYQFZ.

IU's pricing power in the student housing market is illustrated by the fact that IU had not upgraded or constructed new student housing between 1969 and 2010. *See Big Plans to Expand IUB on-Campus Housing*, RESIDENCE HALLS (IU Alumni Ass'n, Bloomington, Ind.), Winter 2007-08, at 1 (2008), https://bit.ly/3xQakPh; Office of the President, *A University Poised for a Dynamic Future* (May 4, 2021), https://bit.ly/3xNbUkZ ("IU Bloomington is a major residential campus" but housing "had been largely unchanged since the 1960s"). In the early 2000s, IU hired outside consultants to advise on its student housing plans. IU, *Residential Programs and Services — History of RPS*, https://bit.ly/3h1o0jN. Only after determining that it "had fallen behind its Big Ten and other peers in the quality of its student accommodation and facilities" did IU decide to spend $625 million renovating its student accommodations. IU, *The Bicentennial Strategic Plan for Indiana University* (approved Dec. 5, 2014), https://bit.ly/2UsAHwp. IU spent significant time and resources centering student life in campus buildings, implementing "the Old Crescent plan" to transform historic buildings "into a vibrant hub of student and academic life" and renovating "dilapidated" student dormitories into "a vitally important part of students' academic and personal development." Office of the President, *Defining the 21st*

Century Public University (Sept. 27, 2011), https://bit.ly/3xLcS1l; Office of the President, *The State of Indiana University at the Bicentennial* (Sept. 24, 2019), https://bit.ly/3zNhdmm.

B.1. Petitioner UJ-Eighty Corporation owns real property located at 1640 North Jordan Avenue in Bloomington. Pet. App. 3a. The property was built in 1984 and purchased by petitioner in 2002. *Id.* The property has been used continuously as a fraternity or sorority house since its construction in 1984. *Id.*

2. Photos of the property and maps showing its location relative to IU appear in Appendix F (Pet. App. 68a-71a). As the photos illustrate, 1640 North Jordan Avenue is not a typical residential property. It is directly across from IU's campus, on a street consisting exclusively of houses that were designed to be fraternity or sorority houses. The property was clearly designed for communal living. It has a full-size basketball court in its backyard and a beach volleyball court in the front yard. The interior is comprised exclusively of bedrooms and shared living spaces. The bedrooms were designed for multiple occupancy of 2-5 students. The bathrooms, which include multiple open showers and toilets within the same space, are shared by all the occupants of the property. The property has one kitchen designed to serve the collective needs of all of the occupants. The common spaces are large and open, as they were designed for the purpose of hosting gatherings, meetings, and group study. This property, which was built to be a fraternity house surrounded by other fraternity and sorority houses, could not be feasibly utilized for any other purpose.

3. The property is located in Bloomington's "Institutional" zoning district, which allowed 26 permitted uses and nine conditional uses. Bloomington, Ind. Mun. Code §§ 20.02.500-10 (2017). At the time of the events of this case, there were only five non-conditional residential

permitted uses, including "[f]raternity house/sorority house." *Id.* § 20.02.500. The others were three different types of group care homes and "[u]niversity or college." *Id.*

When petitioner purchased the property in 2002, the governing Ordinance—which defines various zoning-related terms—defined "[f]raternity or [s]orority" as a "building or portion thereof . . . for groups of unmarried students in attendance at an educational institution," with "occupancy . . . limited to members of a specific fraternity or sorority." Bloomington, Ind. Mun. Code § 20.02.01.00 (1995). In 2015, Bloomington amended the Ordinance's definition to mandate that a property qualifies as a fraternity or sorority house for zoning purposes only if "all students living in the building are enrolled at the [IU] Bloomington campus; and [IU] has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures [IU] uses to render such a sanction or recognition." Bloomington, Ind., Ordinance 15-26 (Dec. 16, 2015) (later codified as part of Bloomington, Ind. Mun. Code § 20.11.020).

In August 2016, petitioner leased the property to the Gamma-Kappa chapter of Tau Kappa Epsilon, Inc. (TKE), a fraternity recognized by IU. Pet. App. 4a. The lease was to run through May 2019. *Id.* About 90 members of the fraternity lived at the house each year of the lease.

Around February 8, 2018, the individuals residing at the property read in the *Indiana Daily Student* that TKE was no longer recognized by IU or by TKE's national organization and that the occupants could no longer reside at the property because of this loss of recognition. Meeting Minutes, City of Bloomington Bd. of Zoning Appeals 34-35 (May 24, 2018), https://bit.ly/2SURF6s. No other notice was ever given to any of the occupants. *Id.*

No other justification for the University's notification was provided. *Id.* The University then told the occupants that they could move into the University's own dormitories, if they paid the applicable dormitory fees. *Id.* Most occupants left the property and moved into the University's dormitories or found other housing alternatives. *Id.*

Fourteen days later, after the City of Bloomington learned that two of the occupants had failed to vacate the house, it mailed petitioner a Notice of Violation on February 22 and a second Notice on February 28. Pet. App. 4a. The Notices asserted that because the property no longer met the Ordinance's definition of a fraternity house by virtue of IU's derecognition of TKE, petitioner was engaging in "an illegal land use" by continuing to use the property as a residence. *Id.* The Notices stated that every violation would result in a $2,500 fine and that "[e]ach day a violation is allowed to continue is considered a distinct and separate violation." Pet. App. 54a, 56a. No fines were issued against petitioner at the time of the February Notices. Pet. App. 4a.

C.1. Petitioner appealed to the Board of Zoning Appeals. Among other things, petitioner explained that the Ordinance constituted an "unlawful delegation" that "has allowed IU to profit from Applicant's hardship because IU has a financial interest in causing the students who are members of TKE to move out of the UJ80's Subject Property and into IU housing. In other words, IU is deriving financial gain from the Subject Property being prohibited from renting its house to the student members of TKE or any other fraternity or sorority." Pet. App. 58a. The Board denied petitioner's appeal. Pet. App. 4a.

2. Petitioner then sought judicial review in the Monroe Circuit Court. Pet. App. 4a. As relevant here,

petitioner argued that Bloomington violated the Due Process Clause of the Fourteenth Amendment by delegating to IU the authority to regulate petitioner's use of its property. Pet. App. 42a-43a. The Monroe Circuit Court struck down the Ordinance's definition of fraternities and sororities on that basis and because the ordinance violated the Indiana Constitution. *Id.* The Board appealed.[1] Pet. App. 4a, 14a.

3. IU filed an *amicus curiae* brief in support of the Board's appeal. *See* Br. of Amicus Curiae Trustees of Indiana University in Supp. of Appellant, 141 N.E.3d 869 (Ind. Ct. App. 2020) (No. 19A-PL-457), 2019 WL 8807895.[2] IU argued that it needed the authority to regulate neighboring property owners to effectively discipline fraternities. *See* 2019 WL 8807895 at *4, *8-12, *15-17; *see also* 2020 WL 2543557 at *5-6, *10-14. "Permitting the trial court's decision to stand" would mean that "[m]embers of no longer recognized fraternities or sororities would be permitted to continue living in their chapter houses after they cease to be recognized by IU." 2019 WL 8807895 at *10. But "[a] group of 50-100 unrelated men living without regulation in an unsanctioned fraternity house is a recipe for damage to the property and threats to life and the possibility of injury." *Id.* "Research demonstrates that unregulated fraternities . . . pose a clear danger to the safety of students." *Id.* "Although IU could try to discipline individual members, this proves to be difficult in practice

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[1] While the appeal was pending, Bloomington amended the Ordinance's definition to eliminate the delegation of authority to IU to define "fraternities" and "sororities" for purposes of the zoning ordinance. Pet.App.4 n.3.

[2] IU filed essentially the same brief in the Indiana Supreme Court. *See* Br. of Amicus Curiae Trustees of Indiana University in Supp. of Appellant's Pet. to Transfer, 163 N.E.3d 264 (Ind. 2021) (No. 21S-PL-77), 2020 WL 2543557.

given the reluctance of individuals to provide information and/or evidence against a single student rather than against an entire organization." *Id.* at *11. "It is also inefficient . . . and does not allow IU to effectively mitigate . . . the problematic culture, attitude, and behavior fostered by the organization." *Id.* IU also explained the case's statewide importance: "To strike down the ordinance would threaten the validity of ordinances of cities across Indiana." *Id.* at *21; *see* 2020 WL 2543557 at *16 (similar).

4. Notwithstanding IU's arguments, a divided Court of Appeals affirmed the trial court's decision. *Id.* The majority found that Bloomington "delegated its legislative authority to [IU] to determine whether the Property was being used by students in a sanctioned fraternity" with "no mechanism for reviewing [IU]'s decision." Pet. App. 28a. The Ordinance's definition was "clearly arbitrary and unreasonable" because it "created a situation where [IU] was allowed to act, but UJ-Eighty would be punished" without taking any "affirmative action to violate the Ordinance." Pet. App. 29a. Finding the due process violation dispositive, it declined to reach the Indiana Constitution or other issues. Pet. App. 16a n.1. The Board sought transfer to the Indiana Supreme Court. Pet. App. 4a.

5. At oral argument in the Indiana Supreme Court, multiple justices recognized the gravity of the issues involved, as the following exchanges between the Court and Bloomington Assistant City Attorney Larry Allen show:

> **JUSTICE DAVID:** So you think they would not necessarily be barred from becoming an apartment complex?
>
> **MR. ALLEN:** An apartment complex is not one of the permitted uses for an institutional zoning in Bloomington. The other four uses potentially could

> be a college or university itself, there are three types of group care homes—
>
> **JUSTICE DAVID:** That's my concern, and maybe it's totally unfounded, that there's no mechanism by which to adequately protect these landowners—property owners—in these situations where the city has essentially given the University this authority to make some of these decisions, and my concern is that if the University says "no" then these property owners go from fraternity/house to virtually very few if any options: sell it to the university or find another fraternity or sorority.

Oral Argument at 8:53-9:52, *City of Bloomington BZA v. UJ-Eighty Co.*, No. 21S-PL-77 (Ind.), *available at* https://bit.ly/3yaw74L. And later:

> **JUSTICE SLAUGHTER:** With that Mr. Allen, let me interrupt and ask you about the health, safety, welfare. You presume, and maybe this is largely the case, that IU is going to be acting as regulator to ensure the health-safety-welfare of the students and the community. What if instead IU is acting not in its regulatory capacity but in its proprietary capacity, its commercial interests? IU owns a bunch of residence halls, and it presumably wants those residence halls filled with students that are paying the freight. If IU says "you know, we're losing a lot of residence hall residents to Greek Houses, so we're going to shut down a few fraternities and sororities, not because it's necessarily in the interests of health and safety but because they're competitors of ours in the marketplace for on-campus institutional housing." What concerns—how do we address those concerns?
>
> **MR. ALLEN:** Well your honor, first of all, again, this is where the fact that IU is bound by the due process protections for the student organizations themselves, because they do have remedies there—

> **JUSTICE SLAUGHTER:** But those obligations are to the student organizations. How does that protect the property owner? They have no such obligations to the property owner, do they?
>
> **MR. ALLEN:** They don't have such obligation to the property owner.

Id. at 13:57-15:08.

6. Notwithstanding these concerns, the Indiana Supreme Court granted transfer and reversed. Pet. App. 4a. The court explained that petitioner's "arguments under the state and federal constitutions hinge on the same allegation: Bloomington improperly delegated the unilateral authority to define 'fraternity' and 'sorority' to IU." Pet. App. 6a. The court held that both claims failed because "Bloomington never empowered IU to define fraternities and sororities, a power IU already clearly possesses. Bloomington, rather—through the legislative process—defined fraternities and sororities based on their relationship with IU." *Id.* Accordingly, "[b]ecause there was no improper delegation or other denial of due process, there were no constitutional violations." *Id.*

Turning first to petitioner's state constitutional claim, the court held that Indiana had not unlawfully delegated legislative power to a private actor because "Bloomington—not IU"—took the relevant legislative action "when it wrote and enacted the Ordinance." Pet. App. 7a. According to the court, Bloomington did not delegate legislative authority to IU because the Ordinance "merely defined certain land uses based on their relationships with relevant outside organizations." *Id.* "While the Ordinance's 'through whatever procedures' language for fraternities and sororities was broad, it did not turn a definition into a delegation." *Id.* "The Ordinance … helped define fraternities and sororities by ensuring their relationship with IU was the

deciding factor, not the process that created the relationship." *Id.* The court concluded "[t]hat was a permissible legislative judgment, not an impermissible delegation." *Id.*

Turning to the due process claim, the court explained that "for Bloomington to have violated" petitioner's rights under the Due Process Clause, "some improper delegation to IU or procedural irregularity was necessary." Pet. App. 8a. The court stated that "[b]ecause we find none, we find no violation." *Id.*

In reaching that conclusion, the court rejected petitioner's reliance on two due process cases, *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Counceller v. City of Columbus Plan Commission*, 42 N.E.3d 146 (Ind. Ct. App. 2015). Pet. App. 8a-9a. In both cases, a local zoning ordinance was held to violate due process because it gave neighboring landowners the right to dictate the use to which a property owner could put his property. *See id.* But the court decided that "[n]either case is on point" because "[i]n both *Roberge* and *Counceller* (absent a waiver), the landowners were required to obtain their neighbors' consent to use their land." Pet. App. 9a. Because petitioner "never had to seek IU's consent to use its land[,]" the court reasoned, "IU had no direct power to prohibit [petitioner] from lawfully using its land." *Id.* "Bloomington never delegated any authority to IU. IU had no power to make or amend zoning law, and its power to regulate and discipline students and student organizations—including fraternities—comes from the General Assembly, not Bloomington." *Id.* "It was not IU that decided whether [petitioner] or any other landowner violated Bloomington's zoning laws. Bloomington, through the [Board of Zoning Appeals], ultimately decided." Pet. App. 10a. "If [petitioner] is unhappy with Bloomington's zoning laws or the [Board of Zoning

Appeals], it can seek change through the political process." *Id.*

The Court determined that "[t]here is another important distinction between this case and *Roberge* and *Counceller*." Pet. App. 10a. In those cases, "private landowners influenced land use." *Id.* "But here, when IU regulates students and student organizations—including fraternities—it is a state actor and must abide by the state and federal constitutions." *Id.* The court stated that petitioner needed to "show[]" that IU had "acted improperly . . . when it revoked TKE's sanction," and that petitioner had merely "hint[ed]" that IU had "an ulterior motive to move [fraternity members] out so that they would then be forced to go [live] on campus." Pet. App. 10a-11a, 10a n.4.

The court also determined that the Delaware Supreme Court's decision in *Schweizer v. Board of Adjustment of City of Newark*, 980 A.2d 379 (Del. 2009), which rejected a procedural due process challenge to a similar zoning ordinance, was "much more on point" than *Roberge* and *Counceller*. Pet. App. 11a. And the court "agree[d] with *Schweizer*." Pet. App. 12a. According to the court, "[j]ust like the landowners there, [petitioner] has failed to show it was deprived of due process aside from the alleged delegation." *Id.* Petitioner "never establishes it was prohibited from supporting TKE during IU's proceedings." *Id.* "As TKE's landlord, it would have been reasonable to remain aware of any potential problems and support its tenant as necessary." Petitioner "also never alleged that IU lacked authority to discipline TKE." And petitioner "failed to identify any procedural irregularities with IU's process for revoking TKE's sanction, including any constitutional or statutory violations." Thus, "[a]s in *Schweizer*," the court concluded that petitioner failed to "establish[] that any action by IU,

Bloomington, or the [Board of Zoning Appeals] violated the Fourteenth Amendment." *Id.*

The Indiana Supreme Court summed up its holding as follows: "The Ordinance did nothing more than define fraternities and sororities based on their relationship with IU. It was not a delegation of power; rather, it was a legislative decision on how to define a certain land use. And [petitioner] failed to establish how, outside the alleged delegation, it was denied due process. Thus, Bloomington did not violate the Fourteenth Amendment." *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

The Due Process Clause establishes a bedrock constitutional protection against delegations of regulatory power to self-interested actors. Yet federal and state courts are now divided into two camps over whether such delegations are always unconstitutional, or, instead, unconstitutional only in narrow circumstances. The D.C. Circuit and the Commonwealth Court of Pennsylvania are on one side of the split. The Indiana Supreme Court and the Delaware Supreme Court are on the other.

This case provides an excellent opportunity for this Court to resolve this conflict. And it is vital that the Court do so. This question is frequently recurring because numerous zoning ordinances nationwide improperly delegate the power to control the use of fraternity and sorority property to neighboring universities. The Due Process Clause's limits on delegations to self-interested competitors have, for decades, ensured democratic accountability, protected America's free market, and safeguarded the fraternity and sorority experience for tens of thousands of students nationwide. The decision

below upends all of that. It is at war with nearly a century of this Court's due process cases. It cannot stand.

I. The decision below deepens a division among state appellate courts and federal courts of appeals

The Indiana Supreme Court's decision deepens a division between state appellate courts and the D.C. Circuit about the limitations the due process clause places on delegations of regulatory power. The D.C. Circuit has squarely held that delegations of power to self-interested entities violate the Due Process Clause, even where, as here, those entities are quasi-governmental entities, and even where there has been no showing of self-dealing in a particular case. The Pennsylvania Commonwealth Court has reached the same conclusion. In contrast, the Delaware Supreme Court and now the Indiana Supreme Court, confronting identical constitutional challenges, have held that these kinds of delegations do *not* violate due process. Only this Court can settle this conflict.

A.1. The D.C. Circuit held in *Association of American Railroads v. U.S. Department of Transportation* ("*American Railroads*"), 821 F.3d 19 (D.C. Cir. 2016), that delegations of regulatory power to self-interested entities—just like the one at issue in this case—violate the Due Process Clause.

American Railroads was the second iteration in the D.C. Circuit of a constitutional challenge to § 207(a) and (d) of the Passenger Rail Investment and Improvement Act of 2008. Subsection 207(a) granted Amtrak—a Government-chartered corporation—a joint role alongside the Federal Railroad Administration (FRA) in promulgating rules governing private companies in the same industry. *See* Pub. L. No. 110-432, Division B,122 Stat. 4848, 4916 (codified generally in Title 49). Subsection 207(d) of the Act further provided that if Amtrak did not exercise its rulemaking power, a private

arbitrator could step in and issue the federal regulations. *See* 122 Stat. at 4917.

In 2013, the D.C. Circuit struck down Section 207 as an impermissible delegation of regulatory power to a private corporation. *See Ass'n Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013). This Court vacated and remanded for further proceedings, holding that Amtrak should be deemed a Government entity "for purposes of determining the validity" of the regulations jointly issued by Amtrak and the FRA pursuant to Section 207. *See Dep't of Transp. v. Ass'n Am. R.Rs.*, 575 U.S. 43, 46 (2015). "Although Amtrak's actions here were governmental," this Court stated, "substantial questions respecting the lawfulness of the [regulations] . . . may still remain in the case." *Id.* The Court specifically identified the argument that "Congress violated the Due Process Clause by giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry" as an issue that "should be addressed . . . on remand." *Id.* at 55-56.

On remand, the D.C. Circuit again held Section 207 unconstitutional. *American Railroads*, 821 F.3d 19. As relevant here, the court held that Section 207 "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor [i.e., Amtrak] to regulate its competitors." *Id.* at 23. Relying on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the court devoted ten published pages to explaining why Subsection 207(a)'s grant of rulemaking authority to Amtrak violated the Due Process Clause. *Id.* at 27-36. The D.C. Circuit "conclude[d], as did the Supreme Court in 1936, that the due process of law is violated when a self-interested entity is 'intrusted with the power to regulate the business . . . of a competitor.' " *Id.* at 31 (quoting *Carter Coal*, 298 U.S. at 311). That is because "the Due Process Clause effectively guarantees the regulatory power of the federal

government will be wielded by 'presumptively disinterested' and 'duly appointed' actors who, in exercising that awesome power, are beholden to no constituency but the public good." *Id.* at 39 (quoting same). The court of appeals explained that the Due Process Clause "puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies"—but not both. *Id.* at 36.

The D.C. Circuit explicitly rejected the argument that the legislative scheme was constitutional because "the potential for bias" in Amtrak's exercise of the delegated regulatory power was "remote" "on account of Amtrak's political accountability." *Id.* at 30 (citation omitted) The relevant question, the court held, was whether there was "any potential for bias." *Id.* Thus, "*[w]herever* Amtrak may fall along the spectrum between public accountability and private self-interest, the ability … to co-opt the state's coercive power to impose a disadvantageous regulatory regime on its market competitors would be problematic." *Id.* at 31 (emphasis added).

The court also explicitly rejected the argument that Amtrak's quasi-governmental nature eliminated the due process violation. *See id.* at 31-32. "[C]oncluding [that] Amtrak is not an autonomous private enterprise is not the same as concluding it is not economically self-interested." *Id.* at 32. "Amtrak's self-interest is readily apparent when viewed, by contrast, alongside more traditional governmental entities that are decidedly not self-interested." *Id.* Unlike Amtrak, "[t]he government of the United States is not a business that aims to increase its bottom line." *Id.* "Amtrak's charter stands in stark contrast" to a more traditional government entity. *Id.* "Its economic self-interest as it concerns other market participants is undeniable." *Id.*

A.2. The Commonwealth Court of Pennsylvania reached a similar conclusion on facts nearly identical to

the facts here in *Property Association of Alpha Chi Rho, Inc. v. State College Borough Zoning Hearing Board*, 223 A.3d 300, 313 n.9 (Pa. Commw. Ct. 2019). *Alpha Chi Rho* involved a challenge to a local zoning ordinance much like Bloomington's ordinance. *See id.* at 303 n.2. That ordinance required a "Fraternity House" to house "residents [who] are students of the Pennsylvania State University (hereinafter called University) and are members of a University recognized fraternity or sorority." *Id.* The ordinance further provided "University recognition shall be determined by the University through its procedures as may be established from time to time." *Id.* The plaintiff in *Alpha Chi Rho* argued that "the Zoning Ordinance was invalid because the definition impermissibly delegated regulatory and decision-making authority to a third-party entity, *i.e.*, Penn State." *Id.* at 303.

The court agreed.[3] *Id.* at 313. It explained that "[u]nder the Zoning Ordinance, Penn State has sole and unbridled discretion regarding the recognition of fraternities and may revoke recognition at will." *Id.* Additionally, there were "no procedural mechanisms in the Zoning Ordinance to protect against Penn State exercising 'administrative arbitrariness and caprice.'" *Id.* Accordingly, the court held that it "would be constrained to conclude that . . . the Zoning Ordinance constitutes an unconstitutional delegation of lawmaking authority." *Id.*

A.3. There is no doubt that, under the analysis in *American Railroads* and *Alpha Chi Rho*, the delegation at issue in this case violates the Due Process Clause. Just like the delegations challenged in those cases,

[3] The Commonwealth Court's footnoted discussion of this issue, though an alternative holding, has been treated as binding precedent in Pennsylvania. *See Southpointe Golf Club, Inc. v. Bd. of Supervisors of Cecil Twp.*, 250 A.3d 495, 504 (Pa. Commw. Ct. 2021).

Bloomington's Ordinance delegated to economically self-interested entities the power to regulate competitors.

B.1. In contrast to the D.C. Circuit and the Commonwealth Court of Pennsylvania, the Delaware Supreme Court held in *Schweizer v. Board of Adjustment of City of Newark*, 980 A.2d 379, 383-85 (Del. 2009), that delegations of zoning authority to self-interested entities are not unconstitutional delegations and do not violate due process. The zoning ordinance in *Schweizer* prohibited fraternity and sorority buildings within city limits. *Id.* at 383-84 (quoting Newark C. § 32-51(b)). Fraternity and sorority buildings that predated the ordinance were permitted to remain as lawful nonconforming uses. *Id.* The ordinance provided, however, that a fraternity suspended by the University of Delaware for a period of more than one year "shall vacate the building" and that such a building's use as a fraternity "shall be terminated immediately upon such University suspension." *Id.*

The Delaware Supreme Court rejected non-delegation and due process challenges to the ordinance. *See id.* at 382-86. Addressing the non-delegation challenge, the court held that the ordinance "does not delegate any legislative function to the University." *Id.* at 385. According to the court, "[t]he University decided only whether [the fraternity] violated the University's rules on the conduct of fraternities and the appropriate sanction for any violation." *Id.* As a consequence, the court concluded that the ordinance did not entail a delegation of legislative power at all and hence not an unconstitutional one.

In reaching this conclusion, the court found the university's status as a state-chartered corporation dispositive. *See id.* at 385 & n.15. The university's "decision to suspend [the fraternity] was neither a legislative nor a zoning decision; rather, it was a quasi-judicial act within the power entrusted to the University

by state law." *Id.* at 385. "Because fraternities are not created nor licensed by the City, the City looks to the University, in a manner similar to a licensing board, to determine if a fraternity is in good standing." *Id.* at 385 n.15.

Addressing the due process challenge, the court held that the absence of a showing of "any procedural irregularity in the University proceeding" doomed the challenge. *Id.* at 386.

B.2. The Delaware Supreme Court's permissive approach eliminates the due process check on the government's ability to delegate legal authority to self-interested actors to regulate their rivals. Its approach is irreconcilable with the decisions of the D.C. Circuit and Commonwealth Court of Pennsylvania that such arrangements are unconstitutional. Only this Court is capable of resolving this entrenched disagreement.

II. The decision below is wrong

The conflicting holdings of the D.C. Circuit and two state supreme courts would warrant review even if the Indiana Supreme Court's ruling were correct. But certiorari is all the more necessary because the Indiana Supreme Court's ruling contravenes nearly a century of this Court's due process precedent.

A. The court below was wrong that Bloomington's Ordinance did not delegate any power to IU. Pet. App. 6a. A zoning ordinance that empowers a university to eliminate a permitted use of a neighboring property through "whatever procedures the university uses" is, "[b]y any measure . . . 'legislative delegation in its most obnoxious form.'" *American Railroads*, 575 U.S. at 62 (Alito, J., concurring) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). Under the Ordinance, IU could have set any rules (or no rules at all) for recognizing and derecognizing fraternities and sororities at any time. It

could have derecognized any individual fraternity or sorority for any reason (or no reason). And it could have carried out those derecognitions using "whatever procedures" it chose. Nothing in the Ordinance would have prevented IU from derecognizing all fraternities and sororities *en masse*, selectively derecognizing enough fraternities and sororities to fill empty rooms in IU's own student housing in a given year, or threatening to derecognize any single fraternity or sorority as a way to pressure the owner of its fraternity or sorority house into selling its land to the university at a discount.

The Indiana Supreme Court's claim that the zoning ordinance merely "define[d] fraternities and sororities by . . . their relationship with IU" is obviously wrong: that claim could be made about any delegation of regulatory power. The power to define is the power to regulate. It is manifestly a delegation of power. Contrary to the decision below, Pet. App. 7a, the similarity between the delegation to IU and a delegation to a professional licensing board is immaterial to the question of *whether* there was a delegation. Delegations to professional licensing boards are still delegations. They are typically constitutionally permissible because such boards are *not* self-interested economic competitors of the very entities they license, but they are delegations of power all the same.

B. The court below was also wrong in concluding that the delegation here comports with due process. Pet. App. 8a-12a. A zoning ordinance that delegates regulatory power to a university directly competing with the entities it regulates violates the Due Process Clause.

1. In the early 20th century, this Court struck down numerous laws that purported to vest one economic rival with the power to regulate or restrict the activities of another. The rule that emerged was straightforward and has not changed: economic rivals cannot regulate each other. *See* Alexander Volokh, *The New Private-*

Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges, 37 HARV. J.L. & PUB. POL'Y 931, 943 (2014).

In two cases involving zoning ordinances that allowed property owners to impose restrictions on neighboring property, this Court struck down the delegations as violating due process. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912); *see* Volokh, *The New Private-Regulation Skepticism*, *supra*, at 941-43. In *Roberge*, the ordinance provided that a "philanthropic home for children or for old people" could be built only if the property owner obtained the consent of two thirds of the property owners who lived within 400 feet of the property. 278 U.S. at 118. The Court held that granting one third of the neighboring property owners an effective veto violated due process because the neighbors were "not bound by any official duty, but [were] free to withhold consent for selfish reasons or arbitrarily and [could] subject the trustee to their will or caprice." *Id.* at 122. Similarly, in *Eubank*, the ordinance gave "owners of two thirds of property abutting on any street" the power to request establishment of a building line, limiting the erection of a building to within the building line. 226 U.S. at 141. The Court held that by granting "control of the property of" one to "other owners of property," the ordinance was "an unreasonable exercise of the police power." *Id.* at 144.

Roberge and *Eubank* were soon followed by this Court's seminal decision in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), which cemented that the government may not vest an economic competitor with regulatory authority over its rivals. *Id.* at 311. The Court in *Carter Coal* held that the vesting of government power in "persons whose interests may be and often are adverse to the interests of others in the same business" is "legislative

delegation in its most obnoxious form." *Id.* "[I]n the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.* "And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*; *see* Volokh, *The New Private-Regulation Skepticism*, *supra*, at 943.

Since then, the Court has reaffirmed and extended these basic due process principles time and again in other contexts, making clear that those wielding government power must be disinterested such that self-interest does not influence the discharge of a public duty. In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), the Court held that due process bars a statutory scheme in which the adjudicator—in that case, a mayor adjudicating violations of Prohibition-era laws—received a portion of the fine and thus had a personal financial stake in the outcome. Likewise, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), the Court invalidated on due process grounds a similar scheme in which the mayor—with "executive responsibilities for village finances"—adjudicated traffic violations with fines payable to the village. *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (explaining that partiality is forbidden in the exercise of sovereign authority, and warning of the mere "potential for private interest to influence the discharge of public duty"); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (due process violated when individuals wield Government authority in an area where they have pecuniary interests).

2. Following *Carter Coal*, federal courts of appeals have long held that Congress may grant private entities no more than a "ministerial" or "advisory" role in the exercise of government power. For example, in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), the

Fourth Circuit "summarize[d] the Supreme Court's holdings" in this area as "articulat [ing] the standard that Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Id.* at 395 (emphases in original); *see also Cospito v. Heckler*, 742 F.2d 72, 87 n.25 (3d. Cir. 1984) (recognizing this Court's "antipathy to the delegation of policy-making responsibility to private organizations"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984) (stating that the harm of delegation of executive authority to a private actor is a per se violation of the nondelegation principle, and the principle is "unquestionabl[y]" vital); *Sierra Club v. Sigler*, 695 F.2d 957, 963 n.3 (5th Cir. 1983) ("[A]n agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest.") (citation omitted).

C. Applying *Carter Coal* here shows that the Bloomington Ordinance's limitless delegation of power to IU violated the Due Process Clause. IU is a self-interested entity—it is not a government entity but "technically" a "private" corporation. *Carr*, 12 N.E. at 319-20. And IU competes directly against independently-owned fraternity and sorority houses in Bloomington in the market for student housing. IU sets its student housing rates based on the market rate for housing in Bloomington. And IU has acquired Greek houses in the recent past. *See* Jon Blau, *Fraternity Swaps Land With IU,* BLOOMINGTON HERALD-TIMES, June 26, 2013, https://bit.ly/3wm3boO. After IU derecognized TKE in this very case, it immediately invited the students to move into IU student housing, if they paid a fee. Pet. App. 46a. Nothing in the Ordinance would have prevented IU from using its power to derecognize fraternities to strong-arm their landlords into selling their properties to IU or

making other critical concessions. Put simply, IU is not neutral, not disinterested, and not unbiased when it comes to regulating fraternity and sorority houses. The risk of arbitrary, self-interested decision-making that arises whenever a competitor is granted regulatory power over its rivals is precisely why this Court in *Carter Coal* held that the Due Process Clause prohibits such delegations. A straightforward application of *Carter Coal* requires invalidation of the Ordinance in this case.

III. The question presented is exceptionally important and warrants review in this case

The question presented is frequently recurring and highly consequential to the fundamental structural precepts of literally every unit of government in the United States and to fraternities and sororities nationwide. It warrants this Court's review.

A. The principle at stake here is among the oldest and most fundamental in our system of democratic government. "No clause in our nation's Constitution has as ancient a pedigree as the guarantee that '[n]o person . . . shall be deprived of life, liberty, or property without due process of law.'" *American Railroads*, 821 F.3d at 27 (quoting U.S. CONST. amend. V). And "[a]t least since the time of Lord Coke, (*Nemo debet esse judex in propria causa*—no one may be a judge in his own case), a fundamental precept of due process has been that an interested party in a dispute cannot also sit as a decision-maker." *Int'l Ass'n of Machinists & Aerospace Workers v. Metro-N. Commuter R.R.,* 24 F.3d 369, 371 (2d Cir. 1994). In *Dr. Bonham's Case,* Lord Coke held it "against common right and reason" to permit the Royal College of Physicians to fine an unlicensed physician when the College received half of the fines. *Dr. Bonham's Case* (1610) 77 Eng. Rep. 638, 652, 8 Co. Rep. 107 a, 118 a (C.P.); *see id.* (panel of College officers could not simultaneously serve as "judges to give sentence or judgment; ministers

to make summons; and parties to have the moiety of the forfeiture"); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1917 (2016) (Thomas, J., dissenting); George P. Smith, II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 304 (1966).

The Due Process Clause protects more than basic fairness in these circumstances—it polices the boundary between government and private industry. Permitting the government to delegate regulatory power destroys democratic accountability. This Court has recognized that the lawful exercise of government power requires democratic accountability. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497-98 (2010). Delegations like the one here subvert the public's ability to "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.* (quoting THE FEDERALIST NO. 70 (Alexander Hamilton) (J. Cooke ed.1961)). Moreover, the Due Process Clause's limitation on delegations protects our system of free enterprise and free markets by preventing the Government from giving one competitor in the market "the awesome and coercive power of the government" to wield as a sword against its rivals. *American Railroads*, 821 F.3d at 36.

B. The question presented in this case has nationwide consequences for fraternities and sororities—organizations that provide students a necessary and important degree of autonomy from universities. Hundreds of fraternities and sororities at some of the largest and most storied educational institutions in the United States are subject to ordinances similar to Bloomington's—UVA, Penn State, UNC, the University of Oregon, Cal Berkeley, and Florida State, to name but a

few.[4] *See* CHARLOTTESVILLE, VA. CODE OF ORDINANCES § 34-1200 (2021); BOROUGH OF STATE COLLEGE, PA. MUN. CODE § 19-201 (2017); CHAPEL HILL, N.C. CODE OF ORDINANCES Appendix A, art. 9 (2021); EUGENE, OR. CODE ch. 9.0500 (2020); BERKELEY MUN. CODE § 23F.04.010 (2021); TALLAHASSEE, FLA. LAND DEV. CODE ch. 1, §§ 1-2 (2021). While these municipal ordinances may differ slightly in the details, they all define fraternities and sororities in their zoning codes as requiring recognition from the university with which the chapter is affiliated.

There are currently roughly 750,000 undergraduate members of Greek organizations in the United States , not including secret societies, co-operatives, eating clubs, and other student organizations situated in off-campus housing that may be regarded as "fraternal organizations" and thus covered by these ordinances. *Fraternity and Sorority Life, Fun Stats*, Univ. of N.M., https://bit.ly/3jLaVOM. Fraternities and sororities are the largest not-for-profit student landlord in the country, housing approximately 250,000 students in roughly 3,500 chapter houses.

These ordinances place billions of dollars of real estate at the unregulated whims of public and private colleges and universities. According to a House Method report based on surveying more than 1,300 fraternity and sorority properties in 50 college towns, the average value of a fraternity property is $1.05 million and the average price of a sorority property is $1.22 million. Teema Flanagan, *Greek Life Property Value: Fraternities and Sororities with the Largest and Most Valuable*

[4] In contrast, Lincoln, Nebraska, home of the University of Nebraska, defines a fraternity or sorority as simply a "type of congregate living facility . . . affiliated with a college or university." LINCOLN MUN. CODE § 27.02.070 F.

Properties, HOUSE METHOD (Apr. 8, 2021), https://bit.ly/2TAqlug. And houses like petitioners' at IU are far more valuable than the average—on the order of tens of millions of dollars. *See, e.g.*, Ben Flanagan, *Take a Look Inside the New $13 Million Phi Mu Sorority House at the University of Alabama*, AL.COM (Oct. 13, 2016), https://bit.ly/3B42DaG; *see also* Sydney Wasserman, *The Most Beautiful Sorority Houses in America*, ARCHITECTURAL DIGEST (Sept. 8, 2017), https://bit.ly/36QtMQR. Based on 2017 insurance assessments, the value of fraternity house real estate in the United States is over $7 billion.

These ordinances also threaten the mental health and financial stability of students. Studies have shown how fraternity and sorority affiliation is associated with higher levels of positive mental health, emotional stability, and academic performance. *See* Gallup, *Fraternities and Sororities: Understanding Life Outcomes* (2014), https://bit.ly/3jKWqdy. Sorority houses and communities can be safe spaces for personal growth and companionship. *See* Ashley Alese Edwards, *Rather Than Become Coed, Harvard's Delta Gamma Sorority Is Shutting Down*, REFINERY 29 (Aug. 7, 2018), https://bit.ly/3hiwEfi. Fraternities can provide key emotional support systems for their members. *See* Ron Fisher, *Op-Ed: Greek Life Was My Safe Space. Don't Burn It to the Ground*, THE TUFTS DAILY (Aug. 20, 2020), https://bit.ly/3qNoLBr. These ordinances allow universities to unilaterally reach into the heart of this supportive association and wipe it out if they choose. The consequences for sorority and fraternity members' freedom of association abound, as members can no longer live, dine, study, meet, pray, or otherwise gather together in this communal space. Moreover, depriving a sorority or fraternity of its house severely impacts its ability to recruit new members and maintain existing ones,

threatening its overall existence. *See, e.g.*, Ryan Brown, *Long Push for Sorority Housing Ends*, THE CHRONICLE (Feb. 3, 2010), https://bit.ly/3idFkTg.

Off-campus fraternity and sorority living is also frequently less expensive than living in student dormitories on-campus or independent housing off-campus, offering a valuable alternative housing option for students. *See So How Much Does Being a Member of a Fraternity or Sorority Really Cost?*, UNIV. OF CINCINNATI, https://bit.ly/2UpEWZE (comparing cost of living in University of Cincinnati residence halls to living in an average Interfraternity Council fraternity or Panhellenic Council sorority); *Housing & Cost of Living*, UNIV. OF WASH. INTERFRATERNITY COUNCIL, https://bit.ly/3Bsmssy (same for University of Washington). This cheaper option is particularly important for low-income students and those attending colleges that do not guarantee housing on campus for all four years. These ordinances threaten to allow universities to unilaterally remove this cheaper option, both for students who choose not to live on campus and for those students who cannot afford the higher rent.

IV. This case is the right vehicle to resolve the question presented

The facts and procedural posture of this case make it an excellent vehicle to answer the question presented.

The question is squarely and cleanly presented. It was raised and addressed at every stage of the proceedings below: before the zoning board, Pet. App. 58a, before the trial court, Pet. App. 42a-43a, before the intermediate appellate court, Pet. App. 27a-28a, and before the Indiana Supreme Court, 8a. And it comes to this Court on direct review.

The question presented is also outcome determinative. Petitioner remains subject to substantial

fines absent intervention by this Court. Bloomington's 2019 amendment to the Ordinance to remove the unconstitutional delegation does not change that, as the Indiana Supreme Court explained below. *See* Pet. App. 4a n.3. "[T]he amendment was not retroactive, so while it provided prospective relief, it did not nullify UJ-Eighty's violation." *Id.*

The specific facts of this case also cast the question presented into stark relief. The facts underscore the difficulties owners of fraternity and sorority properties confront in vindicating their due process rights against powerful universities. One would be hard pressed to find a more flagrant violation of the rule of *Carter Coal* than the Ordinance in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2021

APPENDIX