No. 21-2763

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TYLER CAMERON GUTTERMAN, DALE NELSON,
HUNTER JOHNSON, *and* BRIAN HILTUNEN,

Plaintiffs-Appellants,

v.

INDIANA UNIVERSITY, BLOOMINGTON; *and* PAMELA S. WHITTEN,
in her official capacity as President of Indiana University,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
No. 1:20-cv-02801
Honorable Jane Magnus-Stinson

APPELLANTS' OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Plaintiffs-Appellants Tyler Cameron Gutterman, Dale Nelson, Hunter Johnson, and Brian Hiltunen oppose the Motion to Dismiss Appeal as Moot filed by Defendants-Appellees Indiana University and President Whitten. *See* Dkt. 31-1 ("MTD"). Plaintiffs concede that each of them graduated in May 2022, and that none of them has enrolled in a graduate program at the University this fall, but submit that this does not moot their claims, because the injury they complain of—the University's tracking and retention of their card swipe data without process—continues.

Though Defendants provide a list of cases where courts have found the matter moot after a plaintiff graduated, MTD at 5, mootness is a fact-specific inquiry focused on the nature of the relief sought, asking whether the court could grant relief that would redress that injury. Under the facts as pled in the Complaint, the University retains Plaintiffs' swipe data for months, if not years, and continues to claim the right to access it. Injunctive and declaratory relief should therefore remain available to protect Plaintiffs from the constitutional injury they suffer based on the tracking and retention of their data, which the University retains to this day and can accesses at its whim without constitutional process.

ARGUMENT

Plaintiffs' claims are not moot because the University retains their card swipe data and claims the right to use it without constitutional process.

This Court has explained more than once that "determining whether an appeal has become moot requires a fact-specific inquiry into the nature of the relief

sought." *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992). Therefore "the reviewing court must scrutinize each individual claim" and "reach a determination upon close consideration of the relief sought in light of the facts of the particular case." *Id.* (quoting *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 473 (1st Cir. 1992)).

And here the injunctive relief sought—constitutional protection from the unreasonable search of Plaintiffs' swipe data—remains entirely possible, and Plaintiffs continue to believe it entirely necessary, because the possibility of constitutional injury remains the same: the University continues to retain their swipe data. As pled in the Complaint, as far as Plaintiffs understand, their swipe data "could potentially be stored indefinitely, investigators need not determine that there is probable cause before tracking it — historical records could be consulted for anyone who falls under suspicion." S.A. 26. At the very least, the University "retain[s] the swipe data for several months," S.A. 24, as it was several months between the alleged hazing and the investigation of Plaintiffs.

At the motion to dismiss stage, all facts pled in the Complaint are taken as true and the Court must construe all inferences in favor of Plaintiffs. *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). However, Plaintiffs have a strong basis to believe that, in fact, the relevant information is retained for years, since the data in this case *was* retained for years: In August 2021, while Defendants' motion to dismiss was pending in the district court, Defendants furnished discovery that included Plaintiffs' access data for their dorm buildings

from September 2018, including when they accessed their bedrooms and external and internal doors—meaning their data was retained for nearly three years.[1] Even if Plaintiffs' specific data was subject to a litigation hold, the earliest Defendants could have put on a litigation hold would have been May 5, 2020, when Plaintiffs' counsel sent a demand letter to the University informing it of Plaintiffs' claims. This means that the University is retaining such data for *at least* 20 months, if not longer. In any event, the University has not submitted any evidence to show, contrary to the allegations in the Complaint, that it does not continue to have access to Plaintiffs' swipe data.

Since Plaintiffs' data is retained by the University, this case is not moot. "A case is moot if there is no possible relief which the court could order that would benefit the party seeking it." *In re Envirodyne Indus.*, 29 F.3d 301, 303 (7th Cir. 1994). As long as at least "partial relief is possible," "that is enough to satisfy the requirements of Article III." *Id.* Here, injunctive and declaratory relief would protect Plaintiffs from the same injury they have complained of all along: the University's use of that data without any respect for the constitutional limitations that Plaintiffs believe is required.

[1] Plaintiffs' normal practice would be to attach these discovery materials as an exhibit with a certifying declaration for the Court to review, but given the privacy implications the relevant documents were furnished subject to a protective order. At this Court's request, Plaintiffs could file them with the Court under seal.

Graduation may limit how thoroughly they are tracked going forward,[2] but it does not alleviate the tracking that has already taken place, or prevent a search of such data in the future. "Where a court retains the ability to 'fashion some form of meaningful relief' between the parties, an appeal is not moot, and the court retains jurisdiction." *Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2007) (internal citations omitted). For instance, "[w]hen a student's record contains negative information derived from allegedly unconstitutional school regulations . . . that information may jeopardize the student's future employment or college career." *Id.*; *see also* S.A. 33 (Plaintiffs pled a request to "[e]njoin the University to expunge the investigation for which the University used swipe data of Plaintiffs from their permanent records, to the extent that Plaintiffs' records include information about such investigation").

As this case was decided at the motion-to-dismiss stage, the record does not reflect whether there is any notation on Plaintiffs' permanent records of the hazing investigation, but even if there is not, the University's retention of the swipe data itself presents the same sort of ongoing injury for which this Court could fashion an injunction that would provide Plaintiffs relief, as the University still asserts the right to search Plaintiffs' data at its leisure, and could do so in response to any number of potential allegations, no matter if such allegations were true or, as was the case with the investigation in 2018, Plaintiffs did nothing at all wrong.

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[2] But may not limit the tracking entirely: the Motion to Dismiss record does not reflect whether the CrimsonCards remain functional after graduation, or whether there are instances where Plaintiffs might need to use them.

CONCLUSION

For the forgoing reasons, the Motion to Dismiss this appeal should be denied.

Dated: June 20, 2022

/s/ Reilly Stephens

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations imposed by Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 32 for a brief produced using the following font: Proportional Century Schoolbook Font 12 pt body text, 11 pt for footnotes. Microsoft Word for Windows was used. The length of this brief was 1,083 words.

/s/ Reilly Stephens
Reilly Stephens

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2022, I electronically filed the foregoing Appellants' Opposition to Motion to Dismiss 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/ Reilly Stephens
Reilly Stephens