No. 21-113

In the
Supreme Court of the United States

UJ-EIGHTY CORPORATION,
Petitioner,

v.

CITY OF BLOOMINGTON BOARD OF ZONING APPEALS,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICI CURIAE* NORTH AMERICAN INTERFRATERNITY CONFERENCE AND NATIONAL PANHELLENIC CONFERENCE IN SUPPORT OF PETITIONER

ALEXANDER VOLOKH
Counsel of Record
EMORY LAW SCHOOL
1301 Clifton Rd. NE
Atlanta, GA 30322
404-712-5225
avolokh@emory.edu

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF THE *AMICI CURIAE*[1]

The National Panhellenic Conference (NPC) and North American Interfraternity Conference (NIC) are separate associations that represent, respectively, women's-only and men's-only social sororities and fraternities for undergraduate students throughout the United States and Canada.

NPC, one of the largest organizations advocating for women, is the umbrella group for 26 national and international social sororities. Through its advocacy, NPC highlights the importance of women's-only spaces and showcases the transformational power of the sorority experience.

NIC is a trade association that represents 58 national and international men's fraternities, including a diverse range of culturally and religiously based organizations, on campuses in the United States and Canada. NIC is committed to supporting organizations for young men to seek and form positive, enriching fraternal bonds. The health and safety of students guides NIC's advocacy, standards and education.

NPC, NIC, and their member organizations partner cooperatively with more than 600 colleges and universities across North America. Chapters of NPC

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[1] All parties consented to the filing of this brief after receiving timely notice pursuant to Supreme Court Rule 37.2. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

and NIC member organizations most often operate with recognition from the college or university where their members are enrolled; however, that is not universally true, as some chapters operate independent of university recognition.

NIC and NPC have a direct interest in this case because zoning ordinances like the one in Bloomington, and in certain other college towns across the country, put their member organizations' contract and property rights at the mercy of other self-interested entities, severely undermine fraternities' and sororities' independence with respect to universities, and impair fraternity and sorority members' associational rights.

SUMMARY OF ARGUMENT

Over the last century, this Court has developed a sensible and coherent body of caselaw that stands for the principle that *coercive power over the rights of others may only be wielded by disinterested parties.* This is true whether the parties are public or private: a judge may not be compensated out of the fines he collects from defendants he convicts, and private residents may not exercise zoning power over their neighbors. This Court has reaffirmed this principle in a wide variety of contexts, from industrial wage and price regulation to debtor-creditor or landlord-tenant self-help remedies, from traditional judges to administrative adjudicators to prosecutors. The bias caselaw does not condemn bad acts as such: it condemns structural arrangements that make the probability of bias intolerably high. And it demands not only justice but also the appearance of justice.

Zoning ordinances like the one here do violence to the principle behind this century of caselaw. Indiana University is financially self-interested twice over: it benefits from having more demand for its student housing, and it also benefits from having low-cost land nearby that it can acquire on favorable terms. In other words, the University competes with other landlords for student tenants—and with other landowners for real estate. Derecognize a fraternity,[2] and you kill two birds with one stone: the evicted fraternity members have to go somewhere, and many of them will go to your university housing; and the landowner, who may have trouble finding another tenant within the limited uses allowed by the zoning ordinance, will be more likely to sell you his land for a song. The conflicts of interest are plain.

The effects of this arrangement on the associational rights of fraternities, sororities, and their current and prospective members are stark. In multiple cases nationwide, fraternities and sororities have chosen to exist independently, without formal university recognition. Some have never sought recognition because their university has not offered it; others have chosen to give up the various benefits of recognition as the price of avoiding heavy-handed university regulation. Fraternities' and sororities' ability to be independent is a salutary check on the power of universities to micromanage every aspect of their students' lives, both on and off campus. But fraternities and sororities would find this difficult or impossible if

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[2] This brief will often use the term "fraternity" to refer generically to social fraternities and sororities.

being independent meant losing their house. These sorts of zoning ordinances shift the balance of power in these disputes, giving universities unwarranted power beyond their walls.

This is an ideal case for this Court to reaffirm traditional Due Process values, to resolve a split on an issue that recurs with some regularity, and to protect not only the property and contract rights of landowners but also the associational rights of fraternities and sororities. By protecting the rights of this landowner, this Court will protect the rights of *amici*.

ARGUMENT

I. Basic Due Process principles prevent self-interested parties, whether public or private, from having coercive power over the rights of others.

The basic Due Process principles that are relevant in this case have been formulated in a line of cases that began over a century ago; and though the problem of bias shows up in a variety of factual settings, the caselaw is consistent. *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 940–55 (2014).

In the zoning context, this Court established that a legislature may not delegate a power to some property owners to "virtually control and dispose of the property rights of others" when they can "do so solely for their own interest." *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912); *see also Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121–22 (1928).

In the context of industrial regulation, a "majority" of industry participants may not "regulate the affairs of an unwilling minority": "This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Such a delegation to self-interested parties clearly violates Due Process because, "*in the very nature of things*, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." *Id.* (emphasis added).

In the context of creditor remedies like wage garnishment or prejudgment replevin procedures, a creditor—obviously a self-interested party—may not simply freeze a debtor's wages or seize his goods without making some showing before a judge. *See Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 80–81, 83, 92–93 (1972); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606–07 (1975). This Court very recently reaffirmed the rule in the context of landlord-tenant law: the ability of a tenant to unilaterally stave off eviction by self-certifying financial hardship, where the landlord has no access to a hearing to contest that certification, violates the command that "'no man can be a judge in his own case.'" *Chrysafis v. Marks*, No. 21A8 (U.S. Aug. 12, 2021) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

This isn't just a rule against private regulators: the rule is substantially the same when public actors are involved. A judge can't rule on a case if he has a pecuniary interest in the result. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *see also Connally v. Georgia*, 429 U.S. 245, 250 (1977) (finding a Due Process violation where a magistrate was paid $5 for each search warrant issued). This principle applies equally in quasi-judicial proceedings like administrative adjudications, as when a State Board of Optometry controlled by independent optometrists tried to revoke the licenses of corporate-employed optometrists in *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *see also Marshall v. Jerrico*, 446 U.S. 238, 248 (1980). (In this case, the Indiana Supreme Court described the University's act of derecognizing the fraternity as a "quasi-judicial act." *See Bloomington Bd. of Zoning App. v. UJ-Eighty Corp.*, 163 N.E.3d 264, 269 (Ind. 2021).)

These are the basic rules, though other cases have introduced various common-sense exceptions. Most importantly, there is often no Due Process violation when the self-interested party's power is limited by the involvement of a neutral decisionmaker by the time of the first adjudication. For this reason, Due Process is not implicated when private parties (even self-interested ones) merely have the power to set (disinterested) legal machinery in motion, *see, e.g.*, *Miller v. Schoene*, 276 U.S. 272, 281 (1928); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616–17 (1974); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 243 n.6 (1984); *Concrete Pipe & Prods. of*

Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 618–20 (1993). *See generally* Volokh, *supra*, at 944–50 (discussing the "mandatory-discretionary distinction").

By these standards, the University is self-interested twice over. The University benefits from evicting students from a fraternity house, because these students have to live somewhere, and many of them might move into university housing, whether a dorm or apartment, where they will pay rent to the university. *See* Cert. Pet. at 6–10, 13, 27. And once the fraternity is evicted, what does the landowner do? His options under the Bloomington zoning ordinance are limited. There may be no other fraternity interested in renting or buying a house; other options under the code, like "preschool" or "museum" or "golf course" or "cemetery/mausoleum," may not be appropriate; perhaps there is no need for an additional "post office" in the area. The value of the landowner's property may have dropped precipitously. But one of the permitted uses is highly relevant: "university or college." The party that is most interested in the landowner's property could be the giant right across the street: the University itself, which may be interested in expanding and acquiring new real estate, especially at a discount. *See, e.g.*, Cert. Pet. at 13, 27–28; Lauren Muthler, *Want to Buy a Frat House? Here's What Could Happen to a Former Fraternity for Sale in State College*, CENTRE DAILY TIMES, Mar. 4, 2019 ("Now that more than a dozen Penn State fraternities have been suspended as the result of stricter Greek-life restrictions . . . former fraternity houses [are] becoming more common on the real-estate market."); Henry Grabar, *City Planning*

101: Why Universities Became Big-Time Real Estate Developers, SLATE, May 11, 2018; Goldie Blumenstyk, *Expansion in Mind, Colleges Snap up Real Estate in Buyers' Markets*, CHRON. HIGHER EDUC., Jan. 17, 2010.

The University thus potentially benefits in two separate ways from derecognizing a fraternity. The Due Process violation is doubly clear.

II. This Court has found Due Process violations even when the conflict of interest has been fairly indirect.

Sometimes the pecuniary interest is direct; sometimes it is indirect; the caselaw has condemned self-interested regulation in both cases. *Tumey* involved a mayor of a village who also acted as a judge in Prohibition-related cases. This mayor-judge's compensation arrangement was highly suspect: he was paid, in part, out of the fines assessed on the defendants whom he convicted, so that he had a direct financial interest in convicting more people. That was enough for the Court to find a violation of Due Process, *see* 273 U.S. at 532, but the Court also invalidated the arrangement for an alternative reason: the mayor had a strong motive for assessing more fines because, as chief executive of the village, he was responsible for village finances, *see id.* at 532–34.

And this alternative holding was strongly reaffirmed nearly half a century later, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), and *Gibson*, 411 U.S. at 579. The test is not whether the decisionmaker is *actually* biased, but whether "the *probability* of actual bias on the part of the judge or decisionmaker is

too high to be constitutionally tolerable," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (emphasis added); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 n.18 (1987). Moreover, it is important that justice "satisfy the appearance of justice," *Marshall*, 446 U.S. at 243; *Aetna Life Ins. Co.*, 475 U.S. at 825. The Indiana Supreme Court was thus quite wrong in this case to write: "[D]espite hinting otherwise, UJ-Eighty has not shown IU acted improperly or disregarded either [the federal or the Indiana] constitution when it revoked [the fraternity's] sanction." *Bloomington Bd. of Zoning App.*, 163 N.E.3d at 269 (footnote omitted). Acting badly is bad, but the bias caselaw does not demand actual bad acts; it condemns biased structures that make bad acts more probable, and the appearance of such bias.

Thus, in other pecuniary bias cases, this Court has not inquired deeply into precisely *how* the pecuniary bias might play out. Obviously, when the alleged conflict of interest turns out to be illusory—in the sense that the entity cannot be shown to benefit at all from the challenged action—there is no violation. *See Dugan v. Ohio*, 277 U.S. 61, 64–65 (1928); *Schweiker v. McClure*, 456 U.S. 188, 196–97 (1982); *see also Bevan v. Krieger*, 289 U.S. 459, 465–66 (1933); *Marshall*, 446 U.S. at 250–52 (in a prosecutorial context, biasing influence found to be too remote and insubstantial). But whenever an entity—particularly in the judicial or quasi-judicial context—has stood to benefit financially from its decisions, the Court has condemned the arrangement without requiring a showing that particular employees were under pressure from elsewhere in the organization to achieve a particular

result. In most cases, it has been enough to observe that a party's self-interest was implicated, in the sense that the party could be enriched by its decisions.

In fact, in conducting the necessary "realistic appraisal of psychological tendencies and human weakness," *Withrow*, 421 U.S. at 47, this Court has not hesitated to rely on behavorial factors to find that a probability of bias was excessive. (This Court has unapologetically called this appraisal a process of "informed" "speculation." *Young*, 481 U.S. at 807.) In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), this Court held that it violated Due Process for an elected State Supreme Court Justice to participate in a case where one of the parties had just spent millions of dollars to get that Justice elected. The Justice's compensation didn't depend on his ruling and the donor had no power to get him removed from the Court, so what was the source of bias? Apparently no more than the "debt of gratitude" that the Justice would feel toward his benefactor. *Id.* at 882.

Likewise, in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the problem was that a State Supreme Court Justice ruling on a case had been involved in the very same case as a prosecutor many years earlier. One could reasonably fear that the Justice would be "'so psychologically wedded' to his or her previous position as a prosecutor that [he] 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id.* at 1906 (quoting *Withrow*, 421 U.S. at 57). And in *Murchison*—where a judge acted as a "one-man grand jury" under Michigan law, charged a witness with contempt, and then tried that contempt

proceeding—one of the concerns was that the judge "cannot be, *in the very nature of things*, wholly disinterested in the conviction or acquittal of those accused" and might have some of "the zeal of a prosecutor." 349 U.S. at 137 (emphasis added).

Similarly, while prosecutorial bias is subject to lesser constraints than adjudicatory bias, *see Marshall*, 446 U.S. at 247–48, there may be Due Process violations when prosecutors are improperly motivated—even though a prosecutor does not succeed until a (presumably neutral) decisionmaker finds in his favor. In *Young*, this Court observed that if a lawyer representing a client acted as a private prosecutor, he would act in a biased way (biased toward his client, that is) because of "the ethics of the legal profession"; moreover, his biased behavior could not be adequately policed by later court review because the private prosecutor would "exercise[] considerable discretion" in various matters, and his decisions would be "made outside the supervision of the court." 481 U.S. at 807.

And in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Supreme Court insisted on a predeprivation hearing before a seizure of real property, especially in light of the government's "direct pecuniary interest in the outcome of the proceeding." *Id.* at 56. That direct pecuniary interest was the government's "financial stake in drug forfeiture." Was any government official directly compensated from the proceeds of drug forfeiture? Presumably not—but this Court pointed to a memo from the Attorney General urging U.S. Attorneys to meet the DOJ's annual budget targets. *Id.* at 56 n.2.

This Court was rightly concerned with structural bias, not just individual compensation arrangements—even though the seizure had been approved by a (neutral) Federal Magistrate Judge. *Id.* at 73 (O'Connor, J., concurring in part and dissenting in part).

The phrase emphasized above from *Murchison*—"in the very nature of things"—echoes the same phrase from *Carter Coal*. *Compare Murchison*, 349 U.S. at 137, *with Carter Coal*, 298 U.S. at 311. This Court has operated from the realistic general premises that people can be tempted by financial gain and that the mechanisms by which such temptation can translate into actual bias are subtle, complex, and hard to ferret out. Therefore—and especially since we care not only about actual justice but also about the appearance of justice—as a structural matter, we should avoid arrangements that build in such temptation in the first place.

Here, it is quite natural to suspect that when a university can reap financial benefits from evicting a fraternity, both from receiving extra rental income from the evicted fraternity members and from potentially being able to buy the vacant property at a lower price than before, many subtle influences—some of them hard to detect—will be at work. The university president doesn't need to pick up the phone and tell the Division of Student Affairs to suspend the fraternity; he can instead be motivated to take a harder line against fraternities generally—and appoint stricter disciplinarians to the bodies in charge of fraternity discipline—than he otherwise would if the pecuniary

benefits were absent. This is true whether the university is public or private.

III. The Indiana Supreme Court's supposed distinctions are not relevant to this case.

The Indiana Supreme Court distinguished this case from other Due Process cases in a number of ways, all of which are unconvincing.

First, the Indiana Supreme Court wrote that "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. It did not delegate any authority, legislative or otherwise." *Bloomington Bd. of Zoning App.*, 163 N.E.3d at 267.

This may be partly true, but it is also irrelevant. This is not a lawsuit against Indiana University. The University is not the defendant here; indeed, at least in federal court, this lawsuit would have been dismissed for lack of standing if it had been brought against the University. This lawsuit was brought against the Bloomington Board of Zoning Appeals, because that is the body that is responsible for the eviction; the offending document is the zoning ordinance, which conditions the landlord's contract and property rights on the decision of a self-interested outsider. Of course the ordinance merely "define[s] fraternities and sororities based on their relationship with IU," but that doesn't mean there has been no delegation: in the context of state and federal non-delegation doctrines, statutes incorporating third-party standards and

definitions are straightforwardly analyzed as presenting delegation issues. *See, e.g.*, *Protz v. Workers' Comp. App. Bd.*, 161 A.3d 827, 833–38 (Pa. 2017) (applying Pennsylvania's non-delegation doctrine). In any event, here, it is the definition that is constitutionally problematic, not whether that definition can technically be labeled a "delegation."

Not all such definitions are necessarily problematic. The zoning ordinance also refers to whether all the students in the building are "enrolled" at the university, so an expelled student must also be evicted—but presumably the university does not benefit financially from expelling a student. Whether IU may derecognize a fraternity is one thing; this case is about whether, given IU's financial interest, the city may give that derecognition coercive force in the zoning context.

Similarly, the Indiana Supreme Court distinguished cases like *Roberge* and *Counceller v. City of Columbus Plan Commission*, 42 N.E.3d 146 (Ind. Ct. App. 2015), by noting that in those cases, the self-interested neighbors' power was direct, in that "the landowners were *required* to obtain their neighbors' consent to use their land. Here, UJ-Eighty never had to seek IU's consent to use its land. IU had no direct power to prohibit UJ-Eighty from lawfully using its land." *Bloomington Bd. of Zoning App.*, 163 N.E.3d at 269. But Due Process does not depend on such a direct/indirect distinction, which has been rejected as unworkable in many contexts. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Commerce Clause). Moreover, IU clearly thinks of itself as a

regulator of the landowner, beyond the more limited power it holds over the property as a result of its easements: its own appellate *amicus* brief supporting the zoning restriction stated that "it is appropriate for IU to exercise some degree of *control over the property* to promote the health and safety of the campus community." 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, at *15–17 (emphasis added); *see also* 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, at *5–6, *10–14 (similar).

The Indiana Supreme Court thought it significant that Indiana University "is a state actor" that "must abide by the state and federal constitutions"; "IU was constrained when it engaged in the relevant 'quasi-judicial act' with a collateral effect on land use." *Bloomington Bd. of Zoning App.*, 163 N.E.3d at 269. This is again true, and again irrelevant. As the above survey of the caselaw shows, even state actors are bound by the Due Process Clause, especially in the judicial and (as here) "quasi-judicial" contexts. The judges in *Tumey*, *Ward*, and *Aetna Life*; the quasi-judicial optometry board officials in *Gibson*; and the DOJ employees in *James Daniel Good* were all vulnerable to bias challenges, even though they were all state actors, all subject to their respective constitutions. There is thus no relevant difference, as far as the landlord's bias claim is concerned, between this case and an identical case that could have occurred at a private university.

Nor is it relevant whether the landlord could have intervened in the fraternity's case, as the Indiana Supreme Court finally suggested. *Bloomington Bd. of Zoning App.*, 163 N.E.3d at 270. As the Bloomington Assistant City Attorney stated at oral argument before the Indiana Supreme Court, the University had no obligations to the property owner, *see* Cert. Pet. at 14, so it is unclear what would have been gained by such intervention.

But more fundamentally, the fraternity itself could have been the landowner; indeed, many fraternities or their national corporations own their own houses. In such a case, the landowner is necessarily present at the adjudication whenever the fraternity is present. And that clearly cannot cure the bias, or else *Tumey* and *Ward* would have come out the other way. Due Process requires that the *first* adjudication (i.e., the quasi-adjudication within the University itself) be before a disinterested party, regardless what other procedures are offered or who else has a chance to intervene. The bias itself is an independent problem. After all, as this Court wrote in *Ward*, a biased procedure cannot "be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61–62.

IV. The split in this case is real, and the situation here recurs with some regularity.

Many university communities have zoning ordinances that condition a fraternity's permission to occupy a house on that fraternity's recognition by the university. In addition to the area around Indiana University, such

codes also exist around (among others) Cal Poly, San Luis Obispo; Florida State University; Georgia Tech; Iowa State University; Kansas State University; Miami University; Penn State; Purdue University; Rutgers University; UNC Chapel Hill; UC Berkeley; University of Cincinnati; University of Illinois Urbana-Champaign; University of Iowa; University of Kansas; University of Minnesota, Twin Cities; University of Oregon; University of Utah; University of Virginia; University of Washington; and University of Wisconsin-Madison.

The last dozen years have seen at least three significant fraternity zoning cases. In addition to this case, the Pennsylvania Commonwealth Court decided a case out of Penn State in 2019, and the Supreme Court of Delaware decided a case out of the University of Delaware in 2009. *See 425 Pty. Ass'n of Alpha Chi Rho, Inc. v. State Coll. Borough Zoning Hearing Bd.*, 223 A.3d 300 (Pa. Commw. Ct. 2019); *Schweizer v. Bd. of Adjustment of the City of Newark*, 980 A.2d 379 (Del. 2009). This only scratches the surface: many cases never reach court because fraternities may not have the means to mount a constitutional challenge.

The D.C. Circuit decided a case involving Amtrak in 2016, concluding that Amtrak, as a self-interested (though governmental) corporation, could not, consistent with Due Process, participate in the regulation of its freight train competitors. *See Ass'n of Am. R.R.s v. DOT*, 821 F.3d 19 (D.C. Cir. 2016). This Court has encountered similar ideas in the context of COVID-related eviction moratoria, concluding that a New York statute could not allow tenants to self-certify

financial hardship and deny their landlords a hearing to contest that certification. *Chrysafis v. Marks*, No. 21A8 (U.S. Aug. 12, 2021). *Cf. also N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015) (illustrating the problem of self-interested regulation in antitrust law, in the case of occupational licensing boards dominated by active market participants).

In short, with cases like *Ass'n of American Railroads* (and *Carter Coal* and the bulk of Due Process doctrine) on one side, and this case and *Schweizer* on the other, petitioner UJ-Eighty is correct that there is a split worth resolving. These sorts of cases recur with some regularity, both in the narrow fraternity context and in the broader context of self-interested regulation. This Court's intervention will be welcome, not only to correct the result in this case and to resolve the differences of opinion among federal and state courts, but also to illustrate how the familiar doctrine plays out in this new area.

V. The Indiana Supreme Court's decision severely undermines the associational freedoms of fraternities and sororities.

Universities have a history of interfering in the independence of student organizations, whether those organizations are recognized or unrecognized. Sometimes the struggle between universities and student organizations turns into a lawsuit. If the university is public, it might be a constitutional lawsuit, often on First Amendment grounds: in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), a student organization challenged a policy requiring recognized organizations to accept all

students regardless of belief, and in *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*, 502 F.3d 136 (2d Cir. 2007), a fraternity challenged a policy prohibiting recognized organizations from engaging in gender discrimination. If the university is private, it might be a statutory lawsuit: in *Kappa Alpha Theta Fraternity, Inc. v. Harvard University*, 397 F. Supp. 3d 97 (D. Mass. 2019), and *Alpha Phi International Fraternity, Inc. v. President & Fellows of Harvard College*, 36 Mass. L. Rptr. 201 (Super. Ct. 2020), fraternities challenged Harvard's policy denying certain benefits to members of unrecognized, single-sex organizations under Title IX of the Education Amendments of 1972 and the Massachusetts Civil Rights Act. Sometimes the struggle never reaches the courtroom, and either the university wins or it backs down under criticism. *See, e.g.*, *Ohio University Reverses Unconstitutional Directive Muzzling Fraternity Members*, FOUND. FOR INDIV. RIGHTS IN EDUC., Nov. 26, 2019.

Amici do not claim that all these attempts at interference are illegal or unconstitutional (especially at private universities, which obviously have greater leeway to grant or withhold benefits). The challengers to the policies in *Christian Legal Society* and *Chi Iota Colony* did not prevail; on the other hand, Harvard abandoned its anti-single-sex-organization policy (mooting the lawsuits against it) after this Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See* Nate Raymond, *Harvard Drops Single-Sex Club Ban After Lawsuit by Fraternities, Sororities*, REUTERS, June 29, 2020. This is a tug-of-war that will be won sometimes by universities and sometimes by

student organizations in light of prevailing law and popular pressure; universities may threaten to deny benefits, and organizations may choose to forgo official recognition. But when restrictive zoning codes provide that a fraternity must lose its (privately rented, off-campus) house—that its members must be evicted and find alternative housing—when it loses recognition, this puts unacceptable pressure on fraternities to yield to university demands, even when those demands are clearly unreasonable.

A couple of recent examples will illustrate the point. In 2019, several fraternities expressed concern over the demands of the University of Nevada, Reno, that these organizations provide the University with reports on their own internal conduct investigations—and even refrain from socializing with any unrecognized student organizations. These fraternities chose to protect the privacy of their own internal governance mechanisms, as well as their members' associational freedoms, by forgoing university recognition and existing instead as independent groups. (The situation was resolved in 2020.) *See 12 Fraternities and Sororities Reject Agreement with University (Updated)*, THIS IS RENO, Jan. 23, 2019; Nat'l Panhellenic Conf., *National Panhellenic Conference Statement Regarding Renewed Agreement with University of Nevada, Reno*, May 26, 2020.

The same year, the University of Michigan instituted a policy that prevented freshmen from joining fraternities until their second semester. Several fraternities, believing that students should be able to join any student organization whenever they like, left

UM's Interfraternity Council and operated independently, holding rush in the Fall. *See* Kim Kozlowski, *UM Delays Greek Rush, but Some in No Mood to Wait*, DETROIT NEWS, Oct. 7, 2019. The same has happened this year at Duke University, which bars fraternity recruitment of first-year students entirely. *See* Jake Sheridan, *Seven Fraternities Disaffiliate from Duke IFC*, THE CHRONICLE (Duke Univ.), Feb. 16, 2021.

In short, fraternities' ability to go independent is a salutary check on universities' intrusiveness, providing alternative ways for students to exercise their associational freedoms. *Cf. Christian Legal Society*, 561 U.S. at 691 & n.21. But none of the preceding would have been possible if Reno, Ann Arbor, or Durham had had restrictive ordinances prohibiting unrecognized fraternities from keeping their houses. The fraternities would have had little bargaining power; left with the unattractive options of having a house far from campus or operating without a house at all, the fraternities would probably have had little choice but to yield to the universities' demands. (The *appearance* of bias is also significant here: even if the University had some internal safeguards preventing its self-interest from contaminating its fraternity decisions, outsiders would still assume that their bargaining position was bad.) And if the fraternities had ultimately chosen to forgo official recognition, the universities would have had the pleasant consolation prize of receiving extra rental payments from evicted fraternity members, and perhaps being able to buy some newly vacant buildings near campus at a bargain price.

As an extreme case, suppose a university simply terminated its whole fraternity and sorority program. Fraternities and sororities could still exist, but they would operate without university recognition and without access to the traditional benefits that universities offer fraternities. This is no hypothetical: it happened at Bloomsburg University of Pennsylvania earlier this year. *See* Greta Anderson, *The Last Straw*, INSIDE HIGHER ED, May 17, 2021. (This makes Bloomsburg similar to universities like Harvard, the University of Chicago, or Georgetown, which already follow a policy of complete separation between fraternities and the university.) No university is required to have a Greek Life program or otherwise provide benefits to fraternities, so there is nothing illegal about this as such. But if Bloomsburg had had a restrictive ordinance, this move would have resulted in massive simultaneous evictions—and massive amounts of unoccupied real estate. *See* Cert. Pet. at 24.

At least one state legislature has recognized these problems and passed legislation providing that "[a] zoning regulation or unified development ordinance may not differentiate in terms of the regulations applicable to fraternities or sororities between those fraternities or sororities that are approved or recognized by a college or university and those that are not." N.C. GEN. STAT. § 160D-909. Because no such legislation exists in Indiana, the University has an unfair advantage over fraternities in any future negotiations or proposed requirements.

CONCLUSION

Due Process prevents one's rights from being at the mercy of self-interested parties, whether public or private. This is true whether the self-interested parties can affect others' rights directly or indirectly. This is especially true in the context of adjudication or quasi-adjudication, which is what happened here—but the problem is quite general, and would be substantially the same even if this had occurred at a private university. The University in this case is biased twice over, once in its competition with the landlord over student tenants and once in its competition with the landlord over real estate. This arrangement affects not only landowners but also fraternities and sororities, who are placed at a severe disadvantage in their negotiations with universities. Protecting the contract and property rights of the landowner here will also protect the associational rights of *amici*.

Respectfully submitted,

ALEXANDER VOLOKH
Counsel of Record
EMORY LAW SCHOOL
1301 Clifton Rd. NE
Atlanta, GA 30322
404-712-5225
avolokh@emory.edu

August 26, 2021