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"U. of Wyoming Transgender Lawsuit: Who is a Woman?"

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A federal lawsuit reflective of the nationwide culture wars is challenging the right of a University of Wyoming sorority to induct a transgendered woman, raising questions of central importance to the First Amendment Right of Freedom of Association and Title VII of the 1964 Civil Rights Act. The issues in the suit are likely to be replicated across the nation as the judicial system wrestles with legislative efforts to regulate, distinguish and deny opportunities and rights of the LGBTQ community.

Seven past and present members have filed suit in federal court in Wyoming, asserting that the University of Wyoming chapter of Kappa Kappa Gamma and the national office violated the sorority's mission, purpose and bylaws when it inducted Artemis Langford, who identifies as a woman.

Resolution of the lawsuit should hinge on the question of who, precisely, has the authority to determine whether a transgendered woman has satisfied the criteria for membership in Kappa Kappa Gamma. The local chapter, backed by the parent organization, has concluded that Langford meets the criteria for membership, a decision grounded in its First Amendment right of Freedom of Association.

Freedom of Association is not enumerated in the Constitution, but it was initially recognized by the

Supreme Court in 1876, in *United States v. Cruikshank* as an implied right, derived from the First Amendment's guarantee of the "right of the people peaceably to assemble." The existence of the right of freedom of association is non-controversial, though its scope and contours have inspired debate over the years. In a raft of decisions, the Court has also grounded it in the right to petition government, the right of free speech and privileges and immunities of citizenship. Like all other rights protected by the Constitution—enumerated and implied alike—freedom of association is not absolute but is subject to reasonable limitations requited by substantial public interests.

In a case that lies at the heart of the pervasive cultural wars afflicting our nation, the Supreme Court, in *Boy Scouts of America v. Dale* (2000), invoked freedom of association to uphold the right of the Boy Scouts to revoke the membership of an assistant scoutmaster after he publicly announced his sexual orientation by leading a gay group at Rutgers University. The Court, in a 5-4 opinion written by Chief Justice William Rehnquist, held that freedom of association gave the Boy Scouts the right to bar "homosexuals" from serving as troop leaders. The Court left to the Boy Scouts the right to determine the criteria that should govern its membership.

The Supreme Court's ruling in *Boy Scouts of America* should guide the federal court's decision in the Wyoming case involving the right of Kappa Kappa Gamma to determine its membership. Judicial deference to the conclusion of both the local chapter and the parent organization, grounded on the rational basis test, that Langford meets the criteria for induction in the sorority, avoids the need for the court to determine whether Langford qualifies as a transgendered woman and whether her admission perverts the organizational mission of Kappa Kappa Gamma.

In *Boy Scouts of America*, the four dissenters failed in their effort to persuade the majority to engage in a searching analysis of whether the membership of a gay scoutmaster truly compromised the mission, spirit and principles of organization. Chief Justice Rehnquist's opinion for the Court deferred to the Boy Scouts' own determination of that question. Otherwise, Rehnquist wrote, the presence of a "homosexual" scoutmaster "would, at the very least, force the organization to send a message, both to the young members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

By parity of reasoning, the institution of Kappa Kappa Gamma, rather than disappointed individual members, should be able to determine, on principles of freedom of association, whether induction of a transgendered woman is consistent with its organizational principles and message.

Another Supreme Court precedent has a bearing on the sorority case. In *Bostock v. Clayton County*, in 2022, Justice Neil Gorsuch held for a 6-3 majority that the Title VII of the 1964 Civil Rights Act prohibits employers from discriminating against any person because of that person's "race, color, religion, sex, or national origin." He wrote: "Discrimination on the basis of homosexuality or transgender status" violates the landmark statute.

The Court's ruling in *Bostock* repudiates the plaintiff's argument in the Wyoming case. While sororities and fraternities retain on freedom of association grounds the right to remain single-sex organizations, they may not, under the reasoning of *Bostock*, deny admission to a student for reasons of identity. To do that, as Justice Gorsuch held, would violate Title VII's prohibition against sex discrimination.

The Wyoming sorority case embodies issues that will be raised in lawsuits throughout the nation. The immediate issue before the federal court, the one inflaming the culture wars and one certain to generate controversy grounded in emotions and politics, is clear: Who decides if a transgendered inductee qualifies as a woman?