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Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York

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"War's over, man. Wormer dropped the big one."[1]

In John Landis's classic film *Animal House*, Bluto Blutarsky reminded his fraternity brothers that their struggle against the Faber College administration was not over, just as it was not over when the Germans bombed Pearl Harbor.[2] It may very well be over, however, for Chi Iota Colony ("Chi Iota") and its attempt to gain official recognition by the College of Staten Island.[3] Even though the Supreme Court has consistently acknowledged that students do not "shed their constitutional rights . . . at the schoolhouse gate,"[4] the Court of Appeals for the Second Circuit has effectively placed fraternities—and all groups claiming intimate association rights—on "double secret probation."[5]

In *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*, the United States Court of Appeals for the Second Circuit (the "Second Circuit") vacated the preliminary injunction granted by the United States Court for the Eastern District of New York (the "District Court"), and held that Chi Iota Colony's claim of intimate association rights, which would have allowed Chi Iota to be recognized as an official organization on campus, could not overcome the college's non-discrimination policy.[6] Judge Pierre Nelson Leval, writing for a unanimous panel, based his ruling on Chi Iota Colony's size, purpose, level of selectivity, and inclusion of non-members.[7] This case comment contends that the Second Circuit's analysis was too stringent and is inconsistent with the United States Supreme Court's and other federal circuit courts' "spectrum" analysis. The court should have affirmed the District Court's ruling and allowed Chi Iota Colony to exercise its intimate association rights.

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1. Animal House (Universal Pictures 1978) (Daniel Simpson "D-Day" Day, played by Bruce McGill, to John "Bluto" Blutarsky, played by John Belushi).

2. *See id.*

3. The College of Staten Island is a four-year, senior college of the City University of New York. For more information about the College of Staten Island, see The College of Staten Island, President's Office, About CSI, http://www.csi.cuny.edu/presidentsoffice/aboutcsi.html.

4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *accord* Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 829 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986); New Jersey v. T.L.O. 469 U.S. 325, 348 (1985); United States v. Grace, 461 U.S. 171, 184 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 865 (1982); Healy v. James, 408 U.S. 169, 180 (1972); Jones v. State Bd. of Ed. of Tenn., 397 U.S. 31, 35 (1970).

5. *See* Animal House, *supra* note 1. "Double secret probation" refers to the "little known codicil" in the Faber College Constitution, which gave Dean Vernon Wormer, played by John Vernon, unlimited power to preserve order in a time of campus emergency. *Id.*

6. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 149 (2d Cir. 2007). The court noted that the "Fraternity's interest in intimate association [was] relatively weak" in comparison to the college's non-discrimination policy. *Id.*

7. *Id.* at 145 (referring to the factors used to measure the strength of a group's intimate association interests first laid out by the Supreme Court in Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984)). The Second Circuit considered these factors in determining whether "the state's interests, and its means of achieving them, justify the state's intrusion" on the group's intimate association rights. *Chi Iota*, 502 F.3d at 144.

Chi Iota Colony is a male, social fraternity with a membership primarily consisting of students from the College of Staten Island ("CSI").[8] CSI is a public college within the City University of New York system.[9] It boasts a student body of 11,000 undergraduates, of which 40% are male.[10] In March 2004, Chi Iota applied to become a chartered and officially recognized CSI student group.[11] CSI encourages students to form clubs, but in order for a student group to gain official recognition, the organization must comply with CSI's non-discrimination policy, which prohibits discrimination on the basis of gender.[12] While a group that does not comply with CSI's non-discrimination policy is not banned or forbidden to meet or function,[13] such a group is not entitled to the benefits and privileges that are accorded to officially recognized groups.[14]

While Chi Iota has no limit on its size, as of September 2005 its membership had never exceeded twenty members[15] and its president estimated that membership was unlikely to ever exceed fifty members.[16] Chi Iota identifies itself as a Jewish organization, and most of Chi Iota's members are non-practicing Jews.[17] However, Chi Iota is open to non-Jewish members and several current members are not Jewish.[18]

Chi Iota admittedly does not allow women as members.[19] The president of Chi Iota believes that "[t]he selective, single-sex, all male nature of the Fraternity is essential to achieving and maintaining the congeniality, cohesion and stability that enable it to function as a surrogate family and to meet [the] social, emotional and cultural needs of its members."[20] Furthermore, the president believes that "inevitable

8. *Id.* at 140.

9. *Id.* at 139. The fact that CSI is a public college is significant. *See* Richard H. Heirs, *Academic Freedom in Public Colleges and Universities: O Say Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 Wayne L. Rev. 1, 3 (1993) ("Because the First Amendment aims only at preventing governmental intrusion, the U.S. Constitution does not protect in private colleges and universities except for violations by state or federal entities outside the institution.").

10. *Chi Iota*, 502 F.3d at 139. These numbers are as of 2004. *Id.*

11. *Id.* at 142.

12. *Id.* at 139.

13. *Id.* at 140.

14. *Id.* These benefits and privileges include, *inter alia*, the use of CSI facilities and services, the use of CSI approved bulletin boards to publicize events, the right to apply for special funding through the CSI Student Government, and the right to solicit contributions, underwriting, and advertising outside the College. *Id.*

15. *Id.* Only one of the nineteen members is not a CSI student. *Id.*

16. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 376 (E.D.N.Y. 2006).

17. *Chi Iota*, 502 F.3d at 140.

18. *Id.*

19. *Id.*

20. *Id.*

jealousies and other conflicts" could arise from potential romantic relationships between female and male members.[21]

In March 2004, Chi Iota applied for recognition as an official CSI student group.[22] CSI denied Chi Iota's application because Chi Iota's constitution excluded females, thereby violating CSI's non-discrimination policy.[23] Although Chi Iota operates without official recognition, it claims that its continued existence has been made much more difficult.[24]

In June 2005, Chi Iota filed suit in the District Court.[25] It alleged that CSI violated its rights under the First and Fourteenth Amendments, under federal anti-discrimination law, as well as under New York State law.[26] In November 2005, Chi Iota moved for a preliminary injunction requiring CSI to recognize Chi Iota as an official CSI student organization, and forbidding CSI from enforcing its student-organization policies against Chi Iota.[27] In December 2005, the District Court granted CSI's motion to dismiss Chi Iota's state-law claims.[28] In August 2006, the court ruled on the federal-law claims, and held that Chi Iota showed a "clear" or "substantial" likelihood that Chi Iota qualified as an intimate association, based on Chi Iota's relatively small size, exclusivity in membership, and seclusion in activities.[29] After determining that Chi Iota qualified as an intimate association, the court then ruled that CSI's denial of official recognition to Chi Iota was unjustified.[30]

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21. *Id.* The president of Chi Iota noted that even the admission of lesbians into Chi Iota might disrupt Chi Iota. *Id.* However, the president acknowledged that there had been at least two male bisexual members in the fraternity. *Chi Iota*, 443 F. Supp. 2d at 377.

22. *Chi Iota*, 502 F.3d at 142.

23. *Id.*

24. *See id.* The Second Circuit noted:

> The Fraternity has been forbidden to set up recruitment tables at student orientations, to receive funding from CSI, to hand out fliers or advertise on campus, or to appear in a published list of student organizations. Some students who have been approached about joining the Fraternity have declined to explore membership because of the Fraternity's need to hold its events off-campus. Even some existing members have ceased participating in Fraternity activities because of transportation difficulties.

Id.

25. *Id.*

26. *Id.*

27. *Id.* at 142–43.

28. *Id.* at 143.

29. *Chi Iota*, 443 F. Supp. 2d at 387. The court utilized the preliminary injunction standard used by the Second Circuit in *Bronx Household of Faith v. Bd. of Educ. of the City of N.Y.*, 331 F.3d 342, 348–49 (2d Cir. 2003). *Chi Iota*, 443 F. Supp. 2d at 381.

30. *Id.* at 389.

Accordingly, the court granted Chi Iota's motion for a preliminary injunction against the enforcement of CSI's policy.[31] CSI appealed the District Court's ruling.[32]

The Second Circuit reversed. Both the Second Circuit and the District Court agreed that there is no bright line test to determine whether a group is an intimate association, but rather certain relevant factors must be weighed in the analysis.[33] Relying on the same factors as the District Court, however, the Second Circuit ruled that Chi Iota's interests in intimate association were too weak to overcome CSI's interest in preventing discrimination.[34] This resulted from the Second Circuit's failure to view the factors "on a spectrum from the most intimate to the most attenuated of personal attachments."[35] Instead of viewing the factors along this "spectrum," the Second Circuit forced Chi Iota to meet every factor individually at a threshold that few groups could ever meet. Adhering to this strict application could result in a move towards more segregated and secretive groups in misguided attempts to attain intimate association status—hardly what CSI could have intended when it sought to enforce its non-discrimination policy. The Second Circuit should have affirmed the District Court's ruling. By analyzing each relevant factor individually and then viewing them all collectively according to a spectrum analysis, it is unquestionable that Chi Iota was miles away from "the most attenuated of personal attachments."[36]

The first factor that both the District Court and Second Circuit analyzed was the size of Chi Iota.[37] The District Court looked at the relatively small size of Chi Iota, with its current membership of nineteen and potential maximum membership of fifty, in comparison to the approximate 11,100 undergraduate students at CSI, of which 4500 are male.[38] In contrast, the Second Circuit focused on the fact that Chi Iota had no limit on membership size and that its relatively small size resulted from the large commuter population on campus, and not from a desire to maintain intimacy.[39] The District Court, however, recognized that "a group's failure to choose

31. *Id.* at 397.

32. *Chi Iota*, 502 F.3d at 143.

33. *See id.* at 145; *Chi Iota*, 443 F. Supp. 2d at 385. Both courts relied upon the factors articulated in *Roberts*, 468 U.S. at 619–20 ("We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.").

34. *Chi Iota*, 502 F.3d at 144.

35. *Roberts*, 468 U.S. at 620. Viewing various characteristics of an organization as relevant factors on a spectrum of intimate association, the Supreme Court noted that where there is "the most attenuated of personal attachments," a claim for constitutional protection is weak. *See id.*

36. *Id.*

37. *Chi Iota*, 502 F.3d at 145; *Chi Iota*, 443 F. Supp. 2d at 385–86.

38. *Chi Iota*, 443 F. Supp. 2d at 386. Although the District Court noted eighteen current members, the Second Circuit acknowledged nineteen current members. *Chi Iota*, 502 F.3d at 145.

39. *Chi Iota*, 502 F.3d at 145. Chi Iota's president testified at trial that membership will not likely exceed fifty members, "because CSI is a heavily commuter campus." *Id.* at 141.

a numerical maximum, by itself, does not weigh against intimate association status."[40] It is interesting to note that, even if Chi Iota had fifty members, Chi Iota's members would only constitute less than 1% of CSI's total undergraduate population and only 1.1% of CSI's total male population. With its current nineteen members, Chi Iota includes less than 0.2% of CSI's total undergraduate population, and only 0.4% of CSI's total male population.

Moreover, since CSI is located in New York City, the Second Circuit should have considered the Supreme Court's decision in *New York State Club Association, Inc. v. City of New York*, particularly Justice O'Connor's concurring opinion.[41] Justice O'Connor noted that "[i]n a city as large and diverse as New York City, there surely will be organizations that . . . are deserving of constitutional protection. For example, in such a large city, a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence."[42] "The associational rights of such organizations," Justice O'Connor emphasized, "must be respected."[43] If a 400-member group located in New York City may be entitled to intimate association rights, then surely a nineteen-member group in New York City deserves those rights.

Another factor both courts looked to was the selectivity of Chi Iota. Both the District Court and the Second Circuit acknowledged that Chi Iota has a selection process in place.[44] However, the Second Circuit unfairly contrasted the selection processes of Chi Iota with the selection processes of the institutions of marriage and adoption, two of "the strongest of associational interests."[45] The Supreme Court has acknowledged that there is "a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State."[46] Chi Iota does not need to show that it is as selective as a person selecting a spouse; it can satisfy a lower threshold of selectivity located along "a spectrum from the most intimate to the most attenuated of personal attachments."[47] As the District

40. *Chi Iota*, 443 F. Supp. 2d at 386. The District Court contrasted Chi Iota with the Rotary Club in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), noting that the Supreme Court's focus in *Duarte* was on the Rotary Club's lack of selectivity rather than a numerical cutoff, and found that Chi Iota did not have the "inclusive, not exclusive membership policies that contributed to the finding that the Rotary Clubs were not entitled to protection as intimate associations." *Chi Iota,* 443 F. Supp. 2d. at 386.

41. N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1 (1988).

42. *Id.* at 19 (O'Connor, J., concurring). Staten Island (along with Brooklyn, the Bronx, Manhattan, and Queens) is one of the five boroughs that make up New York City. For a brief history of Staten Island's consolidation with New York City, see Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev 775, 780–83 (1992).

43. *N.Y. State Club Ass'n*, 487 U.S. at 19 (O'Connor, J., concurring).

44. *Chi Iota*, 502 F.3d at 145–46; *Chi Iota*, 443 F. Supp. 2d at 386.

45. *Chi Iota*, 502 F.3d at 145–46.

46. *Roberts*, 468 U.S. at 620.

47. *Id*.

Court found, Chi Iota selects its members like a group that has more intimate than attenuated personal attachments.

The District Court noted that throughout the pledge process, the pool of individuals invited to join Chi Iota would be "significantly whittled down" to a small group of final members.[48] The court then contrasted this process with that of the clubs in *Roberts v. United States Jaycees* and *Board of Directors of Rotary International v. Rotary Club of Duarte*.[49] Unlike the gender and age requirements, which were the only factors that could preclude membership with the group in *Roberts*, "[Chi Iota] screens potential members through a formal process with an emphasis on social and philosophical compatibility with existing members."[50] In addition, Chi Iota's membership policy is much more exclusive than other groups that were denied intimate association rights.[51] Furthermore, the District Court noted that the membership decisions made by existing Fraternity members were highly selective—serious dissent from just one member could be grounds for a denial of membership.[52]

Although it acknowledged that Chi Iota used "some care in selecting recruits," the Second Circuit ruled that Chi Iota was not selective enough.[53] According to the Second Circuit, Chi Iota aggressively recruited new members from the CSI student body. The Second Circuit described the recruiting process as follows:

> Fraternity members invite approximately one out of ten men they meet on campus—and about a third of the men they know through Jewish groups—to rush events. Most of those who attend a first rush event are invited back for later events, and the majority of those who attend multiple events are asked to pledge. Most, though not all, pledges are initiated as members. These figures indicate that a relatively high percentage of Jewish men at CSI who express an interest in [Chi Iota] are invited to join.[54]

48. *Chi Iota*, 443 F. Supp. 2d at 386.

49. *Id.*

50. *Id.* (citing *Roberts*, 468 U.S. at 621).

51. *See Chi Iota*, 443 F. Supp. 2d at 386 (citing *Duarte*, 481 U.S. at 546). At issue in *Duarte* was the Rotary Club's membership policy, which the Court described as "inclusive, not exclusive." *Duarte*, 481 U.S. at 546–47 ("The purpose of Rotary 'is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community.'" (quoting 1 ROTARY BASIC LIBRARY, FOCUS ON ROTARY 60–61 (1981), App. 84)).

52. *Chi Iota*, 443 F. Supp. 2d at 386. The District Court noted that this was similar to the clubs in *Louisiana Debating and Literary Ass'n* v. *City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995), where anywhere from three to five objections could preclude membership. *Chi Iota*, 443 F. Supp. 2d at 386. In *Louisiana Debating*, the Fifth Circuit declared that the groups were intimate associations. *Louisiana Debating*, 42 F.3d at 1497–98.

53. *Chi Iota*, 502 F.3d at 145–46.

54. *Id.* at 145.

Despite the "high percentage of Jewish men" that express an interest in Chi Iota,[55] Chi Iota only has less than twenty members out of 4500 men on campus.[56] The Second Circuit overlooked the fact that, despite aggressive recruiting tactics, Chi Iota still maintains a high degree of selectivity in who is finally asked to join. Based on the Second Circuit's reasoning, Harvard Law School might not be considered selective because a large number of students apply every year.[57]

Another factor the courts looked at was the exclusion of non-members.[58] The District Court agreed with Chi Iota's argument that social parties, which occur only twice a month and are attended by non-members, were not the focus of the Fraternity's activities.[59] Instead, the court ruled that the weekly members-only meetings and shared rituals were the "activities central to the Fraternity's purposes of brotherhood, congeniality, functioning as a surrogate family, and sharing a community of thoughts, experiences, and beliefs."[60] Chi Iota's activities did not have to be as secluded as the clubs in *Louisiana Debating and Literary Association v. City of New Orleans*.[61] Instead of forcing Chi Iota to reach that threshold, the District Court correctly placed Chi Iota on a spectrum between the clubs in *Louisiana Debating* on one end, and the clubs in *Roberts* and *Duarte* on the other.[62] Placing Chi Iota within that spectrum, it is clear that Chi Iota leans more towards the exclusivity of the clubs in *Louisiana Debating*.

The Second Circuit acknowledged that some of Chi Iota's activities took place solely among its members in private, such as decisions involving whether to offer or revoke membership, pledge ceremonies, weekly business meetings, and frequent informal gatherings.[63] However, the Second Circuit characterized Chi Iota's social parties and other events involving non-members as "crucial aspects of its existence."[64] In contrast, the District Court focused on the fact that these social events only occurred "perhaps once or twice a month," while the private, members-only events occurred weekly.[65] Much like its analysis of Chi Iota's selectivity, where Chi Iota's

55. *Id*.

56. *Chi Iota*, 443 F. Supp. 2d at 386.

57. The entering class at Harvard University Law School for 2008–2009 totaled 556 students; 7168 applied. Harvard Law School Class Profile, https://www.law.harvard.edu/admissions/jd/apply/classprofile/ (last visited Oct. 25, 2008).

58. *Chi Iota*, 502 F.3d at 146; *Chi Iota*, 443 F. Supp. 2d at 386–87.

59. *Chi Iota*, 443 F. Supp. 2d at 386.

60. *Id*.

61. *See id.* at 386–87 (holding that Chi Iota likely qualified as an intimate association "though admittedly, the Fraternity is not as secluded in its activities as the clubs in *Louisiana Debating*").

62. *See id.* The District Court described the activities of the Jaycees in *Roberts* and the Rotary Club in *Duarte* as "rife with non-member participation." *Id.*

63. *Chi Iota*, 502 F.3d at 146.

64. *Id*.

65. *Chi Iota*, 443 F. Supp. 2d at 386.

selection process was contrasted with the institutions of marriage and adoption,[66] the Second Circuit appeared to force Chi Iota to meet the threshold of the clubs in *Louisiana Debating*, which few groups could ever reach.[67]

The District Court held that, as in *Louisiana Debating*, there was a close nexus between Chi Iota's central purposes—including brotherhood and congeniality—and its membership criteria, which contributed to Chi Iota's intimate association status.[68] The Second Circuit itself acknowledged that one of Chi Iota's purposes was "to foster personal, intimate relationships between its members," by forming "deep attachments and commitments" and sharing "a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives."[69] Despite this, the court held that these goals were too generic and could be satisfied in any student group in which its members become close friends.[70] The Second Circuit should have affirmed the decision of the District Court, which ruled that "[t]he Fraternity's central purposes are not unlike those of the clubs in *Louisiana Debating*."[71] The District Court described the clubs in *Louisiana Debating* as sharing "common social interests and backgrounds; often, the relationships predate membership in the Clubs through either family, religious activity, or other social groups."[72] Despite the similarities between the purposes of the clubs in *Louisiana Debating* and Chi Iota, the Second Circuit did not view Chi Iota's purpose as strong enough to grant it intimate association status.

The Second Circuit's decision allows CSI to enforce its non-discrimination policy against Chi Iota. The sad irony is that the repercussions of this decision will likely encourage even more discrimination by groups seeking to exercise intimate association rights. Chi Iota contended that "fraternities and sororities are generally portrayed as and criticized for being exclusive and selective."[73] As a result of the Second Circuit's ruling, in order for a group to be accorded intimate association

66. *Chi Iota*, 502 F.3d at 145–46.

67. *See id.* at 147.

68. *Chi Iota*, 443 F. Supp. 2d at 387.

69. *Chi Iota,* 502 F.3d at 146 (internal quotations omitted).

70. *Id.* (citing the Supreme Court in *N.Y. State Club Ass'n*, 487 U.S. at 12). The Supreme Court in *N.Y. State Club Ass'n* pointed out that:

> [A] considerable amount of private or intimate association occurs in such a setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the government has barred it from doing so.

Id. (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)). However, *N.Y. State Club Ass'n* only dealt with clubs that had at least 400 members, provided "regular meal service" and received regular payments "directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." *N.Y. State Club Ass'n*, 487 U.S. at 12. These characteristics do not nearly describe Chi Iota.

71. *Chi Iota*, 443 F. Supp. 2d at 387.

72. *Id.* (quoting *Louisiana Debating*, 42 F.3d at 1496).

73. *Chi Iota*, 443 F. Supp. 2d at 386.

rights, it must be as discriminatory and secluded as possible.[74] If a fraternity were to segregate itself from the general student population, perhaps only then would it be so small, selective, and exclusive that the Second Circuit would grant it intimate association rights.

Fraternities should not be driven to this extreme.[75] For centuries, single-sex fraternities have provided numerous benefits to undergraduate colleges in the United States.[76] In recognition of this, Congress amended Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) in 1974 to specifically grant an exception to the membership practices "of a social fraternity or social sorority . . . , the active membership of which consists primarily of students in attendance at an institution of higher education."[77] Title IX previously restricted the ability of educational institutions to give any substantial support to any organization that discriminated on the basis of sex. The need for an amendment became apparent when social fraternities and sororities had trouble receiving the relatively low rent they had enjoyed prior to Title IX's passage.[78] Senator Evan Bayh, the principal Senator sponsor of Title IX, wrote that "[f]raternities and sororities have been a tradition in the country for over 200 years. Greek organizations . . . must not be destroyed in a misdirected effort to apply Title IX."[79] Senator Bayh's words are true to this day. Greek organizations

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74. For example, the Fifth Circuit made the following observations about the clubs in *Louisiana Debating*:

> No signs outside the Clubs' buildings identify the locations to the public. Nonmembers are strictly prohibited from using the facilities. Even though the Clubs permit members to bring guests, this practice is severely limited. [One club] prohibits its members from bringing or inviting any male guests, at any time and under any circumstances. Female guests are permitted rarely, but usually, they are the members' wives. At [two other clubs], male residents of the City are strictly prohibited from attending as guests; women and children residents may be accompanied by a member, but on extraordinary occasions; the inviting of male nonresidents is strictly limited according to the time, frequency, and occasion of the visit. [Another club] permits nonresident males to attend as guests during the noonday meals, provided the guest is a friend or close relative of the member and has some basis for a social acquaintance with other members; women and resident males are permitted, but only at limited times and with the approval of the club's Board of Governors.

Louisiana Debating, 42 F.3d at 1496–97 (footnotes omitted).

75. The Second Circuit treats fraternities as any other group, even though they have historically been singled out as different. *See Chi Iota,* 502 F.3d 136; *Chi Iota*, 443 F. Supp. 2d at 388. The District Court understood this and gave a concise but thorough history of the long-standing tradition of single-sex membership at educational institutions in the United States. *Chi Iota*, 502 F.3d 136.

76. *See, e.g.,* Craig D. Sandok, Note, *Public Education Institutions and Their Unconstitutional Regulation of First Amendment Rights of Fraternal Organizations: An Analysis of the Maryland Plan*, 48 Syracuse L. Rev. 323, 327–28 (1998).

77. *Chi Iota*, 443 F. Supp. 2d at 388 (quoting 20 U.S.C. § 1681(a)(6)(A) (2006)).

78. *Id.* at 388–89 (citing 120 Cong. Rec. 39992 (1974)).

79. *Id.* at 389 (quoting 120 Cong. Rec. 39992, 39993 (1974)). Senator Bayh's letter was addressed to Caspar Weinberger, who served as Secretary of the Department of Health, Education, and Welfare under President Richard Nixon. *Id.*

should neither be destroyed, nor denied, the intimate association rights they are well deserving of and entitled to, in a misdirected effort to prevent discrimination.