
IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC 17-200

DANTE MARTIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH CIRCUIT

AMICUS BRIEF PROFESSOR GREGORY S. PARKS FOR
HAZINGPREVENTION.ORG
IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

HazingPrevention.Org (“HPO”) submits this brief as amicus curiae in support of Appellee. HPO is a national organization dedicated to empowering people to prevent hazing, by providing education and resources, advocating on hazing prevention, and building partnerships with others. Major initiatives of the organization include National Hazing Prevention Week™, the Novak Institute for Hazing Prevention™, and Prevent.Zone™ educational online courses that touch the lives of thousands of individuals, organizations, campuses and communities. Accordingly, HPO has a substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

This Court should affirm the lower court’s opinion with respect to Petitioner Martin’s claim that the state of Florida violated the freedom of association and expression clause of the First Amendment of the United States Constitution. Mr. Martin’s assertion that by criminalizing hazing without regard to the victim’s consent, Florida’s anti-hazing statute restricts Constitutionally protected conduct, is at odds with decades of social scientific research.

There is a vast body of empirical research as well as theories in the behavioral and social sciences that explains why hazing consent is remarkably difficult to give. Many collegiate hazing victims have likely been habituated to hazing during high school. In addition, most hazing victims lack a fundamental understanding of hazing

risks to adequately consent to hazing. Also, hazing victims are likely to succumb and conform to the influence of peers and the pressure those peers exert. Moreover, once hazing begins, victims likely feel that they have invested too many resources to quit. In addition, “membership” is an elusive concept. Within some organizations, especially those on college campuses, there is a tiered-status to membership. Hazing complicates the notion of membership within these organizations, because non-hazed individuals often take second-class status to those individuals who are hazed. As such, to gain first-class status, even individuals who are formally members often acquiesce to hazing.

ARGUMENT

I. Social Science Research Suggests that Consent in the Context of Hazing is Remarkably Difficult to Give

A. Collegiate Hazing Victims Are Likely to Have Been Habituated to Hazing During High School

Legislatures and courts have suggested that it is difficult, if not impossible, for victims to consent to hazing. Gregory S. Parks & Tiffany Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQUETTE L. REV. 101, 107-23 (2013). They have not directly explicated why this is so considering the vast body of empirical research, and behavioral and social scientific theories, that explain why hazing consent is remarkably difficult to give.

One reason why victim “consent” to hazing rarely exists is because, particularly in college, victims may have previously become habituated to hazing. Students learn to expect hazing in high school and become primed to normalize and accept the behavior once they join college organizations. Jennifer J. Waldron et al., *Duct Tape, Icy Hot & Paddles: Narratives of Initiation onto US Male Sport Teams*, 16 *SPORT, EDUCATION & SOC’Y* 116, 125 (2011). The amount of harmful hazing reports in high schools correlates with high school athletic participation. Michael S. Carroll et. al., *Case Law Analysis Regarding High School and Collegiate Liability for Hazing*, 9 *EUROPEAN SPORT MANAGE. QUARTERLY* 390, 392, 407 (2009). One national survey reported 50% of high school students experienced hazing. Jennifer J. Waldron, *Predictors of Mild Hazing, Severe Hazing, and Positive Initiation Rituals in Sport*, 10 *INT’L J. OF SPORTS SCIENCE & COACHING* 1091, 1095 (2015).

Ultimately, the experiences that many students have with hazing in high school leave them with the misperception that hazing is acceptable. Norms are created through the evaluation of observable behaviors of others, direct and indirect communications, and knowledge of the self. Brian Borsari & Kate B Carey, *Descriptive and Injunctive Norms in College Drinking: A Meta-Analytic Integration*, 64 *J. STUD. ON ALCOHOL* 331 (2008). Research on social norms perception suggests that people have the tendency to overestimate the frequency of others’ conduct in various contexts. H. Wesley Perkins, *Misperception Is Reality: The “Reign of*

Error” About Peer Risk Behaviour Norms Among Youth and Young Adults, in THE COMPLEXITY OF SOCIAL NORMS 22 (M. Xenitidou & B. Edmonds eds., 2014). In doing so, those who misperceive the acceptability of peers’ behaviors tend to conform or shift his or her own attitudes or behaviors to approximate that of his or her peers. Id. In fact, the closer the proximity of a reference group on an individual, the greater the influence on the behavior of an individual. Melissa Lewis & Clayton Neighbors, Social Norms Approaches Using Descriptive Drinking Norms Education: A Review of The Research on Personalized Normative Feedback, 54 J. AM. C. HEALTH 213, 215-216 (2006). Accordingly, collegiate hazing victims may be at risk in part because of the erroneous perceptions they have about the “acceptable” nature of hazing that they developed in high school.

B. Hazing Victims Do Not Likely Understand Hazing Risks Adequately Enough to Consent to Hazing

Another reason why victim “consent” to hazing rarely exists is because victims often lack a fundamental appreciation for the risks associated with hazing. This inability to adequately appraise the risks associated with hazing likely explains his or her willingness to blindly acquiesce to it. The available research generally supports the assumption that as a person’s appraisal of risks rises, his or her willingness to engage in risky behavior decreases. Paschal Sheeran et al., *Does Heightening Risk Appraisals Change People’s Intentions and Behavior? A Meta-Analysis of Experimental Studies*, 140 PSYCHOL. BULL. 511, 512 (2014). Risk

appraisal is a person's belief about his or her vulnerability to a negative outcome. *Id.* For example, one study found that the riskier an activity was judged to be, the less likely a person was to engage in the activity, particularly if the negative outcome was clearly defined. Paula Horvath & Marvin Zuckerman, *Sensation Seeking, Risk Appraisal, and Risky Behavior*, 14 PERSONALITY & INDIVIDUAL DIFFERENCES 41, 50 (1993). The relationship between knowledge and risky behavior varies among individuals. Elizabeth Shulman & Elizabeth Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37 L. & HUM. BEHAV. 412, 419 (2013). In one study, researchers found that despite risk appraisal, the tendency to rate a risky activity as more of a "good idea" is higher in adolescence than in either adulthood or preadolescence. *Id.* at 416. Further, the relation between this predilection toward risky behavior and deviant behavior is stronger in middle adolescence than for younger and older age ranges. *Id.*

For three inter-related reasons, hazing victims tend to lack information needed to make rational decisions about whether to "consent" to be hazed. First, they have little incentive to independently learn about the risks associated with hazing. Research on rational ignorance suggests that it would be detrimental to an individual to gather and process all possible information on a topic. Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CAL. L. REV. 943 (2009). All information has a value and a cost,

and rational decision-makers must decide what type of information to consume. *Id.* at 945. Sometimes the expected cost of acquiring knowledge is higher than its expected value. *Id.* However, cost is not the only problem; there are also the issues of too much knowledge and biased information. *Id.* at 947. Because a person who is rationally ignorant must choose what they want to learn, they need to have a baseline knowledge of what they do not know. Sylvian Bromberger, *Rational Ignorance*, 74 SYNTHESE 47, 48 (1988).

As such, and second, the challenge that most hazing victims face is that they quite often do not know what they do not know about hazing to personally seek-out valuable information on the topic. In fact, people quite often lack the set of skills needed to perform well on a task, which are also the same set of skills needed to see the faults in his or her performance. Justin Kruger & David Dunning, *Unskilled and Unaware of it: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1122, 1131 (1999). In certain contexts, not only do individuals perform poorly because they lack knowledge needed to perform well in that domain; additionally, that lack of knowledge undermines his or her ability to appreciate how poorly they perform in that context. *Id.* at 1122. With respect to hazing, therefore, victims frequently operate in a world of unknown-unknowns—walking blindly into hazing without appreciating that they are doing so. One of the things that could move potential

hazing victims from a world of unknown-unknowns to a world of known-knowns is a clear and detailed explanation about the nature and scope of the hazing that they are about to endure from those who intend to subject them to it. *See* Marian Krajc & Andreas Ortmann, *Are the Unskilled Really that Unaware? An Alternative Explanation*, 29 *J. Economic Psychol.* 724, 735-736 (2008).

In fact, and third, there is usually asymmetry of information between hazing victims and perpetrators. Asymmetric information occurs when one individual involved in an interaction has more or better information than the other individual or individuals. Pengcheng Xiang et al., *Construction Project Risk Management Based on the View of Asymmetric Information*, 138 *J. CONSTRUCTION ENGINEERING & MGMT.* 1303-1311 (2012). Because one individual knows more, or more valuable, information than another, the more knowledgeable individual can take advantage of the less knowledgeable one. *Id.* at 1303. In fact, where the holder of knowledge stands to lose something by sharing that knowledge with a less knowledgeable individual, the knowledge-holder is inclined to keep that information secret or engage in a process of disinformation. NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* 240 (2010). In the context of hazing, perpetrators not only have an incentive to keep the history, culture, and risks associated with hazing secret vis-à-vis potential hazing victims. They also have an incentive to lie to potential

hazing victims to increase the likelihood that the potential victim becomes an actual victim.

C. Hazing Victims are Likely to Conform to Peer Pressure

Another reason why victim “consent” to hazing rarely exists is because, group dynamics, especially where there is peer pressure to do so, often elicit conformity. Solomon Eliot Asch, *Effects of Group Pressure on the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN: RESEARCH IN HUMAN RELATIONS* 235 (Harold Steere Guetzkow ed., 1952). Conformity can be understood as “a change in behavior or belief toward a group because of real or imagined group pressure.” Michael A. Hogg & John C. Turner, *Social Identity and Conformity: A Theory of Referent Information Influence*, in *CURRENT ISSUES IN EUROPEAN SOCIAL PSYCHOLOGY* 139 (Willem Doise & Serge Moscovici eds., 1987). In Asch’s seminal study, he discovered that even on a task as simple as comparing the length of lines on two cards, people tend to select a clearly wrong comparator line when other select the wrong comparator line. Asch, *supra* at 228, 231, 235.

In their research, Deutsch and Gerard investigated the social influences upon individuals in the context of conformity. Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 *J. ABNORMAL PSYCHOL.* 629-630, 634 (1955). They assessed two types of influences—normative and informational. *Id.* at 635. Normative social influence is

“an influence to conform with the positive expectations of another,” *Id.* at 629, and informational social influence is “an influence to accept information obtained from another as *evidence* about reality.” *Id.* In their research, the most prominent findings were that normative influences played a larger role in group situations when there is pressure to conform and when the individual is uncertain about the accuracy of his judgment. *Id.* at 630. Conversely, Hogg and Turner’s work suggested that conformity emerges from self-categorization within a group, from informational social influence. Hogg & Turner, *supra* at 148-49. This occurs in three steps: (1) individuals categorize themselves in a distinct social category; (2) they learn the norms of that category; and (3) they assign these norms to themselves and his or her behavior becomes more conforming as his or her membership becomes salient. *Id.* at 149. Social influence is the result of the need of individuals to validate his or her own responses by reaching consensus with others they perceive to be in-group members. *Id.* at 150. The normative tendencies that individuals may conform to are cognitive representations of the acceptable, appropriate in-group norm. *Id.* at 153. The nature of these norms, then, can lead to circumstances in which there is a disagreement among the group, and this produces pressure to conform or “the recognition of disjunctive category membership to explain disagreements.” *Id.* at 149. However, a clear normative tendency will emerge as appropriately representative of the group norm. *Id.* at 150.

Accordingly, many hazing victims conform to the group expectations about hazing either because they seek to attain the social reward, and avoid social punishment, group membership and ostracization, respectively. Similarly, hazing victims may conform to group expectations about hazing, because they see themselves as in-group members and conform to the norms of the group.

D. Once Hazing Begins, Victims Likely Feel that They Have Invested Too Many Resources to Disengage from Hazing

Another reason why victim “consent” to hazing rarely exists is because once the hazing process begins, various psychological forces—unbeknownst to the victim—often continue to propel them through the process. In short, decision-makers often commit additional resources to a failing course of action. *See* Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 ACAD. MGMT. REV. 39, 39–40 (1992) (providing a review of the theoretical variations on the escalation of commitment). An escalation of commitment situation is characterized by three essential features: costs of continuing the same course of action, opportunities for withdrawal, and uncertainty about the consequences of persistence and withdrawal. *Id.* at 40. Researchers find that escalation effects persist in group as well as individual decision processes. Glen Whyte, *Escalating Commitment in Individual and Group Decision Making: A Prospect Theory Approach*, in 54 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 430, 445-448 (1993). Pursuant to self-justification theory,

decision-makers are reluctant to admit that their earlier decisions were incorrect and thus invest additional resources to demonstrate the correctness of those decisions. Brockner, *supra* at 40, 43. Escalation tendencies are greatest when the decision-maker deems him or herself personally responsible for the failed course of action. Barry M. Staw & Jerry Ross, *Behavior in Escalation Situations: Antecedents, Prototypes, and Solutions*, in 9 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39, 50–51 (1987); Whyte, *supra* at 437.

In addition, what may drive escalation of commitment are the justifications for the conduct provided by the decision-maker. For example, research has shown that merely choosing a course of action seems to exert little effect on escalating commitment. D. Ramona Bobocel & John P. Meyer, *Escalating Commitment to a Failing Course of Action: Separating the Roles of Choice and Justification*, 79 J. APPLIED PSYCHOL. 360, 363 (1994). Rather, both private and public justification significantly increases escalation of commitment to the same extent. *Id.* at 362. Escalation tendencies may also be partly explained by expectancy theory, which asserts that decision-makers assess the subjective expected utility of allocating additional resources based on estimates of the value of goal attainment (i.e., rewards minus costs) and the probability that additional resources will help attain that goal. Brockner, *supra* at 40. Accordingly, “if the reasons for the negative feedback [are perceived to be] unstable rather than stable,” then the decision-maker would consider

the probability of goal attainment to be more favorable and would therefore be more likely to commit additional resources. *Id.* Prospect theory has been proposed as an alternative explanation to self-justification for the behavior associated with escalation of commitment. *Id.* at 50. According to this theory, individuals are risk-seeking when choosing between two losing options but risk averse when choosing between two winning options. *Id.* Thus, the action one takes may depend upon how the problem is framed. Brockner, *supra* at 50.

If the decision is perceived to be in the positive direction (i.e., it will generate gains), then individuals typically react in a risk averse manner. *Id.* However, individuals facing escalation situations prefer to allocate additional resources and increase the probability of a larger loss, rather than to accept the sure loss if they declined to allocate additional resources. Whyte, *supra* at 433. Another theoretical explanation, self-presentation theory, focuses on the effects of an on-looking audience on escalation. Brockner, *supra* at 56. According to this theory, decision-makers escalate commitment to failed courses of action, because they want to be perceived as able to reach suitable choices. *Id.* at 43-44, 47, 56. Thus, they respond to escalation dilemmas by allocating additional resources because departing from a previous pursuit may compromise their credibility. *Id.* at 43-44, 56.

Within the context of hazing, many victims are likely to persist even when threats to their well-being seem imminent. While turning-back may be a real option,

the victim may perceive it as an illegitimate one. As such, what looks to be consent, actually, is not.

II. Many Collegiate Organizations Have De Facto, Tiered Membership Status, thus Increasing the Likelihood of Victim Hazing Acquiescence

Organizational “membership” can be an elusive concept, and hazing victims who are organization members, formally, may acquiesce to hazing to secure a higher membership status within the organization. Researchers find that the need for respect in organizations is so great, particularly among college students, that many are willing to be hazed. Gregory S. Parks et al., *Belief, Truth, and Pro-social Organizational Deviance*, 56 HOWARD L.J. 399, 416, 419 (2013) (citing sources). In fact, within select African American student groups, the level of respect a member receives from other members is often linked to the type of initiation process he or she experiences. *Id.* at 419. Those who are not hazed receive less respect than members who endure hazing. *Id.*

Even once an individual is a member of an organization that does not guarantee that they receive the same rights and privileges, informally, as other members. For example, Orlando Johnson had been a duly initiated member of Kappa Alpha Psi Fraternity at Auburn University, Montgomery without being hazed. Complaint at 4-7, *Johnson v. Kappa Alpha Psi Fraternity, Inc.*, No. 2012-901393 (Cir. Ct. Montgomery Cty., Ala., Oct 22, 2012). However, after Johnson’s initiation, chapter members hazed him, which, allegedly, resulted in Johnson suffering renal

failure. Chapter members informed Johnson that he would not be respected as a member of Kappa Alpha Psi unless he submitted to hazing. *Id.* Within African American fraternities and sororities, it is common for duly initiated members to participate in hazing, as victims, to receive a higher status within their organization. This may occur prior to, or after, initiation. *See Jolevare v. Alpha Kappa Alpha Sorority, Inc.*, 521 F. Supp. 2d 1, 4 (D.C. 2007) (noting Alpha Kappa Alpha's handbook definition on hazing, which included reference to, *inter alia*, "pre-pledging," "post-pledging," or "post-initiation pledging.").

Three things may precipitate post-initiation hazing: (1) an individual's motivation for achievement; (2) his or her need for self-esteem; and (3) organizational prestige. First, with respect to achievement motivation, researchers note that it is strongly related to achievement outcomes. Charles B. Schultz & Michael Pomerantz, *Achievement Motivation, Locus of Control, and Academic Achievement Behavior*, 44 *J. PERSONALITY* 38 (1976). In fact, achievement needs are significantly related to internal attributions of success. *Id.* Most motivational researchers subscribe to the view that achievement motivation is mainly developed from the interplay between implicit and explicit motive systems. Hugo M. Kehr, *Integrating Implicit Motives, Explicit Motives, and Perceived Abilities: The Compensatory Model of Work Motivation and Volition*, 29 *ACAD. MGMT. REV.* 479 (2004). The interaction between these two motivational systems predicts the

motivational behavior of the individual and relates to various aspects of personality. *Id.* at 480. Implicit motives—e.g., power, excellence, and affiliation with others—define subconscious needs and basic “organismic needs.” *Id.* Those who possess strong implicit motives tend to set high personal standards for the goals they wish to achieve. *Id.* Explicit motives, on the other hand, are the conscious and self-attributed reasons for one’s behaviors and actions. *Id.* at 481. They function as the values one associates with proper conduct, especially vis-a-vis obtaining success. *Id.* Both systems, the implicit and explicit, may operate simultaneously. *Id.* at 482.

Second, with respect to need for self-esteem, the concept’s foundation rests on a sense of personal value that is obtained by believing in one’s worldview and living up to the standards of value prescribed by one’s worldview. Tom Pyszczynski et al., *Why Do People Need Self-Esteem? A Theoretical and Empirical Review*, 130 PSYCHOL. BULL. 435, 436-37 (2004). Researchers find that self-esteem can be intertwined with organizational identification. J. Bryan Fuller et al., *Construed External Image and Organizational Identification: A Test of the Moderating Influence of Need for Self-Esteem*, 146 J. SOC. PSYCHOL. 701 (2006). Organizational identification is a person’s “perceived oneness with an organization and the experience of the organization’s successes and failures as one’s own” and “occurs when an individual’s self-concept is tied to his or her organizational membership.” *Id.* at 703. Among the antecedents of organizational identification are a member’s

beliefs about how outsiders perceive the organization and the member through his or her organizational affiliation. *Id.* at 702, 704. In their research, Fuller and colleagues found that (1) an organization member's construed external image positively impacted their organizational identification, and (2) the member's need for self-esteem is moderated by this relationship. *Id.* at 708, 710. In short, "outsiders' opinion of the organization is likely to strongly influence" the self-concept of individuals with high need for self-esteem "because their feelings of self-worth are strongly dependent on the attention and positive evaluations of other people." *Id.* at 706.

Third, with respect to organizational prestige, it reflects a person's beliefs about how those outside the organization evaluate the organization's prestige. Abraham Carmeli, *Perceived External Prestige, Affective Commitment, and Citizenship Behaviors*, 26 *ORG. STUD.* 443, 443–44 (2005). Research in this area also reflects organizational identification, the "perception of oneness with or belongingness to some human aggregat[ion]." It occurs when one integrates beliefs about one's organization into one's identity." *Id.* at 446. In his research, Carmeli found, *inter alia*, that perceived external social prestige increased individuals' emotional commitment to their organization. *Id.* at 453, 454.

Accordingly, victims may acquiesce to hazing even once they become official members of an organization, because of the hierarchical nature of membership

within some organizations. First, they may be motivated to achieve status within the organization for a variety of implicit and explicit reasons. In addition, victims may place value on an organization in part based on how outsiders view the organization. Those organizations viewed by outsiders as more prestigious make it more likely that members will draw an enhanced sense of self-esteem from membership to said, prestigious organization. Moreover, organizations viewed by outsiders as more prestigious make it more likely that members will be more emotionally attached to the organization. Consequently, individuals who are motivated to achieve and are members of prestigious organizations, may be more inclined to acquiesce to hazing in order to become a member, and a well-regarded member of said organization.

CONCLUSION

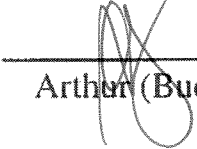
This Court should affirm the lower court's opinion with respect to Petitioner Martin's claim that the state of Florida violated the freedom of association and expression clause of the First Amendment of the United States Constitution. Mr. Martin's assertion that by criminalizing hazing without regard to the victim's consent, Florida's anti-hazing statute restricts Constitutionally protected conduct, is at odds with decades of social scientific research. There is a vast body of social scientific research that explains why hazing consent is remarkably difficult to give. Many collegiate hazing victims have likely been habituated to hazing during high school. In addition, most hazing victims lack a fundamental understanding of hazing

risks to adequately consent to hazing. Also, hazing victims are likely to succumb and conform to the influence of peers and the pressure those peers exert. Moreover, once hazing begins, victims likely feel that they have invested too many resources to quit. In addition, "membership" is an elusive concept. Within some organizations, especially those on college campuses, there is a tiered-status to membership. Hazing complicates the notion of membership within these organizations, because non-hazed individuals often take second-class status to those individuals who are hazed. As such, to gain first-class status, even individuals who are formally members often acquiesce to hazing.

CERTIFICATE OF SERVICE

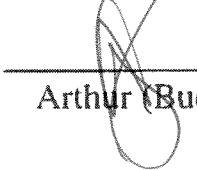
I HEREBY CERTIFY that a true and correct copy of the above Amicus Brief has been furnished to Rupak R. Shah, counsel for Petitioner, 2917 West Kennedy Boulevard, Suite 100, Tampa, Florida 33626, by e-service to rshah@escobarlaw.com; and Wesley Heidt, counsel for Respondent, 444 Seabreeze Blvd., Daytona Beach, Florida 32118, by e-service to wesley.heidt@myfloridalegal.com on this 20 day of October, 2017.

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CERTIFICATE OF FONT COMPLIANCE

I certify that the size and style of type used in this brief is (Times New Roman 14- point Font or Courier New 12-point Font) and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: 
Arthur (Buddy) Jacobs