

No. 21-2763

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TYLER GUTTERMAN, *ET AL.*,
APPELLANTS

v.

INDIANA UNIVERSITY BLOOMINGTON, *ET AL.*,
APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Cause No. 1:20-cv-02801-JMS-MJD
The Honorable Jane Magnus-Stinson, Judge

**APPELLEES' MOTION TO DISMISS APPEAL
AS MOOT**

I. INTRODUCTION

Appellants (Plaintiffs below) brought this lawsuit against Appellees, Trustees of Indiana University, misnamed in Appellants' Complaint as Indiana University, Bloomington, and Pamela S. Whitten, in her official capacity as President of Indiana University (collectively, "IU" or the "University"), asserting that IU's limited review of historic

data from their student ID cards constituted an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, and sought relief under 42 U.S.C. § 1983. Appellants also alleged that IU's review of their data violated a breach of their contract with the University. (*See generally* Dkt. 1.)

IU argued below that the Trustees of Indiana University were entitled to Eleventh Amendment protection from suit on each of Plaintiffs' claims. IU also argued that President Whitten was entitled to Eleventh Amendment protection from suit on claims seeking retrospective relief, i.e., those which sought monetary or declaratory relief. (Dkt. 20 at 6-7; Dkt. 33 at 3-4). The district court agreed and dismissed Plaintiffs' constitutional claims (Counts I and II) in their entirety, as to the Trustees of Indiana University, and as to President Whitten, to the extent that those claims sought retrospective relief. (Dkt. 50 at 8-11). Plaintiffs did not appeal the district court's determination regarding the Eleventh Amendment. (*See generally* Appellants' Br.).

As such, this appeal focuses only on Appellants' claims against President Whitten, in her official capacity, and whether the district

court properly dismissed Appellants' constitutional claims which sought prospective, injunctive relief (*see id.* at 1)—a point which Appellants' counsel conceded at oral argument. Because prospective relief can become moot, which would impact the Court's jurisdiction, mootness can be evaluated and reconsidered at any time in the litigation, including on appeal.

Appellants have indicated they would be seniors for the 2021-2022 academic year and that each of them “expect[ed] to graduate in May, 2022.”¹ Plaintiffs' Ans. to Defendants' First Set of Interrogatories, attached hereto as **Exhibit A**, at No. 4. IU's commencement was held on May 7, 2022. In accordance with IU policy, “[i]f there is a commencement ceremony, degrees will be conferred effective the date of the ceremony.” Commencement Dates and Degree Conferral Policy, USSS-13, attached hereto as **Exhibit B**. IU's records, therefore, now indicate that Plaintiffs have graduated and received their undergraduate degrees. Declaration of Michael Carroll (“Carroll Decl.”), ¶ 9, attached hereto as **Exhibit C**. Accordingly, they are no longer

¹ During oral argument on February 24, 2022, Appellants' counsel also stated that Appellants were still students “as of this semester,” and “on track to graduate this Spring.”

enrolled at IU. *Id.* at ¶¶ 9-10. Moreover, IU’s records indicate that none of the Plaintiffs have registered to attend graduate degree programs on any IU campus. *Id.* at ¶ 10. Because Appellants have graduated from IU, their degrees were conferred, and none are enrolled for further studies at IU, their appeal is moot and must be dismissed.

II. ARGUMENT

A. Standard

The Constitution gives the Judiciary the power to decide “cases” and “controversies.” U.S. CONST., ART. III, §2. Thus, “it is well-settled that a federal court ‘has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.’” *Porco v. Trs. of Ind. Univ.*, 453 F.3d 390, 394 (7th Cir. 2006) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). In cases, like this one, which only seek injunctive relief, “the requirement of a live controversy ordinarily means that, once the threat of the act sought to be enjoined dissipates, the suit must be dismissed as moot.” *Loertscher v. Anderson*, 893 F.3d 386, 393 (7th Cir. 2018) (cleaned up); *see also Klaassen v. Trs. of Ind. Univ.*, 24 F.4th 638, 639-40 (7th Cir. 2022)

(recognizing that the question of mootness must be revisited before reaching the merits).

B. Appellants are no longer students at IU and, therefore, their appeal is moot.

Courts, including the Seventh Circuit, have found where students seek prospective injunctive relief, the case becomes moot when they graduate or change schools. In fact, this Court recently dismissed a case against the University on similar grounds. *See Klaassen*, 34 F.4th at 640 (dismissing where the only plaintiff with standing withdrew from IU); *see also Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 600 (7th Cir. 2006) (vacating judgment of district court and directing case be dismissed as moot where student moved school districts); *Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989, 991 (dismissing appeal as moot where student graduated high school and was no longer eligible to play high school basketball); *Jordan ex rel. Jones v. Ind. High Sch. Athletic Ass'n*, 16 F.3d 785, 788-89 (7th Cir. 1994) (vacating judgment because player graduated high school); *Bd. of Sch. Com'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (recognizing case was moot where all students graduated from school system). Here, IU's records confirm that Appellants graduated on May 7th and their

degrees were conferred effective that date. Because they are no longer undergraduate students at IU, and none of them plan to return as graduate students in the fall, this Court cannot provide them with any relief relative to the alleged constitutional claims raised in their Complaint. As such, their appeal should be dismissed. *See Klaassen*, 34 F.4th at 640.

III. CONCLUSION

For the reasons set forth above, IU respectfully requests that the Court dismiss this appeal as moot.

Respectfully submitted,

ICE MILLER LLP

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*Attorneys for Appellees Indiana
University, Bloomington, and
Pamela S. Whitten, in her official
capacity as President of Indiana
University*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 917 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word for Office 365 in a proportionally spaced typeface using Century Schoolbook 14-point font.

Date: June 6, 2022

/s/ Jenny R. Buchheit
Jenny R. Buchheit

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jenny R. Buchheit

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Tyler Cameron Gutterman, Dale
Nelson, Hunter Johnson, *and* Brian
Hiltunen,

Plaintiffs

v.

Indiana University, Bloomington; *and*
Michael McRobbie, *in his official*
capacity as President of Indiana
University,

Defendants.

Case No. 1:20-cv-02801-JMS-MJD

**Plaintiffs' Responses to
Defendants' First Set of
Interrogatories**

Plaintiffs submit the below responses to Defendants' First Set of Interrogatories.¹

Interrogatory No. 1: State Your full name, all previous names, home address, date and place of birth, and Your 10-digit University ID (UID) number.

Answer to Interrogatory No. 1:

Brian Hiltunen

[Redacted]
Born [Redacted], [Redacted]
UID: [Redacted]

Dale Nelson

[Redacted]
Born [Redacted], [Redacted]
UID: [Redacted]

¹ While Defendants served separate requests on each of the four Plaintiffs separately, the requests were substantively identical, as are the responses, so Plaintiffs consolidate them here in a single response.

Hunter Johnson

Born

UID:

Tyler Cameron Gutterman

Born

UID:

Interrogatory No. 2: Describe in detail Your understanding of the Access, including how You have come to such an understanding.

Answer to Interrogatory No. 2: Plaintiffs understand that employees of Defendants accessed the historical records of their use of their CrimsonCards, with a particular focus on the use at their dorm buildings From September 30, 2018 through October 2, 2018. Plaintiffs came to this understanding because of the questions asked of them during the University's interrogation of them, and because it is detailed at page three of the University's investigation report, which is in Defendant's possession and will be provided as part of Plaintiffs response to Defendant's Requests for Production.

Interrogatory No. 3: Do You contend that, as a result of the Access, You have suffered any injury or damages? If so, describe in detail the nature and extent of any and all injuries and damages You claim to have suffered as a result of the Access.

Answer to Interrogatory No. 3: As detailed in Plaintiffs' Complaint, they suffered injury via the violation of their Fourth Amendment rights against unreasonable searches and seizures, and from the University's breach of contract. Plaintiffs understand that the damages resulting from these injuries are difficult to calculate, and therefore ask in their Complaint for nominal damages.

Interrogatory No. 4: Are You currently a full-time student at the University? If so, provide Your class standing by credit hour (e.g., freshman, sophomore, junior, or senior) and identify the month and year of Your intended graduation from the University.

Answer to Interrogatory No. 4: All four Plaintiffs recently completed their junior year, and expect to graduate in May, 2022.

Interrogatory No. 5: State the name, address, telephone number, title and capacity of all persons believed to have knowledge or information concerning the

matters at issue in this Lawsuit, and describe the nature of the information they are believed to possess.

Answer to Interrogatory No. 5: The people who Plaintiffs' believe may have knowledge of the matters at issue in this case are:

Plaintiffs,
Tyler Cameron Gutterman
Dale Nelson
Hunter Johnson
Brian Hiltunen

Contacted through counsel for Plaintiff:

Liberty Justice Center
208 South LaSalle Street, Suite 1690
Chicago, Illinois 60604
Telephone: (312) 637-2280

Other members of the Beta Theta Pi fraternity, who may have knowledge regarding the alleged hazing incident and conduct of the investigation:

Alex Fertilla - President
Kevin Doran - Pledge Master
Dougie Scheibel
Tommy Katsafanas
Alex Waldinger
Hayden Kea
Mac Berry
Alex Murray

Beta Theta Pi's address is:

1100 North Jordan Avenue
Bloomington, IN 47406

University Employees who were responsible for the conduct of the investigation, including the accessing of Plaintiffs' swipe data:

Anna Krause
Simone Cardosa
Jackie Stelmaszczyk
Libby Spotts

These employees currently or previously worked for the University's Office of Student Conduct:

Alice McDonald Nelson Building

801 N. Jordan Avenue

Bloomington, IN 47405

Phone: 812-855-5419

Fax: 812-855-4465

Email: osc@indiana.edu

Interrogatory No. 6: Identify with specificity any Person with whom You discussed the Lawsuit or the Access, and describe the substance of such discussions(s).

Answer to Interrogatory No. 6: Plaintiffs object to Interrogatory No. 6 as overbroad and not relevant to any party's claim or defense and proportional to the needs of the case, and infringes on privileged attorney-client communications. To the extent a response is required, Plaintiffs have discussed the lawsuit among themselves, and in privileged discussions with their attorneys, and have mentioned the existence of the lawsuit in passing with friends and family.

Interrogatory No. 7: Describe with specificity the basis for Your claim that the CrimsonCard Data "records students' movements around campus," as alleged in Paragraph 23 of Your Complaint.

Answer to Interrogatory No. 7: The basis for the claim is detailed in ¶¶ 22-25 of the Complaint, which cites to Defendants' own website which describes the places the data is generated, and that the data is retained, and by the uncontested fact that this retained data was accessed in this case for the purposes of investigation, as detailed in the University investigation report provided in response to Defendants' Requests for Production.

Interrogatory No. 8: Describe with specificity the basis for Your claim that the University "track[ed] [Plaintiffs] movements into and out of their homes using swipe data," as alleged in Paragraph 42 of Your Complaint. And further, describe with specificity the basis for Your claim that the University tracked Plaintiffs' movements "within [their homes]," as set forth on page 6 of Your Opposition to Defendants' Motion to Dismiss [Dkt. 28].

Answer to Interrogatory No. 8: Both claims are also supported by the facts pled at ¶¶ 22-25 of the Complaint, which cite the University's own website for the places in which CrimsonCard data is generated, and the University's own policies for the fact that is retained. Another basis for the claims is page three of Defendants' own investigation report, which is in Defendant's possession and will be provided as part of Plaintiffs response to Defendant's document requests.

Interrogatory No. 9: Describe with specificity the basis for Your claim that the University “employ[ed] that tracking in an official investigation into Plaintiffs’ conduct (to see if it could convict them of the administrative equivalent of perjury)[,]” as set forth on page 7 of Your Opposition to Defendants’ Motion to Dismiss [Dkt. 28].

Answer to Interrogatory No. 9: The basis for the claim is page three of Defendants’ own investigation report, which is in Defendants’ possession and is also being provided as part of Plaintiffs’ response to Defendants’ document requests.

Interrogatory No. 10: Provide the legal basis for Your claim that disciplinary sanctions against the Fraternity “represent an injury to Plaintiffs, who otherwise would have enjoyed the benefits of membership unencumbered by University sanction,” as set forth on page 22 of Your Opposition to Defendants’ Motion to Dismiss (Dkt. 28). Further, describe with specificity how the Fraternity’s placement on Disciplinary Probation “injured” You.

Answer to Interrogatory No. 10: Plaintiffs object to Interrogatory No. 10 as calling for a legal conclusion not within their personal knowledge. To the extent a response is required, Plaintiffs affirm that they were injured as members of an organization whose activities were restricted by the University. The manner in which those activities were restricted is detailed in the decision letter provided as part of Plaintiffs’ response to Defendants’ Requests for Production.

Interrogatory No. 11: Describe with specificity the basis for Your claim that Defendants acted “illegally, arbitrarily, capriciously, and in bad faith” as alleged in Paragraph 61 of Your Complaint.

Answer to Interrogatory No. 11: The basis for this claim is that the Defendants accessed Plaintiffs swipe data in clear violation of both their own written policies and Plaintiffs’ constitutional rights.

Interrogatory No. 12: Describe with specificity the basis for Your claim that the UA-13 Policy “does not entitle the University to access, use, or release [the CrimsonCard Data] to check past entries to University buildings[,]” as alleged in Paragraph 33 of Your Complaint.

Answer to Interrogatory No. 12: As detailed in ¶¶ 31-35 of the Complaint, the basis for the claim is that the UA-13 Policy does not include any provision allowing those uses of the data. There is also the additional basis that it violates their Fourth Amendment rights.

Interrogatory No. 13: Do You contend that any Policy expressly prohibited the Access? If so, please identify the specific Policy provision(s) that prohibits the University from taking such action.

Answer to Interrogatory No. 13: As detailed in ¶¶ 31-35 of the Complaint, Plaintiffs contend that the use of the data for purposes outside the “intended” uses, as defined by UA-13, constitutes a breach of that policy.

Interrogatory No. 14: Describe with specificity the basis for Your contention that the University’s Policies do not permit access to the CrimsonCard Data for purposes other than “Identification,” as it is so alleged in the Complaint.

Answer to Interrogatory No. 14: As detailed in ¶ 32 of the Complaint, the UA-13 policy specifically says that the CrimsonCard’s “intended use” is to be “an electronic identification, validation, and authentication credential for authorized access to services and facilities.”

Interrogatory No. 15: Identify with specificity the “representation by the University” that You allege to have detrimentally relied upon and describe with specificity in what ways You detrimentally relied upon this representation, as alleged in Paragraph 62 of the Complaint.

Answer to Interrogatory No. 15: As detailed in ¶ 32 of the Complaint, the representations by the University were the explicit policies governing the use of the data generated by the CrimsonCard, and the uses to which it could be put. These representations did not include the use of swipe data to track students’ movements.

Interrogatory No. 16: Describe with specificity the injunctive relief to which You claim to be entitled, as well as the actions You are asking the Court to enjoin Defendants from taking.

Answer to Interrogatory No. 16: Plaintiffs are asking the Court to enter an injunction limiting access to CrimsonCard swipe data unless that access is made pursuant to procedures that comply with the Fourth Amendment.

Interrogatory No. 17: Did you provide any testimony, either as a witness or by affidavit or sworn declaration, or provide any other oral or written statement in connection with the disciplinary hearing conducted regarding the hazing allegations against the Fraternity? If yes, please describe the nature of your testimony and/or statement.

Answer to Interrogatory No. 17: As stated in ¶ 18 of the Complaint, Plaintiffs were interrogated by University officials as part of the hazing investigation. Anonymized summaries of these interrogations are included in the investigation

report provided as part of the response to Defendants' requests for production. Plaintiffs are also aware of recordings of them being interrogated, and are preparing those recordings to be provided as part of a supplemental disclosure.

Interrogatory No. 18: Identify all email, Facebook®, Twitter®, Instagram®, SnapChat®, TikTok®, blog, or any other electronic or social media accounts which You have had from January 1, 2018 to present, and for each, state the address and domain and/or social media handle of each account, and whether or not the account is still active.

Answer to Interrogatory No. 18: Plaintiffs object to Interrogatory No. 18 as overbroad and not relevant to any party's claim or defense and proportional to the needs of the case. As explained in Plaintiffs' responses to Defendants' document requests, Plaintiffs are not aware of social media posts about the investigation or this case. To the extent a response is required, Plaintiffs disclose the following social media accounts:

Brian Hiltunen—Instagram: [REDACTED]

Dale Nelson—Instagram: [REDACTED]

Hunter Johnson—Instagram: [REDACTED]

Tyler Cameron Gutterman— Instagram: [REDACTED]; Facebook: [REDACTED]
[REDACTED]

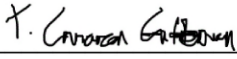
Interrogatory No. 19: Is any non-party to this Lawsuit providing You funding, or paying Your attorneys' fees, including, but not limited to, any active member or alumni of the Fraternity, the Fraternity itself, or the Beta Theta Pi Foundation? If yes, please identify with specificity the individual(s) or organization(s) providing such funding.

Answer to Interrogatory No. 19: Plaintiffs object to Interrogatory No. 19 as overbroad and not relevant to any party's claim or defense, and as calling for a response that includes privileged information. To the extent a response is required, Plaintiffs are represented in this case *pro bono* by the Liberty Justice Center, a 501(c)(3) nonprofit public interest law firm that represents plaintiffs in constitutional litigation throughout the country.

Interrogatory No. 20: Did you ever report or file a complaint regarding the University's the Access with the University Chief Privacy Officer? If so, please provide the date of such communication and whether such communication was by phone, mail, or e-mail. If You did not, explain why.

Answer to Interrogatory No. 20: Plaintiffs did not file a formal complaint with the University's Chief Privacy Officer.

I certify that the foregoing are true and accurate responses:




Tyler Cameron Gutterman



Dale Nelson



Hunter Johnson



Brian Hiltunen

Dated: May 19, 2021

Reilly Stephens (MD Bar, admitted December 14, 2017)*

Daniel R. Suhr (WI No. 1056658)*

Jeffrey M. Schwab (IL No. 6290710)*

Liberty Justice Center

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Counsel for Plaintiffs

*Pro hac vice

Exhibit B

USSS-13

About This Policy

Effective Dates:

06-25-1998

Last Updated:

01-18-2019

Responsible University Administrator:

Executive Vice President for University Academic Affairs Academic Leadership Council

Policy Contact:

Jeff Johnston
 University Registrar
jjohnsto@iusb.edu

Scope

All campuses of Indiana University; Registrar offices; academic units; and students.

Policy Statement

The following points will serve as guidelines for the degree conferral dates that all campuses will use:

- If there is a commencement ceremony, degrees will be conferred effective the date of the ceremony.
- If there is no commencement ceremony, degrees will be conferred effective the last day of the term.
- Graduate degrees may be awarded the last day each month or on the last day of the term ending in that month.

May (Commencement Date)	May (Commencement Date)
June 30	June 30
July (Last Day of Summer Term, if it falls in July; otherwise no July conferral date)	Last Day of Summer Term, if it falls in July; otherwise July 31
August (Last Day of Summer Term, if it falls in August; otherwise no August conferral date)	Last Day of Summer Term, if it falls in August; otherwise August 31
	September 30
	October 31
	November 30
December (BL Commencement Date) (Others – Last Day of Term)	December (BL Commencement Date) (Others – Last Day of Term)
	January 31
	February 28; February 29 in leap years
	March 31
	April 30

Reason For Policy

This policy minimizes the time from the end of a term to the date when a degree is conferred, which allows students to obtain official transcripts or be officially certified in a timely manner.

Procedure

The Offices of the Registrar use standard dates across all campuses as the degree conferral date that is recorded on student transcripts for each term. These dates are maintained in IU's Student Information System (SIS).

Definitions

Term: A Term is equivalent to a semester; individual Sessions are associated with Terms; an academic year consists of three sixteen-week terms (Fall, Spring, Summer); some programs utilize four twelve-week terms (Fall, Winter, Spring, Summer).

Commencement: Commencement is a university ceremony where the University President, Trustees, academic officers, faculty, graduating students, and their families and guests, assemble for the purpose of conferring degrees upon the newly certified graduates. The conferral of degrees is performed by the President with the approval of the Board of Trustees upon recommendation of the faculty.

History

This policy was established in 2013. Previous documentation of this information was published by the Office of the Registrar in 1982 and revised in 1998. This policy was reviewed in 2019 and no substantive updates were needed.

Exhibit C

No. 21-2763

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TYLER GUTTERMAN, *ET AL.*,
APPELLANTS

v.

INDIANA UNIVERSITY BLOOMINGTON, *ET AL.*,
APPELLEES

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Cause No. 1:20-cv-02801-JMS-MJD
The Honorable Jane Magnus-Stinson, Judge

DECLARATION OF MICHAEL CARROLL

Michael Carroll declares, under penalty of perjury and pursuant to 28 U.S.C. § 1746, as follows:

1) I am over 18 years of age and have personal knowledge of the matters described in this declaration.

2) I have been employed by Indiana University ("IU") for more than 26 years. I currently serve as the Registrar for the Indiana University Bloomington campus.

3) My duties include overseeing student enrollment and unenrollment from, as well as administrative enrollments in and withdrawals from, IU Bloomington campus courses.

4) As part of its standard practice and operations, IU creates and maintains student enrollment data in a secure database. IU regularly updates this data at or around the time it receives any information about a particular student's enrollment circumstances.

5) IU Bloomington also updates this data following its Fall and Spring commencement, including, most recently, following its May 7, 2022, commencement.

6) In the regular course of my employment, I oversee IU Bloomington's creation and maintenance of, and routinely access, this student enrollment data.

7) I am also familiar with IU's Commencement Dates and Degree Conferral Policy (USSS-13), which determines the effective dates of IU degree


conferral for graduating students. Pursuant to the USSS-13, on campuses where a commencement ceremony is held, IU confers the degree effective as of the date of such ceremony. As such, any student graduating from IU's Bloomington campus this semester had their degree(s) conferred effective May 7th.

8) In connection with this proceeding, I reviewed enrollment data for the four plaintiffs in this lawsuit: Tyler Cameron Gutterman, Brian Hiltunen, Hunter Johnson, and Dale Nelson.

9) The IU student enrollment data that I reviewed reflects that each of the four plaintiffs graduated from IU on May 7, 2022; that their undergraduate degrees were conferred effective as of that date; and none of the plaintiffs are current undergraduate students at IU.

10) IU's Summer 2022 session commenced on May 10, 2022, and I further certify that none of the plaintiffs are currently enrolled in any courses at IU and that none of the plaintiffs are enrolled for any graduate programs commencing in Fall 2022.

June 6, 2022
Date


Michael Carroll
Registrar
Indiana University Bloomington