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Ultimate Discrimination?: Sunday Play, Sports Schedules, and Evaluating the Effectiveness of Anti-Discrimination Laws

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INTRODUCTION

As the sun rises over Boise, Idaho, on April 16, 2017, more than 100 young men are lacing up their cleats, trudging into warm-ups, deliberating game strategy, and otherwise adhering to the Sunday-morning rituals they have developed over their careers as competitive ultimate players.[1] This particular collection of college athletes, representing universities across the western United States, has descended on Boise State University's campus for the weekend to compete in the first round of the college ultimate postseason.[2] The teams are already several games into the tournament, having completed pool play just the day before.[3] The games they are about to play will determine who advances to the next round of the postseason and whose seasons come to an end.[4]

Conspicuously absent from the scene unfolding on the fields, however, is a nationally ranked team that has won every single one of its games up to this point: Brigham Young University's CHI ("BYU CHI").[5] Repeating a story that had unfolded similarly in seasons past, the Brigham Young University ("BYU") ultimate squad entered the first round of the postseason as a top team, beat all challengers on Saturday, and then summarily packed its bags and went home, forfeiting all of its qualifying games on Sunday and effectively ending

1. *See Big Sky D-I College Men's CC*, USA ULTIMATE, https://play.usaultimate.org/events/Big-Sky-D-I-College-Mens-CC-2017/ [https://perma.cc/6F4C-W5CD] [hereinafter *2017 Conferences*]. Although the sport is colloquially called "ultimate frisbee," many of the sport's athletes call it simply "ultimate." *See, e.g.*, Victor Mather, *A Sport Without Referees? It's the Ultimate Debate*, N.Y. TIMES (June 16, 2016), https://www.nytimes.com/2016/06/17/sports/ultimate-frisbee-debates-a-role-for-referees.html [https://perma.cc/3KXV-HBBD (dark archive)] (using the term "ultimate" but acknowledging that the sport is "popularly known as ultimate Frisbee"). This distinction stems from the fact that a "Frisbee," a product trademarked by Wham-O Inc., has not been the sport's official regulation disc since 1988, when Discraft discs were chosen to be the standard disc of play. PASQUALE ANTHONY LEONARDO, ULTIMATE: THE GREATEST SPORT EVER INVENTED BY MAN 2, 8–9, 29 (2007); *see also* DAVID GESSNER, ULTIMATE GLORY: FRISBEE, OBSESSION, AND MY WILD YOUTH 256 (2017) (discussing the sport dropping "Frisbee" as a product and a name); *Ultimate*, DISCRAFT, http://www.ultimate.discraft.com/ [https://perma.cc/PE68-7E6V] (advertising Discraft discs as the official disc for USA Ultimate). This Comment will refer to the sport as "ultimate." For a concise explanation of the sport, its history, and how it is played, see GESSNER, *supra*, at 7–8, 32–38, 49–57.

2. *See 2017 Conferences*, *supra* note 1.

3. *See 2017 Schedules and Standings for Big Sky D-I College Men's Ultimate Postseason Tournament*, USA ULTIMATE, https://play.usaultimate.org/events/Big-Sky-D-I-College-Mens-CC-2017/schedule/Men/College-Men/ [https://perma.cc/BZ7L-3BJY] [hereinafter *2017 Schedules and Standings*]. For an explanation of tournament formats, see *infra* notes 60–62, 70–76 and accompanying text.

4. *See 2017 Conferences*, *supra* note 1 (showing that the teams finishing in the top three would advance to the next postseason tournament).

5. *See 2017 Schedules and Standings*, *supra* note 3. For an explanation of the team's name, see *infra* notes 79–80 and accompanying text.

its season.[6] The team yet again sacrificed its chances of advancing in the postseason and pursuing a national championship, all in observance of a higher calling.

The team left the tournament early in order to comply with a BYU policy that prohibits its athletes from competing on Sundays.[7] For years, the team has tried to convince USA Ultimate, the sport's governing organization, to accommodate its members' religious observance.[8] These fruitless efforts, as well as the effects of BYU's and USA Ultimate's respective rigid policies, have for years fomented great controversy in the ultimate community. More important, however, the situation has left in its wake a bevy of unresolved issues between the parties, some with potentially momentous legal ramifications.

This Comment uses the incipient conflict between BYU CHI and USA Ultimate to analyze how anti-discrimination laws apply when religious calendars and college sports schedules collide.[9] This Comment seeks to use the legal and historical development of this area of law to extrapolate the legal implications present in the dispute between BYU CHI and USA Ultimate. This Comment then aims to use the novel set of facts to ascertain and assess the claims that BYU CHI may be able to bring against USA Ultimate. Finally, this Comment suggests a new mode of anti-discrimination analysis that borrows intent- and effect-based aspects of burden-shifting tests to better address effective discrimination when people in a protected class encounter societal systems, structures, or schedules that effectively discriminate while refusing to accommodate.

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6. In 2015, for instance, the team won all five of its pool play games on Saturday before the bracket games took place on Sunday. *See 2015 Schedules and Standings for Big Sky D-I College Men's Ultimate Postseason Tournament*, USA ULTIMATE, https://play.usaultimate.org/events/Big-Sky-D-I-College-Mens-CC-2015/schedule/Men/College-Men/ [https://perma.cc/2JLF-KTRH].

7. For a discussion of BYU's policy concerning competing on Sundays, see *infra* Part I.

8. For a discussion of BYU CHI's unsuccessful lobbying efforts with USA Ultimate, see *infra* Section I.B.3.

9. While commentators have robustly discussed "the intersection of sport and the law," much of the discourse concerning the legal implications of discrimination in athletics has oriented around federal laws such as Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. Thomas M. Hunt & Janice S. Todd, *Powerlifting's Watershed:* Frantz v. United States Powerlifting*, the Legal Case that Changed the Nature of a Sport*, *in* SPORT AND THE LAW: HISTORICAL AND CULTURAL INTERSECTIONS 75, 75 (Samuel O. Regalado & Sarah K. Fields eds., 2014) [hereinafter SPORT AND THE LAW]. This Comment focuses instead on possible applications of the Constitution, Title II of the Civil Rights Act of 1964, and various state anti-discrimination laws to an instance of alleged religious discrimination. *See infra* Part II.

The analysis proceeds in three parts. Part I describes the legal history of religious discrimination in the context of sports. This part looks at National Collegiate Athletic Association ("NCAA") and collegiate club sports, as well as BYU's particularly storied history in this area of law. Part II analyzes BYU CHI's potential claims under constitutional, federal statutory, and state statutory law. Finally, Part III suggests a new mode of analysis that would provide a more equitable means of handling alleged effective, unlawful discrimination in a societal structure.

I. BACKGROUND: ISSUES WITH BYU, RELIGION, AND COLLEGE SPORTS

A. The "Y" in All of This[10]

Brigham Young University, located in Provo, Utah, is a private university founded and owned by the Church of Jesus Christ of Latter-day Saints, or, as many know it, the Mormon Church.[11] The vast majority of the school's 33,000 students are members of the Mormon Church,[12] and the university implements an honor code that requires students to abide by Mormon values and encourages behavior in line with the Mormon Church's teachings and expectations of its members.[13] School policy requires students to respect Sundays, the Mormon Church's Sabbath, as a day of rest and religious observance; this particular rule prevents the university's

10. BYU is often colloquially referred to as the "Y." *See* GARY JAMES BERGERA & RONALD PRIDDIS, BRIGHAM YOUNG UNIVERSITY: A HOUSE OF FAITH 273 (1985).

11. *Missions & Aims of BYU*, BYU, http://aims.byu.edu/ [https://perma.cc/JB65-KS4Y]. The Church of Jesus Christ of Latter-day Saints is uniquely "Americana" in that it is "the only world-recognized religion to have been born in the United States during the modern age." DARRON T. SMITH, WHEN RACE, RELIGION, AND SPORT COLLIDE: BLACK ATHLETES AT BYU AND BEYOND 20 (2016). For more about the history of the Mormon Church, including its founding and development, see generally MATTHEW BOWMAN, THE MORMON PEOPLE: THE MAKING OF AN AMERICAN FAITH (2012).

12. *See BYU Demographics*, BYU, https://web.archive.org/web/20150424094326/http://yfacts.byu.edu/Article?id=135 [https://perma.cc/Q692-CUAN] (showing that, in the fall semester of 2014, 98.7% of full-time undergraduate students were members of the Mormon Church).

13. *See University Policies*, BYU, https://policy.byu.edu/view/index.php?p=26 [https://perma.cc/6TR9-CHEK]. Much of the honor code concerns matters such as academic and personal integrity. *See id.* ("All who represent BYU . . . are to maintain the highest standards of honor, integrity, morality, and consideration of others in personal behavior."). Furthermore, it mandates baseline levels of decency and behavior for everyday propositions like maintaining physical appearance and consuming foods and beverages. *See id.* Since early in the university's development, religious and academic life have been closely intertwined. *See* BERGERA & PRIDDIS, *supra* note 10, at 47. For an in-depth review of the BYU Honor Code and other behavioral policy mainstays, see *id.* at 93–130.

athletes from competing on Sundays[14] and has thus led to the current conflict between BYU CHI and USA Ultimate.[15] The ultimate team, though, is not the first at BYU to experience scheduling issues stemming from the Sunday-play prohibition. Instances of various outside parties resisting requests to accommodate the student-athletes' religious observation litters BYU's rich sports legacy. This perennial conflict has placed parties squarely at the intersection of convenient sports scheduling procedures and concerns about potentially unlawful religious discrimination.

B. BYU and a History of (Alleged) Discrimination in Sports

As sports have grown from a purely recreational activity into an immense commercial industry, discrimination and inequality issues in sports have mirrored those in American society at large.[16] BYU is no stranger to this parallel phenomenon. For decades, BYU's athletic teams have experienced myriad difficulties with scheduling due to the university's prohibition on Sunday play.[17] Throughout this time, the school's teams have had to work with, lobby, threaten, or otherwise convince various organizations and governing bodies to craft schedules that avoid conflicts with their religious observance. Overall, the university's sports teams have successfully obtained scheduling changes, but often they have had to resort to applying varying means of pressure—sometimes legal—on their counterparts.[18] This section will review those instances to provide subtext for the current conflict between the university's ultimate team, BYU CHI, and USA Ultimate.

14. Adam Epstein, *Utah and Sports Law*, 28 MARQ. SPORTS L. REV. 107, 110 (2017); Jeff Call, *Never on Sunday: BYU Won't Compete on the Sabbath Day, Regardless of the Consequences*, DESERET NEWS (Salt Lake City) (June 25, 2016, 4:45 PM), https://www.deseretnews.com/article/865656920/Never-on-Sunday-BYU-wont-compete-on-the-Sabbath-Day-regardless-of-the-consequences.html [https://perma.cc/S4HG-7RS3] [hereinafter Call, *Never on Sunday*].

15. *See* Daniel Prentice & Charlie Eisenhood, *Florida Warm Up 2019: Tournament Recap (Men's)*, ULTIWORLD (Feb. 13, 2019), https://ultiworld.com/2019/02/13/florida-warm-2019-tournament-recap-mens/ [https://perma.cc/T359-D3RY] ("BYU, owned and operated by the [Mormon Church], has a university policy that forbids athletes from competing on Sundays. That has blocked BYU's path to Nationals in ultimate, and USA Ultimate has not made accommodations for the team.").

16. *Introduction*, *in* SPORT AND THE LAW, *supra* note 9, at xiii, xiii.

17. For a summary of these difficulties, see Kevin J. Worthen, *The NCAA and Religion: Insights About Non-State Governance from Sunday Play and End Zone Celebrations*, 2010 UTAH L. REV. 123, 127–30.

18. *See id.* at 128–29.

1. NCAA Sports: BYU's Baseball Team and a Short History of the Sunday Rule

The sports-scheduling issue first arose in the context of BYU's NCAA[19] teams.[20] Schools that participate in NCAA athletics—especially large Division I schools[21] like BYU—provide substantial funding and support for their sports teams with scholarships, budgets, and well-recognized allowances for student-athletes to miss class or other school events in order to represent the university on the playing field.[22] In particular, BYU has committed significant resources to its NCAA athletic programs by constructing state-of-the-art facilities

19. The NCAA is the primary governing body for major college athletics. ADAM EPSTEIN, SPORTS LAW 57–58 (2003).

20. Worthen, *supra* note 17, at 127–30; *see also* Call, *Never on Sunday*, *supra* note 14 (noting that the NCAA created "The BYU Rule" in 1963 to "accommodate [BYU's] position on Sunday play"). For a chronicle of intercollegiate athletics at BYU, see BERGERA & PRIDDIS, *supra* note 10, at 269–304.

21. The NCAA has three major division classifications: Division I, Division II, and Division III. *Divisional Differences and the History of Multidivision Classification*, NCAA, http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification [https://perma.cc/N5B8-FAZS]. Member-institutions—i.e., colleges and universities—with NCAA athletic teams generally fall into one of those three categories. *See id.* While one difference among the divisions relates to varying internal rules—such as the minimum number of teams each member institution must have—the most conspicuous external difference arises from the fact that Division I member institutions can offer full athletic scholarships that attract better athletes, which in turn effectively increases viewership and revenue generation. *See id.*; *Our Three Divisions*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions [https://perma.cc/6H29-UVGN]; *The Difference in the College Division Levels*, NEXT C. STUDENT ATHLETE, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions [https://perma.cc/N5K2-B5HN]. For example, BYU, a Division I member institution, generated $67,733,712 in sports revenue in 2016. *Brigham Young University-Provo: Revenues and Expenses*, U.S. DEP'T EDUC. OFF. POSTSECONDARY EDUC., https://ope.ed.gov/athletics/#/institution/details [https://perma.cc/6K9T-9A3J (staff-uploaded archive)].

22. *See* EPSTEIN, *supra* note 19, at 58; Greg Johnson, *Managing Missed Class Time Is Part of the Game*, NCAA (Jan. 11, 2012, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/managing-missed-class-time-part-game [https://perma.cc/TXS3-RSNX]; *see, e.g.*, *Academic Processes for Student-Athletes: Class Attendance & Travel*, U.N.C. CHAPEL HILL, http://www.unc.edu/sacs/March2016/Web_Public/Docs/3.2.11/9.0-class-attendance-travel-policies.pdf [https://perma.cc/G47Y-VPF5] (providing that UNC Chapel Hill student-athletes may miss up to seven days of class per semester for athletic competition, but noting that exceptions may allow for more missed class and that "[s]ome teams require [such] exceptions"); *see also* Anna Orso, *Penn State Athletes' Perks Include Scholarships, Housing, Food, Entertainment*, PENNLIVE (May 1, 2014), http://www.pennlive.com/sports/index.ssf/2014/05/as_ncaa_reforms_loom_a_look_at.html [https://perma.cc/U6E4-FFDF]. *But see* Andrew Carter, *As College Athletes Travel More, Missed Classes Come into Focus*, NEWS & OBSERVER (Raleigh) (Dec. 30, 2017, 11:41 AM), http://www.newsobserver.com/sports/college/acc/duke/article192121459.html [https://perma.cc/WH23-SXR3?type=image] (reporting on the increasing frustration of professors whose student-athletes are missing more class due to travel as conferences expand geographically).

and "awarding generous athletic scholarships."[23] BYU has also provided its NCAA athletes significant institutional support through other means.[24]

BYU's NCAA baseball team was the first to experience significant postseason scheduling issues.[25] The team performed well throughout the 1958 season and postseason, qualifying for the NCAA's College World Series.[26] The World Series schedule, however, required teams to play on a Sunday.[27] BYU requested that the NCAA alter the schedule in order to allow them to play, but the NCAA denied the request, effectively ending BYU's season.[28]

Just three years later, BYU's baseball team again had a successful regular season, but this time the NCAA altogether declined to invite BYU to participate in the postseason due to the team's Sunday-play policy.[29] Foreseeing future conflict, the NCAA soon thereafter crafted a religious accommodation rule that prohibited scheduling NCAA tournament games on Sundays when a competing institution had a policy against Sunday competition.[30] This rule became known as the "BYU Rule," or the "Sunday Rule," and despite some instances of wavering commitment from the NCAA,[31] the rule has largely remained in effect.[32]

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23. BERGERA & PRIDDIS, *supra* note 10, at 279–80.

24. *See, e.g.*, *Academic Services (SAAC)*, BYU, https://byucougars.com/story/athletics/1281428/academic-services-(SAAC) [https://perma.cc/J3KW-3UN8 (staff-uploaded archive)] (detailing BYU's Student Athlete Academic Center, which provides services and support to facilitate and bolster student-athletes' academic success); *Incoming Student-Athlete Frequently Asked Questions*, BYU, https://byucougars.com/dl/sites/default/files/2017-08/Incoming%20Student%20Athlete%20FAQ.pdf [https://perma.cc/A244-GRUJ] (providing information about how BYU student-athletes "have access to an academic advisor, content-specific tutors, a mentor, and a learning specialist," among other academic resources and support). Additionally, the school has given its NCAA athletes greater flexibility in certain scheduling matters, including allowing student-athletes to postpone their mission calls so they can compete contiguously throughout their athletic eligibility. BERGERA & PRIDDIS, *supra* note 10, at 280. A prominent feature of the Mormon faith is an expectation that young men serve as worldwide missionaries for one- or two-year periods. BOWMAN, *supra* note 11, at 188–90. For many, this call to serve occurs sometime during their college careers, which is why the exception is important for BYU student-athletes. *See id.* at 189 (noting that "the age for [missionary] service was standardized at nineteen").

25. Worthen, *supra* note 17, at 127–28.

26. *Id.* at 127.

27. *Id.*

28. *Id.*

29. *Id.* at 127–28.

30. *Id.* at 128.

31. In 1998, the NCAA, eyeing increased television exposure and other financial incentives and noting that it was not "legally required" to implement the BYU Rule, made moves to eliminate the policy. *Id.* After an internal comment and review period and lobbying from BYU, however, the NCAA opted instead merely to modify the rule,

2. BYU Rugby: The Second Coming of the Sunday Rule

Issues stemming from the Sunday-play prohibition, however, have not been limited to the realm of NCAA athletics. Like most other universities, BYU boasts a robust club sports program that allows students to compete athletically outside of the NCAA context.[33] BYU's non-NCAA sports program, which includes both "extramural" and club sports teams, allows students to compete in a wide variety of sports,[34] albeit without the same level of funding and support that the school's NCAA teams receive.[35] Arguably supreme

expanding its scope from allowing schedule changes for only Sunday competition to allowing schedule changes for any day on which a competing institution has prohibited athletic events for religious reasons. *Id.* at 128–29. Furthermore, the new rule allowed the NCAA's individual sports to waive out of this policy if it presented onerous scheduling burdens. *Id.* at 129. The latter rule opened the door to the NCAA's women's soccer and women's basketball divisions to obtain waivers that allowed them to abstain from implementing the BYU Rule, effectively threatening to prevent BYU's teams in those sports from competing in the NCAA postseason. *Id.* Yet again, lobbying and mounting pressure from BYU led those sports to revoke their waivers, thus allowing the teams to compete. *Id.* Shortly thereafter, the NCAA readopted a blanket rule requiring all NCAA sports to alter championship schedules as needed to accommodate schools with a policy prohibiting competition on a particular day for religious observance; this rule remains in effect. *Id.* at 129–30.

32. For example, the NCAA recently accommodated BYU's men's golf team at the men's golf national championship by allowing the team to play on a Wednesday instead of the scheduled Sunday. Ryan Lavner, *NCAA Accommodates BYU with No Sunday Round*, GOLF CHANNEL (May 17, 2018, 7:26 AM), https://www.golfchannel.com/article/golf-central-blog/ncaa-accommodates-byu-no-sunday-round [https://perma.cc/S5X4-VDE9]. Also, for context, BYU and Campbell University, located in North Carolina, are currently the only Division I institutions that maintain policies proscribing Sunday athletic competition. *See* Worthen, *supra* note 17, at 128.

33. *See Extramural Sports at BYU*, COUGARCLUB, http://cougarclub.com/athletics/extramural-sports-byu [https://perma.cc/WDQ4-SESX]; *see also Club Sports*, DAILY UNIVERSE, https://universe.byu.edu/sports/club-sports/ [https://perma.cc/UH25-B4KK] (reporting on BYU's various extramural and club sports teams).

34. *See Extramural Sports at BYU*, *supra* note 33; *Find a Club*, BYU STUDENT ORGANIZATIONS, https://clubs.byu.edu/clubs#/ [https://perma.cc/6C83-9YLS] (compiling BYU's club sports teams and other clubs into a searchable database).

35. *See* James Littlejohn, *Extramural Sports Require More than Just Effort*, DAILY UNIVERSE (Dec. 4, 2007), https://universe.byu.edu/2007/12/04/extramural-sports-require-more-than-just-effort/ [http://perma.cc/HME8-9BRL] (discussing the various levels of non-NCAA sports at BYU and the nominal to nonexistent school funding those teams receive). In fact, BYU CHI receives no funding from the university. Emilee Erickson, *BYU Men's CHI Ultimate Team Looks to Remain Top-Ranked*, DAILY UNIVERSE (Feb. 27, 2019), https://universe.byu.edu/2019/02/27/byu-mens-chi-ultimate-team-looks-to-remain-a-top-ranked-team-1/ [https://perma.cc/6SAC-F6ER] (stating that BYU CHI "is not funded by BYU and has to come up with funds on its own"). The varying levels of recognition and support that BYU's non-NCAA sports teams receive result from the university's hierarchically structured club sports program. Littlejohn, *supra*. The extramural sports teams (women's and men's lacrosse, women's and men's rugby, men's soccer, and racquetball) sit atop this hierarchy, are fully recognized, and receive substantial funding. *See Extramural Sports at BYU*, *supra* note 33; *see also* Jared Lloyd,

among the extramural teams at BYU is men's rugby.[36] The program has experienced resounding success, averaging only one loss per season for the past twenty years[37] and recently winning four national championships in a row.[38]

The rugby team, however, had to fight fiercely off the field to position itself to win those championships on the field. Starting in 1984, USA Rugby[39] began scheduling its intercollegiate National Championship Tournament to take place over a weekend.[40] Given the schedule, the championship match was slated to occur on the Sunday of the annual tournament.[41] Thus, despite its dominant regular season performance, BYU's men's rugby team could not compete for the national title because it adhered to the school's Sunday-play rule.[42] The team and the university, both of which felt as though they were being discriminated against for their rules on religious observation,[43] lobbied USA Rugby for twenty years to change the tournament

Ultimate Frisbee on Upward Course at BYU and Around the Country, DAILY HERALD (Apr. 9, 2017), https://www.heraldextra.com/sports/college/byu/ultimate-frisbee-on-upward-course-at-byu-and-around-the/article_5dd77c45-1864-5094-99ca-8a254aa6c25c.html [http://perma.cc/4ZAK-UV4T] (noting that BYU CHI "would love to see [BYU] raise their status to a similar level as rugby and lacrosse as an extramural sport"). Nonextramural athletic clubs are tiered into "recognized," "in transition," "restricted," and "not recognized" categories. *Find a Club*, *supra* note 34. Support from the school varies depending on the team's designated tier. *See* Littlejohn, *supra* (discussing funding differences among extramural sports and the various club sports); *see also* Sean Connole, *BYU-CHI Ultimate Frisbee*, GOFUNDME (Jan. 12, 2018), https://www.gofundme.com/byu-ultimate-frisbee-team [http://perma.cc/K7SP-7NS3] (stating in a crowdfunding page that "BYU does not recognize CHI as an affiliated sport or club," which means BYU provides "no funding, field time, or transportation" to the team); Lloyd, *supra* (noting that BYU CHI "has no official ties to the university," which means that the university does not fund the team).

36. *See* BYU MEN'S RUGBY, https://rugby.byu.edu/ [https://perma.cc/D5KS-4CEY].

37. *History*, BYU MEN'S RUGBY, https://rugby.byu.edu/content/history [https://perma.cc/ME46-SJ76].

38. *Awards & Honors*, BYU MEN'S RUGBY, https://rugby.byu.edu/awards-honors [https://perma.cc/X3H7-UHGL].

39. USA Rugby serves as rugby's national governing body in the United States. *See About USA Rugby*, USA RUGBY, https://www.usarugby.org/about-usa-rugby/ [https://perma.cc/W8QH-KKYM].

40. Call, *Never on Sunday*, *supra* note 14.

41. *Id.*

42. *Id.*

43. BYU's associate general counsel, David Thomas, said, "We felt we were being discriminated against because we were exercising our religion." Jeff Call, *Legal Scrum in Past: Pressure Is Now on Cougars to Deliver Victories*, DESERET NEWS (Salt Lake City) (Apr. 2, 2004, 3:23 PM), https://www.deseretnews.com/article/595053284/Legal-scrum-in-past.html [https://perma.cc/K8UB-5CX6] [hereinafter Call, *Legal Scrum in Past*]. Jared Akenhead, the team's coach, said, "We felt there was some discrimination in not letting us in and letting us challenge for national titles." *Id.*

schedule so the team could play for the national title.[44] For twenty years, though, USA Rugby refused to change the tournament to a Friday and Saturday format, citing class schedule and financial concerns.[45]

In the early 2000s, BYU and its men's rugby team finally decided to pursue a more pressing method of negotiation: threatening legal action. The team recruited an attorney-alumnus to represent the school and its rugby squad.[46] Having informed USA Rugby of the newly obtained counsel, the university assertively intimated that legal action was on the horizon.[47] BYU moved with more than deliberate speed, quickly drafting a complaint and warning USA Rugby that it was ready to file suit and formally start litigation.[48] USA Rugby, with the options of either engaging in expensive and potentially protracted litigation or conceding to a resolution satisfactory to BYU, finally agreed to alter its college championship schedule.[49] It took twenty years, but in 2004, BYU Rugby was finally able to compete for the national rugby title again.[50]

This particular saga presents an interesting contrast to the NCAA issues that began years before. Whereas the NCAA opted to create a special rule soon after it perceived the possibility of scheduling conflicts in its many sports, USA Rugby implemented change only after the threat of a lawsuit inspired them to act. The differences in approach by the two governing bodies may be attributable to differences in purposes, resources, and general context.[51]

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44. *Id.* For context, the team had a 241–11 record during the period in which the team was unable to participate in the National Championship Tournament due to Sunday scheduling. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. As discussed earlier, the NCAA governs major college athletics for a wide variety of sports, and the organization's member schools generate enough revenue to often give them significant flexibility in traveling and scheduling competition for certain days. *See supra* notes 19–24 and accompanying text. NCAA student-athletes also receive substantial institutional support from administration and faculty, which allows them to often miss class in order to represent the university with relative ease. *See supra* notes 21–24 and accompanying text. While precluding Sunday play for special circumstances may present some difficulties, the NCAA has the resources and clout to overcome them. *See supra* note 31. Additionally, to the extent student-athletes miss more class because competition is moved from the weekend into the school week, universities' policies regarding their NCAA student-athletes diminish the chance for repercussion or reputational damage in the eyes of their professors. *See supra* note 22 and accompanying text.

The factors at play in the rugby conflict were significantly different than those typical in the NCAA setting. At universities, club sports, like rugby, which do not fall under the NCAA umbrella, have much less institutional or reputational clout, making it more difficult for student-athletes to receive approval to miss class during the week in order to play in games or tournaments.[52] Furthermore, club teams often receive much less, if any, funding from their schools, meaning that the students must find other resources or pay out of pocket to participate.[53] Also, USA Rugby is a much smaller governing organization than the NCAA, and it is oriented around just one sport. USA Rugby, therefore, must allocate much of its resources to more than just the college levels of play, like adult club and various youth outlets. In terms of financial wherewithal, USA Rugby relies on membership dues and donations to cover costs of operation, which generate only a limited budget.[54]

Overall, the NCAA had the institutional capacity to more easily implement the BYU Rule. USA Rugby, on the other hand, was assessing its own capabilities, and those of its student-athletes, by aiming to maintain a weekend tournament format. Some of those same limitations, especially budgetary ones, also led to a quick capitulation once BYU threatened legal action.[55] Indeed, whether it intended to or not, BYU's men's rugby team implemented a

52. *See, e.g.*, VANDERBILT RECREATION & WELLNESS: CLUB SPORTS, OFFICER HANDBOOK: REC CLUB SPORTS PROGRAM'S POLICIES, PROCEDURES, AND RESOURCES GUIDE 17, https://www.vanderbilt.edu/recreationandwellnesscenter/clubsports/club-sports-handbook-2017-2018.pdf [https://perma.cc/7DSD-XGHC] (requiring club sport participants to directly discuss potential class absences with professors, who are not obligated to allow students to make up missed work, and indicating that club sports commitments "do[] not excuse a student from academic obligations").

53. *See* Crimson Staff, *Fund Club Sports: The Athletic Department's Hypocrisy in the Spotlight*, HARV. CRIMSON (Oct. 28, 2014), http://www.thecrimson.com/article/2014/10/28/harvard-club-sports-funding/ [https://perma.cc/7YY5-BRH5] (lamenting the lack of funding that Harvard University club sports receive from the athletic department); Owen Hill, *Club Sports Struggle for Funding*, OCCIDENTAL (Mar. 1, 2016), http://www.theoccidentalweekly.com/sports/2016/03/01/club-sports-struggle-for-funding/2875867 [https://perma.cc/ZXC9-PPU2] (detailing the expenses that Occidental College club student-athletes must pay in order to participate); Gregory John "G.J." Vitale, *Here's What College Students Don't Know About Playing Club Sports*, ULOOP (Oct. 10, 2013), https://tufts.uloop.com/news/view.php/101237/college-club-sports [https://perma.cc/BFL9-6A27] (observing the difficulty of financing club sports at Tufts University); *see also* GESSNER, *supra* note 1, at 159–60 (discussing the financial difficulties of traveling to ultimate tournaments).

54. *See* U.S. Rugby Football Union, IRS Form 990, Return of Organization Exempt from Income Tax pt. VIII (OMB No. 1545-0047) (2016) (reporting that approximately eighty percent of total revenue in fiscal year 2016 came from charitable contributions and memberships dues).

55. *See supra* text accompanying note 49.

prelitigation strategy that capitalized on USA Rugby's budgetary limitations: the strike suit.[56] The team achieved its goal by forcing USA Rugby to evaluate its ability to afford litigation. This strategy becomes especially interesting in the context of a statement by BYU's counsel in the rugby affair: "The law is clear that you can't exclude a team based on religious beliefs."[57] In reality, though, the law on this issue is actually quite unclear,[58] which presents the question: Was BYU's threat to sue a bluff that USA Rugby failed to call?

3. The Ultimate Version

A conflict similar to the one between BYU and USA Rugby has been developing over the past several years, but this time in the context of a different sport: ultimate. Although foreign to many, ultimate is one of the fastest growing sports in the nation.[59]

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56. This concept borrows from business law and other areas of law. *See* David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137, 157 n.97 (2016). Essentially, a strike suit allows a party with greater comparative litigation firepower than their counterparts to garner a favorable result simply by threatening a lawsuit. *See id.* at 138–39 (discussing the fact that parties "increasingly wield the law aggressively as a blunt instrument for strategic . . . purposes"); *see also Strike Suit*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "strike suit" as "[a] suit . . . often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement"). In other words, the strike suit is a strategic tool that uses the threat of expensive, protracted litigation to force weaker parties to settle before a complaint is even filed. Orozco, *supra*, at 142–43. Since the stronger party knows, or at least bets, that the weaker party will concede defeat, the threatening party can assert "a baseless legal position to derive advantage by exploiting the high cost of the legal system as a barrier to seeking a remedy." *Id.* at 143. "[T]he high cost of litigation . . . becomes an important factor in the strategic decision-making process since the bullying target is unable to finance its day in court. Knowing this, the [stronger party] can discount the cost of litigation since a quick and favorable settlement is likely." *Id.* at 155; *see also* Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 565 (1992) (observing that instances of what the author calls "sham litigation" are on the rise in anti-trust litigation). Although litigation tools such as the motion to dismiss can mitigate an attempted strike suit, *see* Orozco, *supra*, at 175, there remain real financial risks involved with calling the plaintiff's bluff. This fact is especially relevant when the law on the particular issue at hand is not imminently clear. Furthermore, strike suits that result in settlements prevent judicial precedents that clarify the law. The conflict between BYU and USA Rugby provides an example of this, as anti-discrimination law in that fact pattern has yet to be tested. Indeed, now the only relevant "precedent" to point to is BYU's success in implementing a strike suit to force a tightly funded sports governing organization to give in to scheduling demands. This historical backdrop has set the scene for another potential showdown involving very similar parties—BYU CHI and USA Ultimate.

57. Call, *Legal Scrum in Past*, *supra* note 43.

58. *See* discussion *infra* Section II.B.

59. *About Ultimate*, USA ULTIMATE, https://www.usaultimate.org/about/ [https://perma.cc/HPZ9-52SY]; *see also USA Ultimate Membership Trends*, USA ULTIMATE, https://www.usaultimate.org/membershiptrends/ [https://perma.cc/42YH-J5Z5] (detailing rising trends in participation). For context, ultimate is a team field sport played on a pitch that resembles a football field. *See* GESSNER, *supra* note 1, at 7. Play consists of

Throughout its formative years, as the sport became more structurally organized while remaining largely at an amateur level, the weekend-long tournament developed as the most common format of play.[60] Such tournaments generally consist of "pool play" on Saturdays, the results of which dictate how teams are placed in "bracket play."[61] Bracket play most often takes place on Sundays and culminates in a championship game.[62]

The sport's governing body is USA Ultimate, a 501(c)(3) nonprofit organization based out of Colorado Springs, Colorado.[63] The entity was founded in 1979 with the goal of legitimizing ultimate as a sport and bolstering its growth and organization by facilitating various levels of play and spearheading outreach.[64] The organization, which currently employs twenty professional staff,[65] focuses much of its resources toward facilitating its primary levels of club play at the youth, adult, and college levels.[66]

Although all three levels of club play are thriving, the college club ultimate scene, in particular, has developed rapidly over the past several years, with increasing participation[67] and greater

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two teams of seven people on the field, and the object of the game is to advance the disc from one end of the field into an endzone on the other end of the field. *See id.* at 7–8; Steve Courland & Neal Damba, *Ultimate in 10 Simple Rules*, USA ULTIMATE, https://www.usaultimate.org/rules/ [https://perma.cc/5XLQ-UPM2].

60. *See, e.g.*, *Big Sky D-I College Men's CC 2014, Schedules & Standings*, USA ULTIMATE, https://play.usaultimate.org/events/Big-Sky-D-I-College-Mens-CC/schedule/Men/College-Men/ [https://perma.cc/9ZS2-VKCX].

61. *See, e.g.*, *id.*

62. *See id.*

63. *About Ultimate*, *supra* note 59.

64. LEONARDO, *supra* note 1, at 29; *see also* GESSNER, *supra* note 1, at 71–72 (detailing the organization's early grassroots efforts to connect players around the country in order to grow its base and legitimize the sport); USA ULTIMATE, USA ULTIMATE (UPA) CHRONOLOGY, https://app.box.com/s/tqx77es2cwz1vryk7lrj [https://perma.cc/R79Y-H5GZ]. USA Ultimate also represents the United States internationally by fielding teams that compete at international tournaments like the World Championships. *See International: USA Ultimate National Team*, USA ULTIMATE, https://www.usaultimate.org/national_teams/ [https://perma.cc/H4CC-6ZPA]. USA Ultimate is a member of the World Flying Disc Federation ("WFDF"), which runs World Championship tournaments. *Id.* Recently, WFDF became a recognized member of the International Olympic Committee. *See id.* For examples of the national teams, see *USA Ultimate National Team*, USA ULTIMATE, http://nationalteam.usaultimate.org/ [https://perma.cc/PP6S-AKKH].

65. *About Ultimate*, *supra* note 59.

66. *See USA Ultimate's New Bylaws: Governance and Leadership for Ultimate in the Next 10 Years*, USA ULTIMATE, https://www.usaultimate.org/news/usa-ultimates-new-bylaws-governance-and-leadership-for-ultimate-in-the-next-10-years/ [https://perma.cc/3W25-SU5L].

67. *College Division*, USA ULTIMATE, https://www.usaultimate.org/college/ [https://perma.cc/SH57-73KR]. Currently, over 18,000 student-athletes represent their colleges and universities on over 800 teams at USA Ultimate events. *Id.*

legitimization through developments like USA Ultimate's deal with ESPN to broadcast college championship tournament games.[68]

The formal college ultimate season occurs in the spring semester, running from January through May.[69] During the season, most "sanctioned" regular season games—those formally recognized by USA Ultimate—are played in the conventional weekend tournament format.[70] By compiling results from sanctioned games, USA Ultimate utilizes a connectivity algorithm to create rankings throughout the season.[71] These rankings are then used to allocate "bids" that have postseason implications.[72] The season ends with the "Series," which is a sequence of three postseason tournaments that lead up to and finish with the National Championship Tournament.[73] These postseason tournaments advance from conference championships to regional championships to the National Championship Tournament.[74] Conferences and regionals are geographically based qualifying tournaments, such that teams must place high enough at one in order to qualify for the next round of the postseason.[75] The aforementioned bids determine how many teams advance from one round to the next.[76] The final objective for teams is to reach the national championship game.

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68. *See id.*; Charlie Eisenhood, *USAU Signs Historic Three Year Deal with ESPN; Will Add Live Games on ESPN2, ESPNU*, ULTIWORLD (May 23, 2017), https://ultiworld.com/2017/05/23/usau-signs-historic-three-year-deal-espn-will-add-live-games-espn2-espnu/ [https://perma.cc/3GCH-G9ZJ].

69. *College Division*, *supra* note 67.

70. *See Tournament Calendar: Tournaments & Other Events*, USA ULTIMATE, https://play.usaultimate.org/events/tournament/?ViewAll=false&IsLeagueType=false&IsClinic=false&FilterByCategory=AE [https://perma.cc/Z4CP-XEQ2] (listing sanctioned USA Ultimate tournaments throughout the country).

71. *See Teams & Rankings: Rankings*, USA ULTIMATE, https://play.usaultimate.org/teams/events/rankings/ [https://perma.cc/AU32-STGR].

72. *See, e.g.*, *Teams & Rankings*, USA ULTIMATE, https://play.usaultimate.org/teams/events/team_rankings/?RankSet=College-Men [https://perma.cc/LWK2-QUDF] (showing rankings and bid allocations for men's Division I college teams for the 2017 season).

73. *Season Guidelines*, USA ULTIMATE, https://www.usaultimate.org/college/guidelines.aspx [https://perma.cc/F7EF-7P2C] (detailing the postseason structure and progression in the "USA Ultimate College Series Overview" section).

74. *Id.*; *see, e.g.*, *2019 College Season*, USA ULTIMATE, https://www.usaultimate.org/college/ [https://perma.cc/SH57-73KR] (offering a schedule for the 2019 college postseason). The postseason tournament names are often shortened to "conferences," "regionals," and "nationals." *See Season Guidelines*, *supra* note 73.

75. *See Regional Boundaries*, USA ULTIMATE, https://www.usaultimate.org/college/default.aspx#boundaries [https://perma.cc/SH57-73KR] (demarcating the boundaries for the various conferences and regions).

76. *See Season Guidelines*, *supra* note 73.

BYU is one of these universities competing at the college club level.[77] The school's team was founded decades ago but has yet to earn fully recognized extramural or club status under the university's comparatively demanding certification standards.[78] Despite its tenuous status and relationship with the school, the team has become increasingly organized and has risen in legitimacy since Bryce Merrill became head coach in the early 2010s.[79] Upon his arrival, he instituted a new team motto—"Competition, Humility, Integrity"—which led the team to operate under a new name: CHI.[80] Under Coach Merrill's guidance, BYU CHI has generated greater student interest and has performed increasingly well on the playing field.[81]

BYU CHI has become a veritable powerhouse and nationally respected program, as evidenced by its entry into the top echelon of USA Ultimate's national rankings in the past several years.[82] Despite not competing on Sundays,[83] the team has managed to play enough games during the regular season to qualify for a postseason ranking.[84] Their high level of success in those games has earned their region a

77. *See Brigham Young (CHI)*, USA ULTIMATE, https://play.usaultimate.org/teams/events/Eventteam/?TeamId=kB9yug7FXzHWqdcGUE7djiAcTF7pFOBRrxC1ZYbxWs8%3d [https://perma.cc/3QK2-EBSL] (showing BYU's roster and results for the 2017 college season).

78. *See* Lloyd, *supra* note 35 (noting that the team "would love to see the university raise their status to a similar level as rugby and lacrosse as an extramural sport").

79. *See* Marcus Awakuni, *My Four Years at BYU as a Non-Mormon Player*, ULTIWORLD (Apr. 1, 2016), https://ultiworld.com/2016/04/01/four-years-byu-non-mormon-player/ [https://perma.cc/K5AN-G7TW] (detailing how the coach's "professionalism and discipline" helped lead the team to greater success); Charlie Eisenhood, *The 2016 Ultiworld College Men's Coach of the Year, Presented by Nike Ultimate Camps*, ULTIWORLD (June 2, 2016), https://ultiworld.com/2016/06/02/2016-ultiworld-college-mens-coach-year-presented-nike-ultimate-camps/ [https://perma.cc/ECP3-SGAA] (naming Bryce Merrill as a runner-up for college men's coach of the year).

80. Awakuni, *supra* note 79. BYU CHI is not alone in branding itself separately from its university name and mascot. Early in the development of college ultimate, when teams rarely received support from their universities, clubs created separate identities to represent their individuality and independence, leading to names like Colorado Mamabird and the Wisconsin Hodags. *See* LEONARDO, *supra* note 1, at 95.

81. *See* Awakuni, *supra* note 79.

82. *See* Lloyd, *supra* note 35; *Teams & Rankings*, *supra* note 72 (providing the college men's 2017 end-of-season rankings, in which BYU CHI finished fourteenth).

83. Because BYU CHI has not received the fully recognized status that the extramural teams have, the team does not necessarily have to follow the university's prohibition on Sunday play. The team, however, follows the rule in adherence of its religious underpinnings. *Sabbath Observance Gets Athletes Attention*, DAILY UNIVERSE (Jan. 3, 2011), http://universe.byu.edu/2011/01/03/sabbath-observance-gets-athletes-attention/ [https://perma.cc/5YDZ-C2PJ].

84. Teams must play at least ten sanctioned games for their results to count toward postseason rankings. *See Season Guidelines*, *supra* note 73.

bid to nationals.[85] The team's geographically allotted USA Ultimate conference is the Big Sky Conference, and its region is the Northwest Region.[86]

BYU CHI, however, has been unable to translate their regular season success to the postseason because postseason tournaments take place on weekends.[87] Not only do the qualifying games that determine who advances to the next postseason round typically take place on Sundays[88] but USA Ultimate rules also mandate that any team that forfeits games in a postseason tournament is presumptively ineligible to advance.[89] As such, due to BYU CHI's adherence to its university's prohibition on Sunday play, the team has been unable to advance beyond conferences.[90]

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85. *See* Alex Rummelhart, *Brigham Young Looks Past Sunday*, ULTIWORLD (Dec. 15, 2014), https://ultiworld.com/2014/12/15/brigham-young-looks-past-sunday/ [https://perma.cc/F24C-JHQX]; *Teams & Rankings*, *supra* note 72 (showing that BYU CHI earned its region a bid to the national championship in 2017).

86. Under USA Ultimate's geographically oriented postseason division structure, multiple conferences constitute a region. *See Regional Boundaries*, *supra* note 75 (offering webpage tabs that "detail the breakdown of conferences within each region"). In this case, the Big Sky Conference's geographic scope is Alberta, Idaho, Montana, Utah, and a dozen counties in Washington. *Id.* (providing the Big Sky Conference's geographic scope under the "Northwest" tab). The Northwest Region encompasses Alaska, Alberta, British Columbia, Idaho, Montana, Oregon, Utah, and Washington. *Id.* (providing the Northwest Region's geographic scope under the "Northwest" tab).

87. *See 2018 College*, USA ULTIMATE, https://www.usaultimate.org/archives/2018_college.aspx [https://perma.cc/7NKL-YX79] (offering the weekend dates for the 2018 conference, regional, and National Championship tournament).

88. *See, e.g.*, *Big Sky D-I College Men's CC 2014, Schedules & Standings*, *supra* note 60 (scheduling the qualifying bracket games for Sunday of a Conference Championship).

89. The 2018 College Guidelines state that "[a] team must play all its games at a 'qualifying' tournament in order to qualify for the next tournament in the Series." *Season Guidelines*, *supra* note 73. The rules also allow for discretion from a USA Ultimate official to make an exception to that rule, "provided it does not affect the fairness or integrity of the competition." *Id.*; *see also* Charlie Eisenhood, *Breaking: No Postseason Accommodations for BYU; Any Earned Bid Will Stay with Northwest*, ULTIWORLD (Mar. 31, 2016), https://ultiworld.com/2016/03/31/breaking-no-postseason-accommodations-byu-earned-bid-will-stay-northwest/ [https://perma.cc/HNA7-DV46] [hereinafter Eisenhood, *Breaking: No Postseason Accommodations*].

90. *See, e.g.*, *Big Sky D-I College Men's CC 2014, Schedules & Standings*, *supra* note 60. The women's ultimate team at BYU has also recently improved enough to realistically contend for a spot at the National Championship Tournament, but they encounter the same scheduling roadblocks that the men's team faces. *See* Katie Raynolds, *BYU Is Undaunted: A Story About the Best Team that Won't Play at Regionals*, ULTIWORLD (Apr. 27, 2018), https://ultiworld.com/2018/04/27/byu-undaunted-story-best-team-wont-play-regionals/ [https://perma.cc/S38K-BN28]. One athlete on the women's team recently lamented the difficulties of becoming a prominent program in the face of USA Ultimate's decision not to "make any exception" for the team's Sunday-play proscription, but she believed that the team is rightly adhering to its university's rules: "[W]e are BYU, and those are our standards." Ciera Kueser, *Army Sergeant Rediscovers Unity as BYU Frisbee Athlete*, DAILY UNIVERSE (Nov. 30, 2018), https://universe.byu.edu/2018/11/30/traveled-army-byu-frisbee-athlete-sets-sights-high-1/ [https://perma.cc/LZ3F-MF49].

BYU CHI has petitioned USA Ultimate to change the postseason tournament format or schedule in order to accommodate the team's religiously grounded abstention on Sunday play.[91] The team has also publicly suggested alternative formats and vocalized its desire to resolve the issue.[92] Yet, despite the dialogue, the two sides have failed to find an acceptable middle ground.[93] The simmering conflict reached a boil in the 2017 season when BYU CHI again earned the Northwest Region a bid to the National Championship Tournament and USA Ultimate again declined to accommodate BYU CHI's inability to play on Sunday.[94] As BYU CHI continues to improve its program[95] and remains a top-ranked team,[96] this issue will certainly remain relevant in the coming years.[97]

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91. For a copy of BYU CHI's petition to USA Ultimate and proposal for alternatives, see CHI Ultimate, *USAU Justification & Proposal*, ULTIWORLD, https://cdn.ultiworld.com/wordpress/wp-content/uploads/2016/11/BYU-Proposal-to-USA-Ultimate.pdf [https://perma.cc/CU7T-6Q4Z].

92. *See* Eisenhood, *Breaking: No Postseason Accommodations*, *supra* note 89 (including remarks from BYU CHI's coach concerning the team's disappointment with the postseason scheduling); Sean Walker, *BYU Ultimate Team Denied Entry into National Tournament Over Sunday Play*, KSL.COM (Apr. 1, 2016), https://www.ksl.com/?sid=39147979 [https://perma.cc/CAD4-SP2V] (quoting BYU CHI's coach as indicating frustration with the USA Ultimate's process for taking suggestions for changes to the schedule).

93. *See* Prentice & Eisenhood, *supra* note 15 (reporting that the team has continued to discuss options with USA Ultimate, but noting that "there has been no progress towards accommodations").

94. *See* Charlie Eisenhood, *Breaking: BYU Will Play in Conferences Champs, Keep 4th Bid in Northwest*, ULTIWORLD (Apr. 4, 2017), https://ultiworld.com/livewire/breaking-byu-will-play-conference-champs-keep-4th-bid-northwest/ [https://perma.cc/7XP9-G9L7].

95. Indeed, BYU CHI started the 2019 season strong by excelling at Florida Warm Up, a highly competitive early-season tournament. *See* Prentice & Eisenhood, *supra* note 15 (reporting that "BYU went 7-1 across two days of competition" and beat perennially strong teams such as "Pitt[sburgh], Texas, and Carleton"). Writers at Ultiworld, a news website that focuses specifically on ultimate, asserted that "BYU was arguably the best team at Warm Up." *Id.* The writers also projected that BYU CHI is good enough to contend for the semifinals at the college National Championship Tournament. *See id.* (titling the subsection about BYU CHI: "BYU Would Be A Semifinals Contender At Nationals"); *see also* Graham Gerhart & Daniel Prentice, *Stanford Invite 2019: Tournament Preview (Men's)*, ULTIWORLD (Feb. 27, 2019), https://ultiworld.com/2019/02/27/stanford-invite-2019-tournament-preview-mens/ [https://perma.cc/CV2U-TBG8] (observing that "BYU looked like a National semifinal caliber team at Warm Up").

96. After BYU CHI's success at Florida Warm Up early in the 2019 season, Ultiworld ranked BYU CHI as the third-best team in the college men's division. Will Johnson & Keith Raynor, *College Power Rankings, Presented by NUTC [Feb 20, 2019]*, ULTIWORLD (Feb. 20, 2019), https://ultiworld.com/2019/02/20/college-power-rankings-presented-nutc-feb-20-2019/ [https://perma.cc/7ZXY-UD55].

97. *See* Prentice & Eisenhood, *supra* note 15 ("BYU's continued success at the top of the college ultimate scene will renew questions about their exclusion from the playoff system.").

Throughout the course of this back-and-forth, BYU CHI, while not explicitly threatening to sue USA Ultimate, has heavily alluded to a potential lawsuit.[98] Public comments from team representatives have indicated that the team considers USA Ultimate's actions to be illegally discriminatory.[99] Particularly given the litigation-strategy precedent that the BYU men's rugby team set when it successfully forced USA Rugby to change its scheduling policy,[100] BYU CHI may consider a similar course of litigation strategy if it does not otherwise obtain a favorable resolution.[101]

As this dispute has developed, the historical backdrop and discourse surrounding the present affair have brought back into focus a statement by counsel for BYU's men's rugby team: "The law is clear that you can't exclude a team based on religious beliefs."[102] Yet, because BYU and USA Rugby resolved their near-identical conflict before a complaint was even filed, no court could provide that purported clarity. The current affair, then, offers an excellent opportunity to analyze discrimination law in a new context because of the unclear legal implications of USA Ultimate's stance, BYU CHI's confidence that the team has a legitimate legal claim, the possibility of another strike suit, and the novel issues that this fact pattern presents.

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98. Eisenhood, *Breaking: No Postseason Accommodations*, *supra* note 89 (noting that Coach Merrill did not reject the option of future legal action, and said, "We haven't taken anything off the table and we are considering all options, but we look forward to working through [USA Ultimate's] processes first"); Walker, *supra* note 92 (stating that "[Coach] Merrill did not rule out potential legal action in the future"). In an interview with Ultiworld, Coach Merrill invoked the Civil Rights Act of 1964 when answering a question about BYU CHI's requested accommodations. Charlie Eisenhood, *BYU's Big Day Opens New Questions About Postseason Accommodations*, ULTIWORLD (Mar. 26, 2016), https://ultiworld.com/2016/03/26/byus-big-day-opens-new-questions-about-postseason-accommodations/ [https://perma.cc/SDK2-9EV3] [hereinafter Eisenhood, *BYU's Big Day*] ("That's a hard question. . . . I think it goes down to the Civil Liberties [sic] Act of 1964 that says you don't discriminate on these things, religion included.").

99. CHI Ultimate, *supra* note 91 ("Specifically, USAU's preemptory refusal to allow BYU to participate represents discrimination on the basis of religion because BYU's religiously-motivated policy of not participating in athletic events on Sunday."); *see also* Eisenhood, *BYU's Big Day*, *supra* note 98 (featuring Coach Merrill referring to the Civil Rights Act of 1964 but also noting that BYU CHI "understand[s] that it's not Constitutional law, that 'life, liberty, pursuit of happiness, and a chance at Regionals' is not listed in there").

100. *See supra* notes 46–50 and accompanying text.

101. Indeed, BYU CHI is well aware of the strike-suit precedent established by BYU men's rugby. BYUtv Sports, *Ultimate Frisbee Head Coach Bryce Merrill on BYUSN*, YOUTUBE (Apr. 3, 2017), https://www.youtube.com/watch?v=I-1fPY7YJvI [https://perma.cc/T93T-YQQX] (hosting Coach Merrill, who observed that USA Rugby agreed to accommodate BYU's rugby team "in the shadow of litigation").

102. Call, *Legal Scrum in Past*, *supra* note 43.

II. POSSIBLE LEGAL OPTIONS FOR BYU CHI: IDENTIFICATION AND ANALYSIS

Having explained the building discord between BYU's ultimate team and USA Ultimate, as well as the historical context that colors the current conflict, this part aims to identify and assess the various legal claims that the student-athletes could bring.

A. Identifying the Potential Claims

If it were to file a lawsuit, BYU CHI most certainly would allege that USA Ultimate discriminated against the team for its religious beliefs. The United States has a storied legal history involving discrimination of many kinds, and an extensive body of law deals specifically with religious discrimination. Under this particular set of facts, two veins of federal law are important to analyze: (1) the constitutional protections regarding freedom of religion and (2) the prohibition of religious discrimination in places of public accommodation found in Title II of the Civil Rights Act of 1964. Additionally, states' anti-discrimination laws also have the potential to provide protection for BYU CHI.

B. Assessing the Potential Claims

1. The First Amendment and Constitutional Protections for the Exercise of Religion

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[103] Allegations of religious discrimination—no matter the identity of the alleged discriminating party—may bring to mind the constitutionally protected right to practice the religion of one's choice. For the reasons outlined below, however, First Amendment protections do not apply in this case, and BYU CHI does not have a viable constitutional claim against USA Ultimate for infringing on the student-athletes' right to exercise their religion.

The fatal issue for BYU CHI is that this constitutional protection restrains only the actions of the federal and state governments.[104]

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103. U.S. CONST. amend. I.

104. *E.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (noting that courts must uphold constitutional standards if a state actor is responsible for allegedly injurious actions); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 737 (1996) (stating that "the First Amendment prohibits only

Thus, to state a constitutional claim alleging a violation of the First Amendment right to freedom of religion, a plaintiff generally must allege either that the defendant is a government entity or is somehow acting under the cloak of state authority.[105] This so-called state action requirement[106] can be satisfied with allegations of private discriminatory action only if the defendant's conduct constitutes governmental action[107] or is sufficiently intertwined with governmental authority.[108] Mere private discriminatory action with no connection to government authority will not give rise to a constitutional claim.[109]

Several tests can determine whether a private party's actions are sufficiently attributable to the government to bring it within the scope of the First Amendment's protections: the nexus test, the symbiotic relationship test, the joint action test, and the exclusive function test.[110]

The nexus test analyzes "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[111] Under this test, the private action is attributable to the government only if the state has used the private party as a proxy actor or has coerced or encouraged the private party to act in such a manner.[112] The symbiotic relationship test considers whether the government and private party have developed such an

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'Congress' (and, through the Fourteenth Amendment, a 'State')" from infringing upon constitutional rights).

105. *See Brentwood Acad.*, 531 U.S. at 295–96; Magallanes v. Cracker Barrel Old Country Store, Inc., No. 00-4231-DES, 2002 U.S. Dist. LEXIS 1111, at *6 (D. Kan. Jan. 22, 2002).

106. Lyons v. Chase Home Lending, No. 3:11-CV-1056-N, 2011 U.S. Dist. LEXIS 120100, at *19 (N.D. Tex. Sept. 1, 2011).

107. *E.g.*, United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 832 (1983) (holding that a violation of "First Amendment rights is not made without proof of state involvement").

108. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (stating that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action of the latter may be fairly treated as that of the State itself").

109. *See Jackson*, 419 U.S. at 349–50; Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993) (noting that one's right to freedom of religion is "not protected against private infringement").

110. *See* Schneider v. Cooper, No. 08-cv-01856-REB-KMT, 2009 U.S. Dist. LEXIS 125017, at *19–26 (D. Colo. Dec. 16, 2009).

111. *Jackson*, 419 U.S. at 351.

112. *Schneider*, 2009 U.S. Dist. LEXIS 125017, at *19–20; *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–96, 298 (2001) (observing that the factors that weigh into the nexus test are case specific and that "[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity").

interdependent, long-term relationship that the actions of either, within the applicable scope of authority or normal dealings, can be attributed to either party.[113] The joint action test, on the other hand, allows the fact finder to attribute government authority to private actions if the private party willfully participated in government action for a specific infringement of constitutional rights.[114] Finally, the exclusive function test allows for a determination of state action if the private party "exercises powers traditionally exclusively reserved to the State."[115] Such functions have included the administration of elections of public officials, the operation of a company-owned town, and the management of a city park.[116]

In this case, USA Ultimate, a private, 501(c)(3) nonprofit organization, does not fall within any definition or extension of a state actor. By virtue of its status as a private entity, it is clearly not a conventional state actor or government entity. Furthermore, unless USA Ultimate undertakes some action or responsibility that intertwines it with the government, such as receipt of substantial federal funding[117]—which is not an issue present according to the most recent publicly available annual reports[118]—it does not appear to have rendered itself a state actor.

In other cases, courts have already rejected conceivable factors that could have bolstered the argument that a sufficiently entwined state relationship exists between the government and USA Ultimate.

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113. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724–25 (1961).

114. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453–55 (10th Cir. 1995). Some courts have treated this like a conspiracy between the government and private actors to deprive rights. *See Schneider*, 2009 U.S. Dist. LEXIS 125017, at *22–23.

115. *Id.* at *24 (quoting *Jackson*, 419 U.S. at 352).

116. *Id.*

117. In some cases, government funding can intertwine a private organization closely enough to the government to bring it within the ambit of constitutional accountability. *See* Anne L. DeMartini, *Thirty-Five Years After* Richards v. USTA*: The Continued Significance of Transgender Athletes' Participation in Sport*, *in* SPORT AND THE LAW, *supra* note 9, at 97, 108 ("If an athletic organization receives government funding or is highly entangled with the government, courts consider the organization a state actor and it must adhere to both the US Constitution and appropriate state constitutions."). For example, BYU's receipt of federal student aid renders it "answer[able] to the U.S. government as an educational institution" for anti-discrimination law purposes. SMITH, *supra* note 11, at 95. *But see* Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982) (finding that a school's receipt of substantial funds from the government did not render the school a state actor).

118. USA ULTIMATE, 2017 ANNUAL REPORT 66–67 (2017), https://www.usaultimate.org/assets/1/Page/2017AnnualReport_LR.pdf [https://perma.cc/TC9W-UE2X] (listing revenue sources for 2017, which included no government funding); USA ULTIMATE, 2016 ANNUAL REPORT 63 (2016), https://www.usaultimate.org/assets/1/Page/2016AnnualReport_LR.pdf [https://perma.cc/WZ9Z-KJVZ] (showing that USA Ultimate received no revenue in the form of government grants).

For instance, a 501(c)(3) entity is not rendered a state actor by virtue of its tax-exempt status.[119] In fact, courts considering whether a tax-exempt entity's allegedly discriminatory acts constitute state action have generally found no state action when the purportedly discriminatory acts do not involve racial animus.[120] Additionally a tax-exempt entity does not automatically transform into a state actor by receiving some funding or grants from a government entity; it must receive enough funding to create a substantially intertwined relationship that causes it to pass one of the enumerated tests.[121]

USA Ultimate often holds tournaments, including the first-round postseason tournaments in which BYU plays, at public parks or on a public university's playing field.[122] A private organization's mere use of a public park, however, does not create a nexus sufficient to establish state action.[123] Although an argument predicated on the theory that USA Ultimate is a state actor because it represents the United States in international sporting events may seem too anemic to even consider, a similar case has already been litigated. The case concerned a Puerto Rican basketball organization, and the First Circuit held that status as a national representative does not imbue a private entity with the color of state authority.[124]

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119. Stone v. Elohim, Inc., 336 F. App'x 841, 843 (10th Cir. 2009); *see also* N.Y.C. Jaycees, Inc. v. U.S. Jaycees, Inc., 512 F.2d 856, 859 (2d Cir. 1975) ("[A] tax exemption does not constitute government 'sponsorship' but instead 'creates only a minimal and remote involvement.'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675–76 (1970))); Chance v. Reed, 538 F. Supp. 2d 500, 507 (D. Conn. 2008) (noting that a nonprofit organization's 501(c)(3) status does not render the entity a state actor). The government, however, has used the threat of stripping organizations of tax-exempt status in order to indirectly compel compliance with civil rights laws. For instance, upon determining in 1970 that racist admissions policies at BYU and Bob Jones University were in violation of Title VI of the Civil Rights Act of 1964, the IRS warned that it could no longer give tax-exempt status to private colleges and universities that perpetuated racially discriminatory practices. SMITH, *supra* note 11, at 96.

120. *See* Jackson v. Statler Found., 496 F.2d 623, 628 (2d Cir. 1973).

121. *See N.Y.C. Jaycees*, 512 F.2d at 859.

122. *See, e.g.*, *Big Sky D-I College Men's CC (2015)*, USA ULTIMATE, https://play.usaultimate.org/events/Big-Sky-D-I-College-Mens-CC-2015/FieldMap/ [https://perma.cc/Z9TZ-NCTC] (indicating that the tournament took place on both the campus of Boise State University and local municipal parks).

123. *See* Gilmore v. Montgomery, 417 U.S. 556, 573–74 (1974); Magill v. Avonworth Baseball Conference, 516 F.2d 1328, 1333 (3d Cir. 1975).

124. *See generally* Ponce v. Basketball Fed'n of P.R., 760 F.2d 375 (1st Cir. 1985) (holding in a case alleging nationality discrimination that the Basketball Federation of the Commonwealth of Puerto Rico ("Federation") did not act with state power when declining to admit an American citizen based on eligibility rules). Much like USA Ultimate, the Federation served as a private, nonprofit sporting organization that oversaw and directed the play of a sport at an amateur level. *See id.* at 376. In the same way that USA Ultimate, through WFDF, is a member of an Olympic Committee and represents the United States on the international stage, the Federation represented Puerto Rico on the

Furthermore, none of the aforementioned tests brings USA Ultimate within the scope of state action. The nexus test fails in part because there is not a sufficiently close connection between USA Ultimate and the government. While USA Ultimate may have received some form of federal funding in the past, such receipt fails to create a close enough connection.[125] In any event, USA Ultimate appears not to have received federal funding in recent years.[126] No government entity is alleged to have used USA Ultimate as a proxy actor or encouraged USA Ultimate's actions. The symbiotic relationship and joint action tests similarly fail due to a lack of legitimate connections between the state and USA Ultimate; the two simply cannot be said to have acted in concert due to the lack of a clear dependency or decisionmaking relationship. Additionally, because tournaments take place at various public facilities on an irregular basis,[127] no long-term relationship develops between USA Ultimate and the government entities with which it interacts for tournament purposes. Finally, USA Ultimate, in functioning only as the governing entity of a sport, does not exercise powers traditionally reserved to the state. This test is interpreted even more narrowly than the others,[128] and considering that USA Ultimate does not take on responsibilities as distinctly governmental as running elections for public officials or managing public parks, notwithstanding their use of them, the exclusive function test must fail as well.[129]

Olympic and international level. *See id.* Despite the aesthetically meshed relationship between the Federation and the Puerto Rican government, however, the First Circuit determined that the relationship was merely symbolic and did not accord the Federation state authority. *Id.* at 378. Considering the similarities between USA Ultimate and the Federation, it appears that one could easily project a lack of state authority in USA Ultimate's actions.

125. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 384 n.3 (1978) ("This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor.").

126. *See supra* note 117–18 and accompanying text.

127. This lack of consistency results from the bid system for tournament locations, whereby individual schools or groups apply to host tournaments; this system presides for USA Ultimate postseason tournaments as well. *See Tournament Sanctioning*, USA ULTIMATE, https://www.usaultimate.org/resources/sanctioning/tournaments.aspx [https://perma.cc/MGS3-CVMQ].

128. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (noting that the question in this test is not whether the party performs a public function but "whether the function performed has been traditionally the *exclusive* prerogative of the State" (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974))).

129. In assessing USA Ultimate's potential governmental ties and the resulting possible implications of state action, it is worth noting that the Supreme Court has determined that the NCAA is not a state actor, despite its considerable ties to all fifty state governments in the form of a substantial number of its constituent members being state universities. NCAA v. Tarkanian, 488 U.S. 179, 182 (1988). By extension, USA

Unless USA Ultimate has done or later will do something that creates a closer nexus between itself and state authority, claims undergirded by the First Amendment or other constitutional provisions should not succeed. The Constitution is not the only potential source of help for BYU CHI, however, so other sources of law are worth assessing.

2. Title II of the Civil Rights Act of 1964

Title II of the Civil Rights Act of 1964 states in part that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of . . . religion."[130] This portion of the broadly sweeping and landscape-changing federal civil rights legislation deals specifically with discrimination in places of public accommodation.[131] The scope here differs from constitutional protections of the exercise of religion in that this law can encompass completely private acts so long as they substantially interact with interstate commerce.[132] Courts must liberally construe Title II in order to fulfill the clear purpose of the Act: to eradicate discrimination in public places so that all citizens can have the full enjoyment of public facilities.[133] Specifically important to BYU CHI's case is the fact that the statute includes within its definition of "place of public accommodation" spaces such as "sports arena[s], stadium[s] or other place[s] of exhibition or entertainment."[134]

Because Title II explicitly encompasses sports arenas and other similar venues, the law appears at first blush to be a potential avenue for BYU CHI to pursue its claim. Additionally, because BYU CHI's

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Ultimate's tangential ties to state universities should not be considered enough to render its actions "state action." While the Supreme Court has decided that one athletic governing body—"a statewide association incorporated to regulate interscholastic athletic competition"—qualified as a state actor under the nexus test, USA Ultimate bears far fewer connections to the state than did the entity at issue in that case. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290–93 (2001) (observing that the association was largely funded by public schools, was led by public school representatives, operated under the state's approval, offered benefits through the state's public retirement system, and associated itself with the state in a number of other ways).

130. 42 U.S.C. § 2000a(a) (2012).

131. *Id.*; *see also* Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1095 (2005) (expressing that the Civil Rights Act of 1964 was "a seminal legislative accomplishment of the twentieth century").

132. *See* Daniel v. Paul, 395 U.S. 298, 303–08 (1969) (ruling that a private recreational facility fell within the scope of Title II because its snack bar interacted with interstate commerce and the club anticipated entertaining people traveling in interstate commerce).

133. *See id.* at 306–08.

134. 42 U.S.C. § 2000a(b)(3) (2012).

coach has alluded to the Civil Rights Act of 1964 in discussing this dispute publicly, the team appears to be aware that Title II may apply.[135] Indeed, the particular fact pattern adds new wrinkles to already-addressed issues and even finds new ground for argument, making this conflict especially interesting to analyze under the civil rights legislation.

Generally, to state an actionable claim under Title II, a party must allege that it

> (1) is a member of a protected class; (2) attempted to exercise the right to full benefits and enjoyment of a place of public accommodations; (3) was denied those benefits and enjoyment; and (4) was treated less favorably than similarly situated persons who are not members of the protected class.[136]

Additionally, a Title II plaintiff is entitled to injunctive relief if it can show a "real or immediate threat that the plaintiff will be wronged again."[137]

At first glance, and based solely on the above test, BYU CHI seems as though it could have an actionable claim. The team passes the first element—a showing that it is a member of a protected class—because it effectively is a religious group.[138] Then, depending on tournament venue, the team could pass the second element by showing that it attempted to participate in a tournament that occurred in a place of public accommodation. It should then be able to pass the third element by showing that it was unable to fully participate due to its religious beliefs. Finally, BYU CHI should pass the final element by showing that other teams who were not part of the protected religious class were able to compete for the full weekend. Also, proving that the team is likely to suffer the same harm again will not be problematic, considering the tournament occurs yearly and the team has suffered this same fate for many years.

Yet the above test is not entirely straightforward as applied in this case. For instance, does every single college postseason tournament actually take place at a place of public accommodation?

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135. *See supra* notes 98–101 and accompanying text.

136. Dunn v. Albertsons, No. 2:16-cv-02194-GMN-PAL, 2017 U.S. Dist. LEXIS 127815, at *6 (D. Nev. Aug. 10, 2017) (citing United States v. Lansdowne Swim Club, 894 F.2d 83, 88 (3d Cir. 1990)).

137. Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1351 (N.D. Ga. 2005) (quoting Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1007 (11th Cir. 1997)). Furthermore, a plaintiff in a Title II claim is entitled only to injunctive relief, not money damages. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968).

138. 42 U.S.C. § 2000a(a) (2012) (prohibiting discrimination in any place of public accommodation on the basis of "race, color, religion, or national origin").

Due to the relative complexity of the matter at issue, several other factors must be analyzed to determine whether the alleged discrimination by USA Ultimate would be actionable under Title II. Those include the nexus between USA Ultimate's actions and interstate commerce; whether a postseason tournament qualifies as a place of public accommodation; and USA Ultimate's apparent lack of discriminatory intent as a precipitating factor.

a. Interstate Commerce

First, in order for Title II to apply, the location of the alleged discrimination must be involved in interstate commerce in some substantial way.[139] That factor, which is separate from but interacts with the four-element test above, can be met in several ways. For instance, if the space offers items that have traveled in interstate commerce, Title II will apply.[140] In the case of sporting events, the presence of participants who have traveled in interstate commerce can also satisfy Title II's interstate commerce requirement.[141] Furthermore, substantial and regular attendance of patrons from out-of-state can satisfy this requirement.[142] As such, if an establishment or place of entertainment like a sports venue customarily hosts tournaments that feature goods, athletic teams, or patrons that have moved in interstate commerce, then the establishment falls within the scope of Title II.[143]

Additionally, Title II's application extends to the whole of a facility or establishment when one portion of it is determined to fall within Title II's reach.[144] For instance, if an establishment's snack bar or lunch counter is covered under Title II because it offers goods that have traveled in, have interacted with, or will affect interstate commerce, then the entirety of the establishment becomes a place of public accommodation within the meaning of Title II.[145]

139. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250–51 (1964).

140. *See* Daniel v. Paul, 395 U.S. 298, 303–08 (1969).

141. United States v. Lansdowne Swim Club, 713 F. Supp. 785, 792 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990). In a sports tournament context, courts have determined that attendance of out-of-state teams and players at annual golf tournaments was enough to bring the pertinent golf courses within the ambit of Title II. *See* Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399, 401–02 (E.D. Va. 1983); Evans v. Laurel Links, Inc., 261 F. Supp. 474, 477 (E.D. Va. 1966) (holding that a golf course that hosted an out-of-state team once a year was subject to Title II).

142. *See, e.g.*, *Lansdowne*, 713 F. Supp. at 792 (determining that a swim club's out-of-state guest rate of around ten percent over two years was significant and regular enough to satisfy the commerce requirement).

143. *Evans*, 261 F. Supp. at 477.

144. *Daniel*, 395 U.S. at 305.

145. *Lansdowne*, 713 F. Supp. at 795; *Evans*, 261 F. Supp. at 476.

For the postseason tournaments that would be at issue in a lawsuit between BYU CHI and USA Ultimate, this factor is satisfied in every single case. At the very least, the Big Sky Conference encompasses colleges and universities from four states. Thus, whenever the Conference Championship Tournament occurs, teams travel interstate in order to reach the tournament. That fact satisfies the interstate participant analysis. Furthermore, apparel vendors or tournament directors often sell merchandise that likely would have traveled through interstate commerce. Finally, many tournaments are held at parks with some form of food and beverage stand. As with those food stands at issue in several seminal cases like *United States v. Lansdowne Swim Club*,[146] a food bar at an ultimate tournament likely would offer food and beverages that traveled in interstate commerce. By extension, the designation of the food bar as a public accommodation would bring the entire sports complex hosting the ultimate tournament into Title II's scope. Invariably, the interstate commerce test would be met at a college postseason ultimate tournament.

b. Place of Public Accommodation

The next issue is determining whether the postseason tournaments are places of public accommodation—the second of the four elements in the Title II test. In order to prove that the tournaments are places of public accommodation, BYU CHI would need to satisfy the "place" or "situs" requirement. Included within "public accommodations" are places of entertainment, which generally encompass establishments where the entertainment materializes with the direct participation in an activity or a sport.[147] In other words, the "sports arena" and "stadium" included in the language of Title II serve as places of accommodation both for the spectators and for the participants.[148] Courts have reached this

146. 713 F. Supp. 785 (E.D. Pa. 1989), *aff'd*, 894 F.2d 83 (3d Cir. 1990).

147. *Daniel*, 395 U.S. at 306–08. Even under stricter articulations of the "place of entertainment" test, an ultimate tournament should qualify because its primary purpose is to provide entertainment for those participating and potentially for spectators as well. *See* Michael F. Roessler, Recent Development, *We Are Not Amused: The Narrow Interpretation of Title II's Place-of-Entertainment Provision in* Denny v. Elizabeth Arden Salons, Inc., 85 N.C. L. REV. 1259, 1269–70 (2007) (discussing the "primary-purpose test" used in the Fourth Circuit, which requires that an establishment's primary purpose be to entertain in order to be considered a place of entertainment under Title II).

148. *Lansdowne*, 713 F. Supp. at 790–91. The Supreme Court noted that this finding comports with the generally accepted meaning of "entertainment" and accords with Title II's aim of "remov[ing] the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel*, 395 U.S. at 307–08; *see also Evans*, 261 F. Supp. at 477 (determining that plaintiffs suing for access to a whites-

conclusion in the context of several sports, including golf[149] and football.[150]

Under the clear meaning of "place," the tournaments should satisfy the situs requirement. Generally, the tournaments take place at either public fields—whether owned by a university or municipality—or private athletic fields. Either way, the tournaments qualify as places of entertainment because both spectators and competitors are invited to enter or participate, and the tournaments take place at venues that are explicitly included within the language of Title II. Thus, in terms of the plain language of the statute, the tournaments constitute Title II places of public accommodation.

Other issues remain, however. Namely, because USA Ultimate would be the likely defendant in a Title II lawsuit, assessing how that organization interacts with the place of public accommodation requirement could be pivotal. Thus, this Comment analyzes whether USA Ultimate is *itself* a place of public accommodation and whether it becomes more closely tied to the situs as a lessee.

i. USA Ultimate: The Organization as a Place of Public Accommodation

Under current case law, USA Ultimate as an organization does not qualify as a Title II place of public accommodation. Although the organization does not fall within the express statutory exception for "private clubs," its similarity to other organizations that have been deemed not to fall within the ambit of Title II should prevent its application in this case.

First, Title II explicitly places certain private establishments outside its reach. Specifically, Title II does not apply to private clubs "not in fact open to the public."[151] As a result, if an organization or business is determined to be a private club, then it may discriminate without fear of repercussion under Title II. Because the statute itself does not clearly define what a private club is,[152] courts have identified several factors to evaluate in determining whether a club is private, including the selectivity of the organization's membership; the membership's management, ownership, or control over the club's

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only golf club "[were] not limited to watching golf matches" but could "*play* golf on the defendant's course on the same basis as white customers" (emphasis added)).

149. Brown v. Loudoun Golf & Country Club, Inc., 573 F. Supp. 399, 402 (E.D. Va. 1983).

150. United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474, 482–83 (E.D. La. 1974).

151. 42 U.S.C. § 2000a(e) (2012).

152. *Lansdowne*, 713 F. Supp. at 796.

operations; the club's history; whether nonmembers have access to or use the club's facilities; the purpose of the club's existence; whether the club publicly recruits or advertises for members; whether the club is for-profit or nonprofit; and whether the club has implemented formalities such as having bylaws, meetings, and membership cards.[153]

For example, in an early Title II case, an Alabama YMCA claimed that it qualified as a private club and thus could not be forced to comply with the anti-discrimination law.[154] The Fifth Circuit rejected the YMCA's argument.[155] The court observed that the YMCA's membership policies were too unselective; it lacked attributes of member ownership associated with private clubs; it generated substantial revenue from public agencies; it provided many recreational programs to the general public; and it operated as a quasi-public agency.[156] Assessing these aggregate factors, the court determined that the YMCA was not a private club and was thus subject to Title II as a place of public accommodation.[157]

Similarly, USA Ultimate should not qualify as a private club. First, the organization is not selective in its membership. It actively solicits members—indeed, it exists to grow the sport by recruiting members—and the threshold for membership is signing up and paying to be a member.[158] Although USA Ultimate members provide feedback,[159] and most of the staff are members,[160] there is a clear and narrow organizational leadership structure that does not incorporate the opinions of its many individual members.[161] The organization is a nonprofit corporation;[162] it has established various corporate features

153. *Id.* at 796–97.

154. Smith v. YMCA of Montgomery, Inc., 462 F.2d 634, 642 (5th Cir. 1972).

155. *Id.* at 648–49.

156. *Id.* at 642, 648–49.

157. *Id.* at 649.

158. *See Membership Overview*, USA ULTIMATE, https://www.usaultimate.org/membership/ [https://perma.cc/VN8V-FKUF].

159. *See Members' Impact*, USA ULTIMATE, https://www.usaultimate.org/membershipimpact/ [https://perma.cc/85ZJ-HZK9] (stating that "members' . . . feedback . . . [is] important to USA Ultimate").

160. *See Contact Us: USA Ultimate Headquarters Staff*, USA ULTIMATE, https://www.usaultimate.org/about/contact_us/hq_staff.aspx#leej [https://perma.cc/52ED-BBKM] (providing the biographies of staff members, many of whom previously played the sport and were otherwise associated with USA Ultimate).

161. *See Board of Directors*, USA ULTIMATE, https://www.usaultimate.org/about/contact_us/board_of_directors.aspx [https://perma.cc/G42E-5HM6]; *Contact Us: USA Ultimate Headquarters Staff*, *supra* note 160.

162. *About*, USA ULTIMATE, https://www.usaultimate.org/about_us/ [https://perma.cc/K32A-U6XA].

like bylaws;[163] and members wield membership cards.[164] Although some facts—like the membership cards—push lightly in favor of deeming USA Ultimate a private club, the organization should not be so considered. USA Ultimate, similar to the YMCA in *Smith v. YMCA of Montgomery, Inc.*,[165] is a large organization that solicits and welcomes all types of members and has low hurdles for admission. By almost any measure, USA Ultimate is not a private club and is therefore not exempt from Title II for that particular reason.

While USA Ultimate most likely is not exempt as a private club, other features of the organization arguably take the organization outside the scope of Title II. Recent litigation dealing with the Boy Scouts of America's ("BSA") refusal to allow prospective boy scouts or adult scout leaders to join the organization due to internal policies indicates that an organization's lack of concrete association to particular locations can bring the organization outside the scope of Title II.

In *Welsh v. Boy Scouts of America*,[166] for instance, a son and father sued the BSA and a local BSA council under Title II for admission to a troop after they were refused entry due to their atheism.[167] The plaintiffs contended that the BSA constituted a place of public accommodation because the active, fun, and recreational nature of the organization rendered it a place of entertainment.[168] The BSA argued that it was not a "place" subject to Title II but merely an organization that facilitated scouting activities.[169] Early in its analysis, the court noted that the BSA is a membership organization whose activities did not center around a specific facility or place and that "membership in [the BSA] does not provide access to a particular facility."[170] It then moved on to determine whether "place" should be construed in its literal connotation as a "physical site" or if this was merely a term of convenience that would allow for inclusion of accommodations that do not have a specific location or facility.[171] It

163. *See generally USA Ultimate Bylaws*, USA ULTIMATE, https://www.usaultimate.org/bylaws/ [https://perma.cc/WL8N-CY2R] (providing the USA Ultimate bylaws).

164. USA ULTIMATE, 2013 ANNUAL REPORT 18 (2013), https://www.usaultimate.org/assets/1/Page/USA%20Ultimate%20Annual%20Report%202013_FINAL_lowres.pdf [https://perma.cc/F8U2-GQ3M] ("All members receive a membership card . . . .").

165. 462 F.2d 634 (5th Cir. 1972).

166. 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 933 F. 2d 1267 (7th Cir. 1993).

167. *Id.* at 1512. The BSA requires its members to "subscribe to a duty to God." *Id.*

168. *Id.*

169. *Id.* at 1512–13.

170. *Id.* at 1521.

171. *Id.* at 1522.

noted that this question was novel in the Title II context but that it had been addressed in similarly worded state laws.[172]

Ultimately, the *Welsh* court declined to extend "place" status to the BSA within the context of Title II because the BSA lacked the commensurate ties to a particular facility of the kind contemplated in Title II.[173] In its analysis, the court noted a range of interpretations of the term "place," spanning from strict adherence to its physical connotation to a conclusion that "a membership organization need not be a 'place' in order to come within the reach of a statute like Title II, so long as its activities center upon an identifiable location."[174] The *Welsh* court considered "place" to be inextricably tied to "the concept of a physical site" under Title II.[175] The court pointed to membership organizations, like youth sports associations, that would fall within the scope of Title II, but only in the context of the organization owning its own facilities and discriminatorily refusing entry to particular protected parties.[176] In contrast, the BSA "lack[ed] a connection to a particular site or facility" and thus failed to qualify as a "place" under Title II.[177] In the end, the court concluded that, "[i]n order to qualify as a 'place of public accommodation' within the scope of Title II, an establishment must have a substantial connection to a concrete facility or location," which means that membership organizations that "do not operate from or supply access to a particular facility or location" are not within the scope of Title II.[178] The Seventh Circuit affirmed.[179]

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172. *Id.* at 1522–23.

173. *Id.*

174. *Id.* at 1528; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–57 (2000) (observing that in some states, the definition of "public accommodation" had extended from "clearly commercial entities" to "membership organizations such as the Boy Scouts"); Brounstein v. Am. Cat Fanciers Ass'n, 839 F. Supp. 1100, 1107 (D.N.J. 1993) (observing that the New Jersey state anti-discrimination law did not require "place" to be a fixed location).

175. *Welsh*, 787 F. Supp. at 1530.

176. *Id.* at 1531.

177. *Id.* at 1538. The court also noted that, although the BSA has administrative offices and meets at certain sponsored locations like churches and schools, access to the physical locations was not at issue; membership to the organization was at issue. *Id.* at 1538–39. Furthermore, the court feared the constitutional implications of considering organizations with any semblance of a physical meeting point to be open to everyone under Title II. *Id.* at 1539.

178. *Id.* at 1541. Also, "where the benefits of membership in an organization flow primarily, if not exclusively, from the interpersonal association among the people who belong to the organization rather than the enjoyment of the physical accoutrements of a particular facility," then Title II does not reach the organization itself. *Id.* at 1540.

179. Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1268 (7th Cir. 1993). *Welsh* has not received universal approbation. *Compare* Edward Bigham, Recent Decision, *Civil Rights—Seventh Circuit Permits Boy Scouts of America to Exclude Atheist*, 67 TEMP. L.

Given the *Welsh* court's analysis, USA Ultimate compares favorably with the BSA. USA Ultimate is an organization that facilitates recreational activities across the United States. Due to the nature of how its tournaments are held, however, its spatial ties are fluid. Individual teams or groups apply to host tournaments, and USA Ultimate merely sanctions them.[180] Unlike the sports leagues that actually own the spaces at issue in some Title II cases,[181] or the YMCA discussed above,[182] USA Ultimate does not actually own the spaces at which most of its activities are held.[183] Indeed, in this regard, USA Ultimate and the BSA are quite similar. The analogy between the two organizations in this legal context is limited, of course, by the type of controversy at hand in each case. In *Welsh*, the issue is membership in the organization, whereas in the present conflict, the issue is BYU CHI's ability to compete meaningfully in USA Ultimate's college postseason. BYU CHI and its players are members of USA Ultimate, so the access to the organization is not at issue. In terms of Title II, however, it is important to note that the location, not the organization itself, is the linchpin for a lawsuit because being able to sue USA Ultimate as a place of public accommodation could grant BYU CHI great latitude to choose a forum for its lawsuit.

ii. Lessee Issue

Lastly, there is another spatial issue: USA Ultimate does not directly own or operate the facilities where tournaments take place. As such, the relationship between USA Ultimate as the allegedly discriminatory party and the locations and establishments of the tournaments where the alleged discrimination occurs is tenuous and creates ambiguity for Title II application. This issue is novel in the context of Title II. Most cases have dealt with businesses or entities

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REV. 1333, 1345–49 (1994) (criticizing the courts' conclusions that the BSA does not qualify as a place of public accommodation), *with* Patrick J. Poff, Case Note, Welsh v. Boy Scouts of America*: Defining the Scope of a "Place of Public Accommodation" Under Title II of the Civil Rights Act of 1964*, 45 MERCER L. REV. 1137, 1141–44 (1994) (commending the *Welsh* court's conclusions of law).

180. *See Tournament Sanctioning*, *supra* note 127.

181. *See, e.g.*, United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474, 477 (E.D. La. 1974).

182. *See supra* text accompanying notes 154–57.

183. Since it does not have facilities to offer, USA Ultimate relies on its "sanctioning program . . . to encourage and support the growth of Ultimate at all levels" by facilitating opportunities for players and legitimizing playing the sport. *USA Ultimate Sanctioning*, USA ULTIMATE, https://www.usaultimate.org/resources/sanctioning/default.aspx [https://perma.cc/NZ9C-Q62M].

operating in a static location, such as a motel.[184] In this case, however, USA Ultimate is not the owner of particular fields at which the tournaments occur. Instead, individual schools or teams apply to host the tournament, and USA Ultimate simply facilitates the tournament at that location.[185] The issue becomes, then, whether the ephemeral nature of the tournament locations from year to year prevents the site from falling within the scope of Title II.

One particularly relevant example for this issue is *Wesley v. City of Savannah*,[186] which involved a private organization's annual use of a municipal golf course for a local golf tournament.[187] The private golf association that organized the tournament limited its membership and special event eligibility to Caucasians.[188] The organization owned no golf course of its own and primarily used public courses for its events.[189] Black golfers who were refused entry to the tournament sued under Title II, claiming that the private club's use of a municipal golf course implicated the government enough to bring the tournament within Title II's reach.[190] While the private organization conceded that the city's golf course was a place of public accommodation, it argued that it was merely a third-party customer using the course and that Title II should not reach into such lessee relationships.[191] The court determined that "[s]tate action may take the form of allowing private organizations to use public facilities" and that, while the city was not actively subsidizing the club's use of its golf course, the mere leasing of the course constituted enough governmental action to qualify as state involvement sufficient to implicate Title II.[192] Factors such as the clear association with the city government, the annual use of public resources by the private organization, and the coining of the tournament as the "City Amateur Championship" helped lead the court to its determination.[193]

Additionally, analogous cases involving the NCAA have occurred in a similar public accommodations context: Title III of the Americans with Disabilities Act of 1990 ("ADA"). Since Title II of the Civil Rights Act of 1964 and Title III of the ADA have

184. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (forcing a motel to open up to black patrons).
185. *See supra* note 127 and accompanying text.
186. 294 F. Supp. 698 (S.D. Ga. 1969).
187. *Id.* at 699.
188. *Id.*
189. *See id.* at 702–03.
190. *Id.* at 700.
191. *Id.* at 701–02.
192. *Id.* at 702.
193. *Id.* at 702–03.

comparable public accommodations provisions, decisions rendered under either statute can provide instructive analysis for the other.[194] In those cases, courts recognized the difference between analyzing "organizations as *organizations*" in the public accommodations context and organizations "as the operators of facilities that might, in turn be considered places of public accommodation."[195] In those cases, courts analyzed whether the NCAA had close enough connections with particular facilities to be deemed, as an organization, a place of public accommodation.[196] For example, in *Ganden v. NCAA*,[197] the court, in considering a motion for preliminary injunction, found that the plaintiff had a "reasonable likelihood of demonstrating" that the NCAA qualified as a place of public accommodation because it exerted a certain amount of control over and was closely connected to the athletic facilities of its member institutions.[198] That analysis relied on whether the organization was affiliated with a particular facility and whether one needed to be a member of or affiliated with the organization in order to use that facility.[199] The court found that it was reasonably likely that the NCAA operated a university's facilities and was sufficiently closely connected to qualify as a place of public accommodation.[200]

Much like the golf organization in *Wesley*, USA Ultimate does not own the athletic venues, arenas, and fields where its tournaments take place. This attenuated connection to the ultimate tournament facilities contrasts USA Ultimate against the NCAA, which has member institutions and bears a much closer relationship to the physical locations that act as places of public accommodation. And moving further away from the *Wesley* golf club example, USA Ultimate does not even directly lease out space for most of the postseason tournaments potentially at issue in this particular conflict. Instead, individual teams or groups apply to host, and these parties find the particular tournament sites. USA Ultimate merely facilitates the tournaments. *Wesley*'s application is therefore suspect, and the

194. *See* Tatum v. NCAA, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998). Borrowing from the ADA for this analysis is limited to assessing whether leasing a certain space would qualify an organization as a place of public accommodation. The comparison does not extend to evaluating whether discrimination has occurred in a place of public accommodation.

195. *See, e.g.*, *id.*

196. *See, e.g.*, *id.* at 1119, 1121.

197. No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. 1996).

198. *Id.* at *29–30.

199. *Id.* at *33–34.

200. *Id.* at *34; *see also Tatum*, 992 F. Supp. at 1121 (finding that the NCAA "operates a place of public accommodation" in part because of "[t]he significant degree of control that [it] exerts over the athletic facilities of its member institutions").

NCAA cases do not provide strong purchase. The *Wesley* court, however, clearly determined that third parties who lease and operate places of public accommodation may not discriminate in a manner that violates Title II. Arguably, those who run USA Ultimate postseason tournaments are doing so either under the auspices of USA Ultimate or are USA Ultimate's agents in facilitating the postseason. Although there is a layer of separation that was not present in *Wesley*, courts should be able to find that USA Ultimate is implicated enough in the public accommodation spaces to bring them in as a party to a lawsuit. Due to the nebulous nature of the law on this point, along with USA Ultimate's fluid and sporadic relationship with the various tournament locations from year to year, both sides could have ample room to argue their cases.

c. Intent

The final and certainly most fatal issue is one of intent. In order for Title II of the Civil Rights Act of 1964 to apply, a defendant must have intentionally discriminated against a party in a protected class.[201] Actions that incidentally affect a particular religious group generally do not fall within the scope of Title II.[202] If an establishment or organization "has set up facially neutral regulations governing the provision of its services, with no indication of discriminatory motive or intent," then there is no claim under Title II.[203] Furthermore, if the organization establishes "a legitimate, non-discriminatory justification" for its policy, then it has asserted enough to stave off a Title II claim.[204]

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201. Generally, Title II claims must "allege intentional discrimination." Jalal v. Lucille Roberts Health Clubs Inc., 254 F. Supp. 3d 602, 607 (S.D.N.Y.) (quoting James v. Am. Airlines, Inc., 247 F. Supp. 3d 297, 305 (E.D.N.Y. 2017)), *vacated as moot*, No. 17-1936, 2017 U.S. App. LEXIS 18798 (2d Cir. 2017). Additionally, Title II claims must "plead 'facts which demonstrate discriminatory intent' . . . ." *Id.* (quoting Coward v. Town & Vill. of Harrison, 665 F. Supp. 2d 281, 307 (S.D.N.Y. 2009)). Furthermore, Title II does not necessarily target private actions that have unintended discriminatory effects. *See id.* "[I]ntent to discriminate [as] the animating element of a Title II claim" is necessary "given the fact that religious beliefs are subjective and personal, [and] practically any rule created by a public accommodation could adversely affect an individual or one group of people." *Id.* at 608; *see also* Akiyama v. U.S. Judo Inc., 181 F. Supp. 2d 1179, 1184–85 (W.D. Wash. 2002) (determining that, for "allegations of religious discrimination, intent must be an element of the claim," and commenting that "[v]irtually any restriction or regulation imposed by a public accommodation could impinge on a person's religious beliefs . . . whether it be by conducting business only on Sundays, by failing to keep a Kosher kitchen, [or] by failing to include fish on the menu during Lent").

202. *See Akiyama*, 181 F. Supp. 2d at 1184–85.

203. *Id.* at 1187.

204. *Id.*

Boyle v. Jerome Country Club,[205] for instance, dealt with a fact pattern similar to the one present in the USA Ultimate conflict. The defendant country club hosted golf tournaments that took place exclusively on weekends.[206] The plaintiff, a Mormon, was unable to play in the tournaments due to his religious abstention of playing on Sundays.[207] After the defendant refused to make scheduling accommodations, the plaintiff sued under Title II, claiming that the tournament format and the defendant's refusal to change it constituted religious discrimination.[208] The plaintiff also asserted that the defendant had a duty to accommodate his religious beliefs.[209]

The court preliminarily observed that the plaintiff's religious beliefs were sincere,[210] the defendant had never refused to permit the plaintiff entry to the course or tournament,[211] the golf course was in fact a public accommodation,[212] other Mormon members had played in the tournament,[213] and no Mormon had requested a change in the schedule in the past.[214] Additionally, the court paid particular attention to the defendant's stated reasons for refusing to change the tournament schedule. These included a desire to avoid negatively affecting other players; "open[ing] the door to allow every participant in the tournament to make special requests"; and various staffing, logistical, and economic issues that would accompany such an accommodation.[215]

Because the parties to the case agreed that the golf course was a public accommodation, the court proceeded to analyze "legal issues on which precious little precedent exists," including who bears the burden of proof and the level of scienter required in Title II cases.[216] Following authority from the Seventh Circuit, the court used a burden-shifting analysis.[217] Under that test, a "[p]laintiff has the initial burden of establishing a prima facie case of improper discrimination," which can be met with minimal proof.[218] If a plaintiff establishes a

205. 883 F. Supp. 1422 (D. Idaho 1995).
206. *Id.* at 1424.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 1425.
211. *Id.*
212. *Id.* at 1429.
213. *Id.* at 1429–30.
214. *Id.* at 1430.
215. *Id.*
216. *Id.* at 1429.
217. *Id.*
218. *Id.* (citing Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)).

prima facie case, then the court presumes unlawful discrimination.[219] "The burden then shifts to the defendant 'who must offer evidence that the adverse action was taken for other than impermissibly discriminatory reasons.'"[220] If a defendant gives proof of "legitimate reasons" for its action, then "the presumptions created by the prima facie case" in favor of a plaintiff "disappear."[221] Finally, the burden shifts back to a plaintiff, who must show that the defendant's proffered reasons are mere "pretext for another motive which is discriminatory."[222]

In this case, the court found that the plaintiff established a prima facie case because he provided sufficient evidence that the tournament's Sunday games prevented him from fully and equally enjoying the public accommodation's benefits.[223] The burden then shifted to the defendant, which provided evidence that Mormons had played in the tournament in the past and that allowing this accommodation to the schedule would create logistical and financial burdens on the defendant.[224] The court determined that the defendant "presented substantial evidence that it has legitimate business reasons, completely unrelated to religious considerations, for scheduling its final round of play on Sunday."[225] Finally, the plaintiff had an opportunity to show that the defendant's reasons were pretextual.[226] While the plaintiff attempted to show that altering the schedule would not create a great burden for the defendant or undue benefit for the plaintiff, he failed to do what the court asked: to show that the defendant's given reason for not changing its schedule was pretextual.[227] The plaintiff thus failed to carry his burden, and the court granted the defendant's motion for summary judgment.[228]

Ultimately the defendant's clear and substantial evidence of its business reasons for refusing to accommodate the plaintiff—which were unrelated to religious considerations—and a lack of evidence that the club showed any animus towards the plaintiff on religious grounds convinced the court to grant the defendant summary judgment on the Title II claim.[229] Essentially, the court held that, if a

219. *Id.*
220. *Id.* (quoting *Wallis*, 26 F.3d at 889).
221. *Id.* (quoting *Wallis*, 26 F.3d at 892).
222. *Id.* (quoting *Wallis*, 26 F.3d at 889).
223. *Id.*
224. *Id.* at 1429–30.
225. *Id.* at 1430.
226. *Id.*
227. *Id.* at 1430–31.
228. *Id.* at 1431–33.
229. *Id.* at 1430–33.

defendant has clear and legitimate business or operational reasons for refusing to accommodate, and there is no clear pretextual religious discrimination, then the defendant is not obligated to accommodate religious preferences for incidentally discriminatory effects of the organization's policy.[230]

Here, USA Ultimate clearly did not establish the weekend tournament format to intentionally discriminate against BYU CHI for its adherence to a Sunday-play prohibition. Instead, the weekend tournament format developed over many years by necessity. Ultimate is a sport that is still largely played on the amateur level, and weekends are the most efficient time to schedule the necessary number of games for a full tournament and to have enough games for college rankings. Unlike many NCAA athletes, those who play ultimate often are unable to make multiple trips to play games or to miss classes. The weekend tournament is the best way to meet the various needs of most student-athletes, and changing the schedule to abandon Sunday play would create great inconveniences for the vast majority of players. Additionally, making concessions here means that USA Ultimate could lead to having to make similar concessions for schools that have prohibitions on playing on other days. Although Title II covers places of public accommodation, it does not require a sports organization to accommodate members of protected classes by changing schedules if its refusal is not intentionally discriminatory and it has legitimate business, logistical, or other reasons to refuse.

Since BYU CHI does not have options for recourse under the Constitution and federal statutory law, it will need to succeed in showing that USA Ultimate has unlawfully discriminated against BYU CHI under state anti-discrimination laws by refusing to accommodate the team's scheduling needs.

3. State Options

Beyond the realm of federal law, individual states have implemented their own anti-discrimination legislation, and prohibitions on religious discrimination in places of public accommodation are universally present.[231] While federal law sets a de

230. *Id.* at 1432.

231. *See, e.g.*, Michelle L. Carusone, Comment, Dale v. Boy Scouts of America and Monmouth Council*: New Jersey's Attempt to Define Places of Public Accommodation and Remedy the "Cancer of Discrimination*,*"* 49 CATH. U. L. REV. 823, 827 n.22 (2000) (listing the state anti-discrimination statutes and noting that they all prohibit religious discrimination). For this section's state statutory analysis, this Comment will assume that ultimate tournaments qualify as places of public accommodation because the statutes broadly define the term "public accommodation." *See, e.g.*, MONT. CODE ANN. § 49-2-101(20)(a) (Westlaw through chapters effective, Apr. 3, 2019 sess.) (defining "public

facto minimum standard of anti-discrimination for this type of legislation,[232] states can opt to provide further protections and establish more rigid policies against discrimination.[233] As such, state laws may provide a party that allegedly has suffered from discrimination further opportunity to seek redress.

Although BYU CHI hopes to resolve this conflict in a manner that allows them to attend the National Championship Tournament, which could be located in any given state in any given season, a state law claim likely would need to be brought where the initial harm occurred. In this case, because the team would effectively be penalized for forfeiting its Sunday games in the first round of the postseason, the harm would have to occur at the conference championships, which BYU CHI would play in Montana, Washington, Utah, or Idaho. As such, this section will review state anti-discrimination laws in these states.[234]

As a preliminary matter, of the states discussed below, Montana, Washington, and Idaho have statutorily established administrative commissions that adjudicate complaints alleging discrimination.[235] In some cases, the complaints must first be brought to the applicable administrative agency before the parties can resort to the state's judiciary.[236] In those states, courts do not have jurisdiction over these cases until all remedies are exhausted at the administrative level.[237]

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accommodation" as "a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons" and providing an explicitly noncomprehensive list of examples of places of public accommodation).

232. This is a de facto minimum standard because federal law is plenary. *See* Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

233. States can generally provide laws that are more protective than federal laws. *See, e.g.*, Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1423–24 (9th Cir. 1990) (upholding a California maritime overtime pay law more generous than applicable federal statutes).

234. Alberta, also a geopolitical unit that is included in the Big Sky Conference, will be ignored for the purposes of this analysis because it is a Canadian province that likely will not serve as a viable venue for BYU CHI.

235. *See* IDAHO CODE § 67-5903 (LEXIS through Chapter 197 of 2019 Reg. Sess.) (establishing the Idaho commission on human rights); MONT. CODE ANN. § 2-15-1706 (Westlaw through chapters effective, Apr. 3, 2019 sess.) (creating the state's commission for human rights); WASH. REV. CODE ANN. § 49.60.050 (Westlaw through Chapter 9 of 2019 Reg. Sess.) (creating the Washington state human rights commission). Plaintiffs in Utah, on the other hand, can resort to the state's court system straightaway. *See* UTAH CODE ANN. § 13-7-4(3) (LEXIS through 2018 3d Spec. Sess.) (establishing that anyone who is discriminated against "shall have a civil action for damages and any other remedy available in law or equity against any person who" discriminates against him).

236. *E.g.*, MONT. CODE ANN. § 49-2-512 (Westlaw through chapters effective, Apr. 3, 2019 sess.).

237. *See, e.g.*, Jones v. Mont. Univ. Sys., 2007 MT 82, ¶ 39, 337 Mont. 1, 155 P.3d 1247 (ruling that the plaintiff's failure to exhaust administrative remedies by failing to file a

Some states, though, allow for one to choose whether to pursue the administrative route or the judicial route.[238]

a. Montana

Under the Montana Human Rights Act (the "MHRA"),

> it is . . . unlawful . . . for the owner, lessee, manager, agent, or employee of a public accommodation:
>
> (a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of . . . creed [or] religion . . . ;
>
> (b) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain . . . creed [or] religion . . . .[239]

The MHRA provides a reasonableness exception, however, that allows such proprietors to distinguish persons "on reasonable grounds."[240]

Before plaintiffs[241] can resort to the court system, they must first bring their complaint to the Montana Human Rights Commission ("Montana Commission").[242] This administrative body has the power to enjoin a party from future discriminatory practices, and it has the discretion to award reasonable monetary damages.[243] After the

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complaint with the Montana Human Rights Commission precluded the plaintiff from bringing a viable claim in the trial court).

238. *See, e.g.*, WASH. REV. CODE ANN. § 49.60.020 (Westlaw through Chapter 9 of 2019 Reg. Sess.).

239. MONT. CODE ANN. § 49-2-304(1) (Westlaw through chapters effective, Apr. 3, 2019 sess.).

240. *Id.* No cases have construed "reasonable grounds" in the context of public accommodations discrimination.

241. Under the MHRA, a plaintiff must distinguish herself as an "aggrieved party," or "someone 'who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been or is likely to be specially and injuriously affected' by a violation of the Act." Baxter Homeowners Ass'n v. Angel, 2013 MT 83, ¶ 16, 369 Mont. 398, 298 P.3d 1145 (quoting MONT. CODE ANN. § 49-2-101(2) (Westlaw through chapters effective, Apr. 3, 2019 sess.)).

242. MONT. CODE ANN. § 49-2-205 (Westlaw through chapters effective, Apr. 3, 2019 sess.); *id.* § 49-2-501.

243. *Id.* § 49-2-506(1); *see also* Vainio v. Brookshire, 852 P.2d 596, 601 (Mont. 1993) (determining that the Montana Commission may award reasonable damages).

Montana Commission has issued a decision, the losing party may commence a civil action in trial court.[244]

Additionally, the Montana Commission has the power to "adopt procedural and substantive rules necessary to implement the commission's responsibilities" under the MHRA.[245] Using this authority, the Montana Commission has adopted several substantive rules to guide its adjudication of claims of discrimination. For instance, the Montana Commission has established that it will construe the MHRA "liberally . . . with a view to effect [its] objects and to promote justice."[246] The same rule, however, allows the Montana Commission to decline finding discrimination where "strict adherence" to its rule of construing the statute liberally "would cause undue hardship or create a substantial injustice to a party."[247]

Furthermore, the Montana Commission has adopted rules specific to discrimination in places of public accommodation. For instance, it has established that public accommodation discrimination may include "imposing or applying qualification standards . . . that screen out or tend to screen out a person or persons who are members of a protected class unless the . . . selection criteria can be shown to be necessary" for the place of public accommodation.[248] The Montana Commission has also created rules allowing plaintiffs to prove discrimination under either of two tests: (1) the disparate treatment test[249] or (2) the disparate impact test.[250]

Under the disparate treatment test, a plaintiff must first establish a prima facie case with evidence supporting an inference that the

244. MONT. CODE ANN. § 49-2-512(3) (Westlaw through chapters effective, Apr. 3, 2019 sess.); *see also* Griffith v. Butte Sch. Dist. No. 1, 2010 MT 245, ¶¶ 36–39, 358 Mont. 193, 244 P.3d 321 (holding that a party may take a discrimination case to district court for a trial on the merits once the Montana Commission has reached a decision).

245. MONT. CODE ANN. § 49-2-204(1) (Westlaw through chapters effective, Apr. 3, 2019 sess.).

246. MONT. ADMIN. R. 24.9.104(2) (Westlaw through Issue 5 of 2019 Mont. Admin. Register). The rule further states that "[a] principle objective of the [MHRA] is to assure that there will be no discrimination in certain areas of the lives of Montana citizens, except under the most limited of circumstances." *Id.* Indeed, this administrative rule tracks with the MHRA itself, which establishes a broad policy against discrimination in places of public accommodation. MONT. CODE ANN. § 49-1-102(1) (Westlaw through chapters effective, Apr. 3, 2019 sess.) (establishing a "right to be free from discrimination because of . . . religion," which includes "the right to the full enjoyment of any" places of public accommodation); *see also* Edwards v. Cascade Cty. Sheriff's Dep't, 2009 MT 451, ¶ 62, 354 Mont. 307, 223 P.3d 893 (asserting that the MHRA establishes a state "non-discrimination policy").

247. MONT. ADMIN. R. 24.9.104(6) (Westlaw through Issue 5 of 2019 Mont. Admin. Register).

248. *Id.* R. 24.9.609(2)(a).

249. *Id.* R. 24.9.610.

250. *Id.* R. 24.9.612.

allegedly discriminating party considered a plaintiff's membership in a protected class when engaging in its allegedly discriminatory act.[251] In order to establish a prima facie case, a plaintiff generally must show that: (1) it is a member of a protected class, (2) it sought an opportunity that the defendant made available, and (3) it was denied the opportunity under "circumstances raising a reasonable inference that [a plaintiff] was treated differently because of membership in a protected class."[252] If a plaintiff successfully establishes a prima facie case of unlawful discrimination, then the burden of proof shifts to the defendant who "must produce evidence of a legitimate, nondiscriminatory reason for the challenged action."[253] If a defendant produces such evidence, then a plaintiff "must demonstrate that the reason offered by the [defendant] is a pretext for unlawful discrimination," for instance, by showing that the defendant's "acts were more likely based on an unlawful motive" or that the defendant's explanation is not believable.[254]

Under the disparate treatment test, BYU CHI may be able to establish a prima facie case of unlawful discrimination. The team can easily show that it is a member of a protected class and that it sought an opportunity that USA Ultimate made available to it. While the third prong might present some interpretive difficulties,[255] the Montana Commission's policy of construing the statutory language and rules broadly could help BYU CHI establish a prima facie case. At that point, USA Ultimate has the opportunity to rebut by offering a legitimate, nondiscriminatory reason for refusing to change its tournament schedule. The argument is straightforward: the

251. *Id.* R. 24.9.610(2).

252. *Id.* R. 24.9.610(2)(a).

253. *Id.* R. 24.9.610(3).

254. *Id.* R. 24.9.610(4). Furthermore, if the plaintiff "establishe[s] a prima facie case with direct evidence of unlawful discrimination," then the defendant "must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief." *Id.* R. 24.9.610(5).

255. To some extent, that third prong appears to be satisfied—BYU CHI does not have the opportunity to advance in the postseason like most other teams because the tournament format requires competition on the team's religious day of rest. Such a wide construction of that rule, however, may misconstrue the rule's intent. After all, the requirement that the plaintiff must raise a reasonable inference of discrimination because of disparate treatment based on membership in a protected class strongly implies that the defendant's reason for distinguishing must be focused on the plaintiff's membership in the protected class. Here, USA Ultimate does not appear to be distinguishing because BYU CHI is a team of Mormons. Instead, USA Ultimate is distinguishing because BYU CHI does not play on Sundays when postseason tournaments' qualifying games occur. That BYU CHI does not play on Sundays because it adheres to rules stemming from its membership in a protected class may or may not be a close enough link to USA Ultimate's reason for distinguishing to satisfy the third prong of the prima facie test.

tournaments have always operated this way in order to accommodate college-athletes' schedules and to fit in the appropriate number of games. BYU CHI would then have to show that USA Ultimate's reason is simply pretext for unlawful discrimination, which is an implausible argument given that the sport's long tradition of weekend tournaments was ingrained well before BYU CHI became a nationally relevant team.

The Montana Commission has also adopted the disparate impact test, which allows a plaintiff to prove discrimination by showing that a defendant's actions adversely affected that plaintiff's protected class.[256] As with the disparate treatment test, the disparate impact test requires the plaintiff to establish a prima facie case of unlawful discrimination.[257] To establish a prima facie case under this test, the plaintiff must prove "that one or more identified practices or policies of [a defendant] have a significant or substantial adverse effect on the charging party's protected class."[258] Under this test, the plaintiff does not need to provide evidence of the defendant's intent to discriminate.[259] If the plaintiff successfully establishes a prima facie case of unlawful discrimination, then the burden of proof shifts to the defendant, who "must produce evidence of a legitimate business justification for the challenged practices or policies."[260] If the defendant shows such a legitimate business justification for the allegedly discriminatory practices or policies, then the plaintiff "must prove that the articulated justification . . . is a pretext for unlawful discrimination."[261] The plaintiff can prove this pretext "directly with evidence that an unlawful motive more likely motivated the respondent, or indirectly" by showing that the defendant's justification is not believable or that "there are other practices or policies available which are equally effective in serving the legitimate business interests of the [defendant] which do not have similar discriminatory effects upon members of a protected class."[262]

256. *Id.* R. 24.9.612(1).
257. *Id.*
258. *Id.*
259. *Id.* R. 24.9.612(2).
260. *Id.* R. 24.9.612(3).
261. *Id.* R. 24.9.612(4).
262. *Id.* The Montana Commission has also passed a rule addressing "mixed motive" cases, in which the plaintiff proves unlawful discrimination and the defendant proves that it would have taken the same action "in the absence of the [allegedly] unlawful discrimination." *Id.* R. 24.9.611(1). In such a case, the Montana Commission has limited its authority to simply ordering the defendant "to refrain from the discriminatory conduct and [possibly] impose other conditions to minimize future violations." *Id.* The Montana Commission will not reward money damages in such a case. *Id.* Because the plaintiff still must prove discrimination in this scenario, this Comment will focus its analysis on the

Additionally, BYU CHI likely would not obtain a favorable result under the disparate impact test. The team would easily establish a prima facie case by showing that USA Ultimate's postseason tournament format and rules substantially and adversely affect the team's ability to take full advantage of a place of public accommodation. BYU CHI would not have to show any intent from USA Ultimate to establish its prima facie case. It simply needs to show that it is adversely affected. As with the disparate treatment test, the burden would then shift to USA Ultimate, which ultimately should prove fatal for BYU CHI. USA Ultimate would need to show a legitimate business justification for its policy of having tournaments on weekends. As in the disparate treatment test, USA Ultimate should be able to establish a legitimate business interest by showing that it aims to increase tournament attendance and participation in the sport by holding tournaments on weekends when most students are able to attend. Again, BYU CHI would then have to show that USA Ultimate's justification is unbelievable pretext, which it will not be able to do.

To date, no litigation has dealt with discriminatory practices on religious grounds under the MHRA. A few other claims have been brought under the statute, though, and they lay some helpful groundwork. For instance, a party alleging discrimination may succeed by providing even just one example of discrimination under the MHRA.[263] Overall, however, the MHRA has been the subject of little litigation as compared to Title II of the Civil Rights Act of 1964. Thus, the dearth of case law on this issue necessitates further analysis of the MHRA and the Montana Commission's rules.

The statute establishes that denying a protected party access to the advantages or privileges of a place of public accommodation because of that party's religion is unlawful discrimination.[264] Furthermore, the statute allows an exception for where the allegedly discriminatory party has distinguished the member or members of the protected class "on reasonable grounds."[265] Even without the reasonable grounds exception, BYU CHI's claim would appear to be on shaky ground. After all, USA Ultimate has not disallowed the team to participate in the postseason because of its religious

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disparate treatment and disparate impact tests, which both address proving discrimination in the first place.

263. Blackfeet Opportunities, Inc. v. Cattin's Rest., No. BDV-98-767, 1999 Mont. Dist. LEXIS 216, at *5 (D. Mont. Mar. 22, 1999).

264. MONT. CODE ANN. § 49-2-304(1) (Westlaw through chapters effective, Apr. 3, 2019 sess.).

265. *Id.*

convictions. In fact, USA Ultimate allows BYU CHI to participate in conferences, and the team has done so in the past few years.[266]

Thus, BYU CHI would need to convince a fact finder that USA Ultimate commits unlawful discrimination not by blocking the team from playing in the postseason but by refusing to change a tournament format that prevents BYU CHI from taking full advantage of the public accommodation. That argument, while plausible, stretches the statute's intent because USA Ultimate is not preventing BYU CHI from accessing the public accommodation's physical space. Also, a fact finder may not decide that this scheduling issue sufficiently denies the team access to the advantages of the tournament. Finally, the reasonable grounds exception appears to allow USA Ultimate the opportunity to show that its allegedly discriminatory acts result from the schedule that it has used for tournaments for decades and that this schedule works well with student-athletes' academic schedules. While the lack of relevant case law leaves that interpretation open, USA Ultimate appears to be able to establish the statutorily requisite reasonable grounds for its refusal to accommodate.

Since BYU CHI must first bring their claim before the Montana Commission, it is important to analyze their claim under the commission's rules in addition to carrying out a pure statutory analysis. First, the commission's policy of construing the MHRA liberally tends to benefit BYU CHI. The commission, however, has also established a rule similar to the statutory reasonable grounds rule by determining that it will avoid causing undue hardship to a party, which favors USA Ultimate. Thus, while the Montana Commission's general policy to read the statutory language and rules broadly to prevent discrimination favors BYU CHI, the administrative rules ensure that justice remains the central point of concern.

Additionally, the Montana Commission has adopted a rule stating that there can be a finding of discrimination when a place of public accommodation imposes qualification standards that tend to screen out members of a protected class unless such standards are "necessary" for the defendant.[267] In this case, USA Ultimate's tournament format tends to screen out BYU CHI from qualifying for subsequent rounds of the college postseason. This rule, however, is geared more toward the place of public accommodation's initial qualification standards. In other words, USA Ultimate's postseason

266. *See supra* notes 77–90 and accompanying text.

267. MONT. ADMIN. R. 24.9.609(2)(a) (Westlaw through Issue 5 of 2019 Mont. Admin. Register).

features a sequential progression of events that most conventional places of public accommodation would not. For instance, a conventional membership gym is a place of public accommodation that does not require its guests to advance past increasingly competitive levels in order to access the gym's facilities. For example, if the membership gym imposed a qualification standard stating that people who wear a hijab are not allowed to become a member of the gym, there likely would be an unlawful discrimination because the gym would have a qualification standard that tends to screen out Muslim women. USA Ultimate's weekend schedule, even if BYU CHI could portray it as a qualification standard, would fall outside this rule's ambit.

For the reasons given above, BYU CHI does not appear positioned to succeed under Montana's anti-discrimination statute or administrative rules. As such, BYU CHI's options under Montana law run aground.

b. Washington

The Washington Law Against Discrimination ("WLAD") protects an individual's right to be free from discrimination because of religion, which includes "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement."[268] Procedurally, anyone injured by a discriminatory act has the right to civil action in a state court.[269] That person can instead choose to bring the action to the State's Human Rights Commission, which has the power to adjudicate discrimination cases.[270]

The WLAD broadly defines "full enjoyment," which expands beyond simply allowing a member of a protected class to be admitted to a public accommodation to include a right to be treated as "welcome, accepted, desired, or solicited."[271] In the public accommodations context, the WLAD also prohibits "any person or the person's agent or employee [from committing] an act which directly or indirectly results in any distinction, restriction, or discrimination" based on a person's membership in a protected class.[272] The Washington Supreme Court has determined that

268. WASH. REV. CODE ANN. § 49.60.030(1) (Westlaw through Chapter 9 of 2019 Reg. Sess.).

269. *Id.* § 49.60.030(2).

270. *Id.* § 49.60.230(1)(a). One may appeal from the administrative level to the trial court level. *Id.* § 49.60.270.

271. *Id.* § 49.60.040(14).

272. *Id.* § 49.60.215.

discriminating against someone in the public accommodations context based on the person's membership in a protected class is "an affront to personal dignity," and that a central purpose of the WLAD is to protect people from such an affront.[273] "This broad standard focuses the liability inquiry on whether *actions* resulted in discrimination, not whether the proprietor of a place of public accommodation intended to discriminate."[274]

Washington courts have looked to comparability of treatment in public accommodation discrimination cases.[275] The state's anti-discrimination law aims primarily to address situations where defendants refuse or withhold access to places of public accommodation and their facilities.[276] Courts aim to avoid overburdening businesses by providing them some latitude "in achieving the goal of comparable treatment."[277]

Washington has adopted a burden-shifting approach for determining whether discrimination has occurred in a place of public accommodation.[278] First, a plaintiff must establish a prima facie case of unlawful discrimination.[279] To do so, a plaintiff must prove that

> (1) the plaintiff is a member of a protected class, (2) the defendant's establishment is a place of public accommodation, (3) the defendant discriminated against the plaintiff when it did not treat the plaintiff in a manner comparable to the treatment it provides to persons outside that class, and (4) the plaintiff's protected status was a substantial factor that caused the discrimination.[280]

If the plaintiff successfully establishes a prima facie case, then the burden shifts to the defendant to give a "legitimate nondiscriminatory explanation for its action."[281] If the defendant succeeds, then the burden returns to the plaintiff, who must show that the defendant's proffered explanation "is merely pretext for unlawful discrimination."[282]

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273. Floeting v. Grp. Health Coop., 434 P.3d 39, 42 (Wash. 2019).

274. *Id.* at 41; *see also* Lewis v. Doll, 765 P.2d 1341, 1345 (Wash. Ct. App. 1989) (holding that lack of discriminatory intent was irrelevant).

275. Fell v. Spokane Transit Auth., 911 P.2d 1319, 1328 (Wash. 1996).

276. *Id.*

277. *See id.*

278. *See id.* at 1327; Demelash v. Ross Stores, Inc., 20 P.3d 447, 456 (Wash. Ct. App. 2001).

279. *Floeting*, 434 P.3d at 41; *Fell*, 911 P.2d at 1328; *Demelash*, 20 P.3d at 456.

280. *Floeting*, 434 P.3d at 41.

281. *Demelash*, 20 P.3d at 456.

282. *Id.*

In *Spry v. Peninsula School District*,[283] applying the state's burden-shifting approach, parents sued a school district and included claims under the WLAD that the school district discriminated against the plaintiff's children by treating them differently and less favorably than other children because they were racial and religious minorities.[284] The parents claimed that requests for certain accommodations were "not addressed as timely as another person's request" and that "the school discriminated in its discipline of [the] children."[285] The trial court granted summary judgment in favor of the school district; however, the Washington Court of Appeals found that the plaintiffs "failed to provide evidence of comparators" and so also "failed to establish a causal connection between their status as a protected class and any disparate treatment they may have received."[286] Thus, the plaintiffs failed to establish a prima facie case of unlawful discrimination and thereby failed to state a claim under the WLAD.[287]

Additionally, while Washington law affirmatively requires parties to accommodate certain other parties to avoid unlawful discrimination,[288] such a requirement to accommodate has only been applied to the employment realm[289] and to disability discrimination in places of public accommodation.[290] Furthermore, the Washington Supreme Court has "decline[d] to import doctrines developed for the employment context into the public accommodations context."[291] Thus, while some Washington courts have read into the WLAD a duty to accommodate in certain limited circumstances, those will not necessarily apply to the conflict between BYU CHI and USA Ultimate. For instance, the Washington Supreme Court recently held

283. No. 46782-8-II, 2016 Wash. App. LEXIS 704 (Wash. Ct. App. Apr. 5, 2016).

284. *Id.* at *1–4.

285. *Id.* at *5.

286. *Id.* at *19–20.

287. *Id.* at *20; *see also Demelash*, 20 P.3d at 457 (observing that the plaintiff "failed to produce competent evidence that [the defendant's] conduct towards him differed from its treatment" of people not within the defendant's protected class or that "race/national origin constituted a substantial factor in motivating [the defendant's] behavior," but reversing the lower court's summary judgment ruling in favor of the defendant because the plaintiff sought discovery that "might have evidenced disparate treatment sufficient to permit [the plaintiff] to establish his prima facie case").

288. *See, e.g.*, WASH. ADMIN. CODE § 162-32-020(2) (Westlaw through the 18-24 Wash. State Register) (requiring employers to provide reasonable accommodation for certain disabilities).

289. *See, e.g.*, Kumar v. Gate Gourmet, Inc., 325 P.3d 193, 203 (Wash. 2014) (en banc).

290. *See, e.g.*, Wash. State Commc'n Access Project v. Regal Cinemas, Inc., 293 P.3d 413, 421–22 (Wash. Ct. App. 2013) (discussing reasonable accommodations for disabilities in the public accommodations context).

291. Floeting v. Grp. Health Coop., 434 P.3d 39, 40 (Wash. 2019).

that an employer had an affirmative duty to reasonably accommodate employees' religious practices.[292] That rule, however, does not graft onto cases of alleged religious discrimination in the public accommodations context though.[293]

As with Montana law, the WLAD may provide some initial hope for BYU CHI but will ultimately provide no grounds for relief against USA Ultimate. Similar to Montana law, the WLAD initially benefits BYU CHI's potential claim by expansively defining the full enjoyment of public accommodations to include the right to access and feel accepted at a place of public accommodation. Furthermore, Washington courts have construed the WLAD as establishing a statewide policy that discrimination is an affront to personal dignity, a declaration that also favors BYU CHI. Courts have acknowledged, however, that they must balance considerations of enforcing accommodations for members of protected classes with the reality that accommodations must be reasonable in order to avoid smothering businesses. That consideration benefits USA Ultimate.

In the end, though, Washington's burden-shifting test pushes the analysis in USA Ultimate's favor. Under this test, BYU CHI should be able to establish a prima facie case because it qualifies as a member of a protected class; the tournament is a place of public accommodation; the team can assert that USA Ultimate treated other people and teams outside of BYU CHI's protected class differently than BYU CHI; and the team's membership in a protected class was a substantial factor in USA Ultimate's allegedly discriminatory acts.[294] BYU CHI should be able to avoid the evidentiary pitfall that the *Spry* plaintiffs encountered because they can more easily point to comparative treatment.

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292. *Kumar*, 325 P.3d at 200. Additionally, various theories—including disparate treatment and disparate impact—can be used to prove discrimination in the employment context. *See* Goodman v. Boeing Co., 877 P.2d 703, 712 n.7 (Wash. Ct. App. 1994). Since those theories may not necessarily apply in the nondisabilities public accommodations context, this Comment's analysis will be contained to the test provided above.

293. *Floeting*, 434 P.3d at 40–41.

294. Ultimately, the third and fourth prongs may not be so straightforward. A court would require BYU CHI to show that USA Ultimate treated it differently than other teams that do not fall within BYU CHI's protected class, and that USA Ultimate has not accommodated BYU CHI because of its membership in that protected class. USA Ultimate, however, arguably is not treating the team differently because of its membership in a protected class. Instead, it is treating the team the same as every other team by requiring it to compete in the conventional tournament format. What BYU CHI is asking for is a special accommodation. It is not asking to be treated like teams outside of its protected class. During early stages of litigation when the court would view these assertions in a light most favorable to BYU CHI, however, the court may be willing to accept the team's argument. Due to the strike-suit concerns that loom over this type of conflict, that early-litigation benefit greatly strengthens BYU CHI's position.

The state's burden-shifting approach, however, decisively turns the tide in USA Ultimate's favor. If BYU CHI establishes its prima facie case, then USA Ultimate would need to give a legitimate nondiscriminatory explanation for its action. As stated earlier, USA Ultimate would need to assert that it has adopted and adhered to the weekend tournament format to accommodate student-athletes' academic schedules and to include the appropriate number of games in the tournament. They would undoubtedly meet their burden. BYU CHI would then need to prove that USA Ultimate's explanation is an unbelievable discriminatory pretext, which it will not be able to do. As a result, Washington law provides no remedy for BYU CHI.

c. Utah

The Utah Civil Rights Act[295] ("UCRA") broadly recognizes that "the practice of discrimination on the basis of . . . religion . . . endangers the health, safety, and general welfare of [Utah] and its inhabitants."[296] The legislation also establishes that discrimination on the basis of religion in places of public accommodation "violates the public policy of [Utah]."[297] That sweeping statutory language has been interpreted as an "explicit guarantee of equal treatment [that] reflects Utah's public policy" to treat all people fairly and equally and to prevent unlawful discrimination in places of public accommodation.[298] Furthermore, the UCRA charges courts with the responsibility to construe this legislation "liberally . . . with a view to promote the policy and purposes of [the UCRA] and to promote justice."[299] The Utah Supreme Court has determined that this language "amply demonstrates that the legislature intended [the UCRA] to be construed as broadly as possible to combat invidious discrimination in Utah."[300] The legislation contains some breathing room for places of public accommodation to craft uniform standards, however, by stating that "[n]othing in [the UCRA] shall be construed to deny any person

295. Although the pertinent statutory chapter is labeled "Civil Rights," Utah courts consistently refer to the statutes collectively as the "Utah Civil Rights Act." *See, e.g.*, Elks Lodges No. 719 (Ogden) v. Dep't of Alcoholic Beverage Control, 905 P.2d 1189, 1191 (Utah 1995); World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 257 (Utah 1994); Benyon v. St. George-Dixie Lodge # 1743, Benevolent & Protective Order of Elks, 854 P.2d 513, 514 (Utah 1993). This Comment will follow suit.

296. UTAH CODE ANN. § 13-7-1 (LEXIS through 2018 3d Spec. Sess.).

297. *Id.*; *see also id.* § 13-7-3 (stating that all people in Utah "are free and equal and are entitled to full and equal accommodations, advantages, facilities, privileges, goods and services in . . . all places of public accommodation . . . without discrimination on the basis of . . . religion").

298. MacArthur v. San Juan Cty., 416 F. Supp. 2d 1098, 1181 (D. Utah 2005).

299. § 13-7-1.

300. *Benyon*, 854 P.2d at 517.

the right to regulate the operation of a . . . place of public accommodation . . . in a manner which applies uniformly to all persons without regard to . . . religion."[301]

Additionally, the UCRA provides parties that are subject to unlawful discrimination a cause of action and ability to sue in court.[302] The relevant statute states that any place of public accommodation that unlawfully discriminates against a member of a protected class is a "public nuisance" and may be enjoined as provided in the statute.[303] Furthermore, the statute grants any person against whom unlawful discrimination occurs a civil cause of action "for damages and any other remedy available in law or equity against any person who [unlawfully discriminates against him]."[304] Finally, the statute protects defendants against frivolous lawsuits by allowing them to recover "all actual and necessary expenses incurred in" its defense.[305] The Utah Supreme Court has held that a defendant can recover attorney's fees and court costs, but only when the presiding court concludes "that [a] plaintiff's action, even if brought in good faith, was frivolous, unreasonable, or without foundation" or that a "plaintiff continued to litigate the claim after it had clearly become frivolous, unreasonable, or without foundation."[306]

Few litigants have relied on the UCRA. As a result, Utah courts have had few chances to interpret the UCRA and provide guidance for future cases involving allegedly unlawful discrimination. Among the cases in which the Utah Supreme Court has relied on the UCRA, the court determined the following: (1) a county ordinance forbidding massage parlors from offering opposite-sex massages did not violate the UCRA because the court determined that the UCRA "cannot be so read as to entitle a member of the public to a massage by a member of the opposite sex";[307] (2) a nonprofit fraternal organization with membership criteria was subject to the UCRA despite the fact

301. § 13-7-3.

302. *Id.* § 13-7-4(3). Because Utah has no administrative body that has the authority to investigate or adjudicate claims of discrimination, plaintiffs are free to go straight to the courts. *See id.*

303. *Id.* § 13-7-4.

304. *Id.* § 13-7-4(3).

305. *Id.* § 13-7-4(4).

306. World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 262 (Utah 1994) (establishing the attorney's fees and court costs rule). In *World Peace Movement*, the Utah Supreme Court determined that even though the defendant in the case successfully defended against an unlawful discrimination claim against it, the lower court should not have awarded the defendant attorney's fees and court costs because the plaintiff's claim was a meritorious question of first impression for the court and was not frivolous as a matter of law. *Id.* at 259–62.

307. Redwood Gym v. Salt Lake Cty. Comm'n, 624 P.2d 1138, 1145–46 (Utah 1981).

that it was a private club because its liquor license rendered it an enterprise regulated by the state and thus within the ambit of the UCRA;[308] (3) a membership organization subject to the UCRA violates that law when the organization denies membership to a person solely because of her gender;[309] (4) a publication could not deny "advertising services on the basis of the religion of the person seeking those services," but it "may discriminate on the basis of content even when content overlaps with a suspect classification like religion";[310] and (5) "passive discrimination" in the form of written policies that clearly discriminate but have not yet manifested in an overtly discriminatory act still qualify as unlawful discrimination.[311] The common thread that applies to the present dispute stems from the Utah Supreme Court's assertion that the UCRA should be construed liberally to promote the public policy of ending unlawful discrimination,[312] and that courts interpreting the UCRA should "err toward over-protection of the enlisted classes rather than toward under-protection."[313] Interestingly, Utah courts have not implemented a preferred mode of analysis for unlawful discrimination in the public accommodations context.[314]

Unfortunately for BYU CHI, Utah does not provide a home court advantage. As with Montana and Washington law, the UCRA does initially look promising. The legislation establishes a broad

308. Benyon v. St. George-Dixie Lodge # 1743, Benevolent & Protective Order of Elks, 854 P.2d 513, 514–15 (Utah 1993).

309. *Id.* at 518. The Utah Supreme Court reaffirmed that ruling just two years later in another case dealing with private fraternal organizations with liquor licenses. Elks Lodges No. 719 (Ogden) v. Dep't of Alcoholic Beverage Control, 905 P.2d 1189, 1206–07 (Utah 1995).

310. *World Peace*, 879 P.2d at 257–58. The court provided a helpful hypothetical to illustrate this distinction:

> [A] Jewish-owned and -operated newspaper which serves a primarily Jewish community might lawfully refuse advertisements propagating anti-Semitic "religious" sentiments. However, that same newspaper could not single out members of an anti-Semitic religious group and refuse to accept advertisements, regardless of content, from any member of that group *simply because they are a member of that group*. Such discrimination, which is directed at the individual seeking to place the advertisement rather than at the content of the advertisement, is prohibited by the [UCRA].

Id. at 258.

311. *Elks Lodges*, 905 P.2d at 1205–06.

312. *See id.* at 1204; *World Peace*, 879 P.2d at 262; *Benyon*, 854 P.2d at 517.

313. *Elks Lodges*, 905 P.2d at 1204.

314. Utah courts have, however, used disparate impact and disparate treatment analyses in other contexts. *See, e.g.*, Malibu Inv. Co. v. Sparks, 996 P.2d 1043, 1050–51 (Utah 2000) (analyzing a housing discrimination claim using disparate impact and disparate treatment tests); Kunej v. Labor Comm'n, 306 P.3d 855, 862–63 (Utah Ct. App. 2013) (analyzing an employment discrimination claim using a disparate impact test).

public policy against discrimination, which courts have construed liberally to ensure protection for members of the enumerated suspect classes.[315] Despite that judicial recognition, Utah courts have found unlawful discrimination in places of public accommodation only in instances where there was clear intent to discriminate.[316] For example, the courts have found discrimination when fraternal organizations refused to accept female members and had standing policies of accepting only male members.[317] On the other hand, the Utah Supreme Court did not find unlawful discrimination when a publication refused to publish a religious group's advertisement because the court found that the publisher refused the business not because of the group's religion but because of its message.[318] Thus, while Utah courts have acknowledged the statutory call to liberally construe the UCRA, they have not equated this call to an automatic win for plaintiffs. Instead, the courts simply lean toward overprotection.

Furthermore, the UCRA statutory language includes a provision critical to any defense USA Ultimate would present: "Nothing in [the UCRA] shall be construed to deny any person the right to regulate the operation of a . . . place of public accommodation . . . in a manner which applies uniformly to all persons without regard to . . . religion."[319] While this provision has not been litigated—and thus not interpreted by Utah courts—it protects defendants that have a uniform rule or policy that is not designed to distinguish people based on characteristics associated with a suspect class. USA Ultimate falls into that enumerated exception because it regulates its tournaments in a manner that applies uniformly to all teams without regard to any characteristics associated with a suspect class. Thus, even under a liberal construction of the UCRA in favor of protecting members of protected classes, the statute's express language shields USA Ultimate.

The statutory preference to protect members of suspect classes falls short of sustaining BYU CHI's potential case because the statute includes an exception for uniform and facially neutral policies. Since Utah courts have not rendered decisions on many public

315. *Benyon*, 854 P.2d at 517.

316. *See, e.g.*, *id.* at 517–19 (holding that a woman was entitled to relief as a matter of law after a place of public accommodation refused to admit her as a member solely because she was a female).

317. *Elks Lodges*, 905 P.2d at 1205–07.

318. World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 258 (Utah 1994).

319. UTAH CODE ANN. § 13-7-3 (LEXIS through 2018 3d Spec. Sess.).

accommodations cases or developed a consistent analytical framework for such cases, there may be some room for creative litigating. Ultimately, however, BYU CHI would likely not succeed under Utah law.

d. Idaho

Idaho law establishes that "[t]he right to be free from discrimination because of . . . creed . . . is recognized as and declared to be a civil right," including the "right to the full enjoyment of any of the accommodations, facilities or privileges of any place of public resort, accommodation, assemblage or amusement."[320] Specifically, the Idaho Human Rights Act ("IHRA") "secure[s] for all individuals within the state freedom from discrimination" because of religion in connection with access to and use of public accommodations.[321] The IHRA prohibits discrimination on the basis of religion that results in the denial of the "full and equal enjoyment" of places of public accommodation.[322] One who believes he or she has been unlawfully

320. IDAHO CODE § 18-7301 (LEXIS through Chapter 197 of 2019 Reg. Sess.). Under this particular statutory chapter, any person who denies another, on the basis of religion, the full enjoyment of a public accommodation is guilty of a misdemeanor. *Id.* § 18-7303. This statute is part of the penal code, however, and creates no private right of action. *See* Foster v. Shore Club Lodge, Inc., 908 P.2d 1228, 1233–34 (Idaho 1995). The Idaho Human Rights Act, discussed below, provides for civil recourse in the discrimination context.

321. IDAHO CODE § 67-5901(2) (LEXIS through Chapter 197 of 2019 Reg. Sess.).

322. *Id.* § 67-5909(5). Subsection (5) specifically states that it is prohibited "[f]or a person . . . [t]o deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation." *Id.* Separately, subsection (6) of the statute *may* prohibit one who "owns, leases or operates a place of public accommodation" from imposing "eligibility criteria that screen out or tend to screen out" individuals who are in a protected class or not modifying "policies, practices, or procedures" when they tend to exclude people in a protected class, unless "such modifications would fundamentally alter the nature of [the place of public accommodation's] goods, services, facilities, privileges, advantages or accommodations." *Id.* § 67-5909(6)(b)–(c).

The drafting of the statute, however, makes application of those particular provisions in this context unclear. The statute begins by stating that "[i]t shall be a prohibited act to discriminate against a person because of, or on a basis of . . . religion . . . *in any of the following subsections*." *Id.* § 67-5909 (emphasis added). The statute then specifies that discriminating on the basis of disability is disallowed as provided in certain subsections, including subsection (6). *Id.* Subsection (6) is accordingly drafted to prohibit discrimination in places of public accommodation "on the basis of disability." *See id.* § 67-5909(6). The provisions in subsection (6) also provide protections, such as requiring places of public accommodation to make reasonable accommodations for people with disabilities, that are generally given in the public accommodations context only for people with disabilities and not for people in other protected classes. *See, e.g.*, Fell v. Spokane Transit Auth., 911 P.2d 1319, 1323 (Wash. 1996) (stating that a place of public accommodation can comply with the state's anti-discrimination laws by providing reasonable accommodations for a "disabled person's disability"). In other words, the statute starts by stating that all of its subsections prohibit discrimination on the basis of

discriminated against can initiate legal proceedings by filing a complaint with the Idaho Human Rights Commission ("Idaho Commission"), an administrative body under the state government.[323] A complainant must exhaust administrative avenues before filing in state court.[324]

Unfortunately, as with the other states, there is little case law in this area. Most cases that have involved the IHRA are in the employment context,[325] and courts have adopted consistent analytical frameworks only in employment discrimination cases.[326] One case in the United States District Court for the District of Idaho actually analyzed alleged religious discrimination against a Mormon in a

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religion, but then it provides a subsection that, by its own language, deals specifically with discrimination in the disability context and provides public accommodations protections that are generally given only to people with disabilities and not to people in other protected classes. Further adding to the confusion, subsection (5) also prohibits discrimination in places of public accommodation, and does so broadly and in a manner that conventionally applies to protect members of all protected classes. § 67-5909(5). Additionally, subsection (5) does not require places of public accommodation to modify policies or provide reasonable accommodations. *Id.*

In essence, the statute asserts that all subsections apply to all protected classes but then provides a subsection that states that it applies to people with disabilities and provides public accommodations protections traditionally given only in the disabilities context. This confusion may stem from a 2005 amendment to the statute that added the disability subsection. *See* Act of Apr. 5, 2005, ch. 278, sec. 4, § 67-5909, 2005 Idaho Sess. Laws 869, 872–75 (codified at IDAHO CODE § 67-5909 (LEXIS through Chapter 197 of 2019 Reg. Sess.)). If the reasonable accommodations rule were to apply to all protected classes, and not just those with disabilities, then places of public accommodation would need to reasonably accommodate people for characteristics associated with their protected class. In this case, that would mean USA Ultimate would be exposed to liability much more than it is in other states, and it might be forced to provide reasonable accommodations to BYU CHI because of the team's religious needs. The statute is unclearly drafted, however, so that issue remains unclear. Due to that unclear drafting, and taking into account that the reasonable accommodations provided in subsection (6) generally apply only in the disabilities context, this Comment assumes that only subsection (5) applies and that USA Ultimate would not be subject to the reasonable accommodations rule provided in subsection (6).

323. IDAHO CODE § 67-5907(1) (LEXIS through Chapter 197 of 2019 Reg. Sess.).

324. *See id.* § 67-5908(2). Courts have confirmed that a claim under the IHRA must start with the Idaho Commission, which was created to oversee these types of issues. *See* Boyle v. Jerome Country Club, 883 F. Supp. 1422, 1426 (D. Idaho 1995).

325. *See, e.g.*, Stout v. Key Training Corp., 158 P.3d 971, 973–74 (Idaho 2007) (concluding that the IHRA did not entitle an employee who won an employment discrimination lawsuit to attorney's fees); *Foster*, 908 P.2d at 1232–33 (analyzing whether the IHRA contemplated "individual liability for an employer's agents and employees"); O'Dell v. Basabe, 810 P.2d 1082, 1096 (Idaho 1991) (determining that "front pay is a permissible element of damages under the [IHRA]" in employment discrimination cases).

326. *See, e.g.*, Pottenger v. Potlatch Corp., 329 F.3d 740, 745–50 (9th Cir. 2003) (employing disparate treatment and disparate impact tests in an employment age discrimination case); Bowles v. Keating, 606 P.2d 458, 462–65 (Idaho 1979) (using disparate treatment and disparate impact tests in a case concerning sex discrimination in the employment context).

sports context similar to the dispute at issue between USA Ultimate and BYU CHI,[327] but the court reviewed only Title II of the Civil Rights Act of 1964 and not the IHRA.[328] Because there have been few cases, Idaho courts also have not had the opportunity to further ingrain public policy against unlawful discrimination by construing the IHRA liberally.

Additionally, few complaints have been filed with the Idaho Commission.[329] The Idaho Commission has stated that it will construe its own anti-discrimination rules liberally "to secure just, speedy and economical determination of all issues presented" to it.[330] It does not, however, specifically say that it will construe the IHRA liberally.[331] Finally, the Idaho Commission does provide some guidance on its website: "Individuals should not be treated more or less favorably in [the public accommodations context] because of their religious beliefs or practices. Decisions about providing service . . . should be made without regard to someone's religious preferences."[332]

Yet again, undeveloped case law renders analyzing this issue in this state difficult. Idaho's statutes also establish a public policy that opposes all forms of discrimination against people in protected classes, but Idaho courts have not had the opportunity to show how far this public policy reaches. The IHRA does broadly state that one cannot "deny an individual [in a protected class] the full and equal enjoyment of" places of public accommodation,[333] but the statute indicates that one cannot deny "*because of*" religion,[334] which implies that the statute looks more toward intent than effect. The lack of case law or administrative guidance also makes analysis difficult, but the Idaho Commission's statement that "[i]ndividuals should not be treated *more* or less favorably" in this context[335] evinces an intent to allow facially neutral policies or structures, such as a tournament

327. *See generally Boyle*, 883 F. Supp. 1422 (dealing with a claim of religious discrimination in the public accommodations context when a Mormon professional golfer sued a golf course to allow him to play all of his rounds on the Saturday of a golf tournament in order to allow him not to play on a Sunday). The court ruled for the golf course after undertaking a burden-shifting analysis. *Id.* at 1429–33.

328. *See id.* at 1428–32.

329. *Religion*, IDAHO HUM. RTS. COMMISSION, https://humanrights.idaho.gov/Idaho-Law/Types-of-Discrimination/Religion [https://perma.cc/DAG3-RPXB] ("Claims of religious discrimination in [the public accommodations context] are not made very frequently to the Commission.").

330. IDAHO ADMIN. CODE r. 45.01.01.004 (LEXIS through July 1, 2018).

331. *See id.* r. 45.01.01.012 (addressing the commission's interpretation of the IHRA and stating only that certain federal statutes can provide guidance).

332. *Religion*, *supra* note 329.

333. IDAHO CODE § 67-5909(5) (LEXIS through Chapter 197 of 2019 Reg. Sess.).

334. *Id.* § 67-5909 (emphasis added).

335. *Religion*, *supra* note 329 (emphasis added).

schedule, to fall outside of unlawful discrimination. As a result, Idaho also does not appear to provide BYU CHI a fruitful forum.

III. A NEW STATE STATUTORY APPROACH

The prior sections analyzed the potential avenues that BYU CHI could take to carry out its veiled threats to litigate its conflict with USA Ultimate if the governing organization does not find an acceptable tournament-scheduling compromise. Most sources of law provide the team with little hope of success. While some state laws may prove more promising, the lack of extensive precedent creates significant uncertainty. Courts that have settled upon a preferred mode of analysis have generally adopted a form of a burden-shifting approach. Often, those modes of analysis either rely on or combine intent-based and effect-based tests.

The burden-shifting approach works well in many contexts, especially when a public accommodation refuses to serve or admit a member of a protected class. When a member of a protected class encounters a discriminatory system or structure, however, such as a rigid sports schedule, the burden-shifting test can be difficult to overcome because it is often hard to prove pretext that overcomes an ostensibly legitimate business reason to refuse to accommodate. As a result, while burden-shifting tests have their benefits, they can be heavy-handed.

Unsurprisingly, not all instances of potential discrimination fall neatly into or are optimally resolved by the burden-shifting approach. The budding conflict between BYU CHI and USA Ultimate presents an example of such a dispute that is not easily resolved under such tests. USA Ultimate did not apparently intend to discriminate against BYU CHI's predominantly Mormon team by creating the weekend tournament structure; however, BYU CHI is in a position where that structure results in a discriminatory effect, and the burden-shifting test may not appropriately take all of the case's factors into consideration.

This Comment proposes a dual analysis that combines aspects of the intent-based and effect-based aspects of burden-shifting tests in order to better address cases like the BYU CHI controversy and thereby fill a gap in the law. This new test would require a fact finder to undertake a three-step analysis.

First, the fact finder would employ an intent-based approach. This initial step would resemble other intentional discrimination tests, where the fact finder would need to find that the plaintiff (1) is a member of a class protected under the statute, (2) attempted to access

or enjoy a place of public accommodation, (3) was denied that access and enjoyment, and (4) was treated less favorably than similarly situated persons who are not members of the protected class. After determining that the plaintiff passes this threshold determination, the court would assess whether the defendant intended to discriminate. If the alleged discrimination manifested in a refusal to provide service at or allow access to a place of public accommodation,[336] the analysis should be confined to determining whether the defendant expressed or acted with animus in the discriminatory action. If, on the other hand, the fact finder faces an instance of discrimination that results more from the defendant's system or structure,[337] then the fact finder should analyze whether there was discriminatory intent or animus present in the *creation* of the system or structure. If the fact finder finds discriminatory intent or animus in either case, then the analysis should end there with a holding for the party harmed by the discrimination. If, on the other hand, the fact finder discovers no such discriminatory intent or animus, then it would move to the second step of the analysis.

In the second step of the analysis, the fact finder would determine whether the defendant's action or structure resulted in a discriminatory effect. Likely, if the plaintiff has made it this far in the analysis, this prong should be met. That is because the four-part test above determines whether the plaintiff has standing under the statute to meet the effect-based test; it determines that a member of a protected class tried to use a public accommodation and was denied even though others outside the protected class had access. If this finding is met, then the fact finder could move to the final step of the analysis.

Under the third step, the fact finder would assess whether the defendant exhibited discriminatory intent or animus in the refusal to accommodate. For example, if a plaintiff of a protected class encounters some discriminatory effect by a defendant or their policies, yet there is no discriminatory intent or animus in the creation or implementation of that defendant's system or policy, then the plaintiff may still succeed in proving discrimination if the defendant

336. For instance, a recent case relating to a cakeshop's refusal to bake a wedding cake for a homosexual couple represents a prototypical example of a refusal to serve that results more from a one-off decision than from the implementation of some elemental structure of the cakeshop. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (discussing whether a government commission violated the First Amendment when it evaluated a bakery that refused to make a cake for a gay couple).

337. For instance, the weekend tournament format that USA Ultimate uses does not constitute a one-off direct refusal to allow BYU CHI to participate.

exhibits discriminatory intent or animus in the refusal to accommodate the plaintiff. If a fact finder discovers discriminatory intent at this stage, then there is a finding of discrimination.

This combined approach begins to fill a gap by combining intent- and effect-based approaches and allowing for findings of animus at multiple stages. While the third step may prove redundant or possibly inapplicable to directly discriminatory actions,[338] it better and more fairly captures cases where a plaintiff encounters a system that may not have been established or structured with the intent to discriminate but which has the effect of discriminating. If a plaintiff collides with such a structure, bargains with the party presiding over that structure to seek accommodation, and the presiding party refuses to accommodate, then a plaintiff can attempt to prove discriminatory intent in the refusal to accommodate.[339] This approach more fairly fills the gap by providing plaintiffs multiple opportunities to prove discrimination but still prevents a finding of discrimination if a defendant presides over a structure that has an inadvertent discriminatory effect on a suspect class. This test also replaces the often-insurmountable "pretext" stage of a burden-shifting approach by focusing on the animus in a refusal to accommodate instead of the business, logistical, or other reasons for refusing to accommodate.

The test suggested above differs slightly from other tests in that the discriminatory intent or animus can be found not only in the establishment or operation of a system—such as an ultimate tournament—but also in the refusal to accommodate by changing the system. Despite the benefits of such a test, some drawbacks remain. First, just as effect-based approaches may encourage more litigious behavior by plaintiffs, this test's inclusion of the effect-based step may

338. For example, if a proprietor of a place of public accommodation refuses to serve a member of a protected class, then the discriminatory intent is wrapped both in the action that would result in a finding of discrimination under the first step of the test and a finding at this stage. Of course, the fact finder should not reach this stage of the test if it finds under the first part of the test, so the third step likely would not apply in these instances.

339. One point of distinction that states would need to consider at this stage would be who carries the burden of proof. Up to this point, the plaintiff will have carried the burden, and that likely should continue. So, if the plaintiff were to carry the burden of proof at the third stage, then she would need to elicit convincing evidence of discriminatory intent in the defendant's refusal to accommodate. On the other hand, states could opt to treat the discriminatory effect portion of the test as prima facie evidence of discrimination that the defendant would need to rebut. Under that test, the defendant likely would need to show a legitimate reason—for instance, convenience or necessity—for why it refused to accommodate. Keeping the burden of proof with the plaintiff is the better course, however, because animus at this stage is more reasonably proven through proof of that animus than it is by whether the defendant can point to an alternative reason to refuse to accommodate, which the defendant could craft even if it did act discriminatorily.

similarly leave the door open to litigation. On the other hand, the fact remains that a plaintiff would still need to prove discriminatory intent or animus at *some* stage of its interaction with a defendant, which will remain a difficult burden in many cases.[340] Thankfully, the entirety of the test dampens these negative aspects. The test assuages the first drawback by continuing to require some proof of discriminatory intent, which could stave off frivolous lawsuits. The test also lightens the second drawback because the analysis effectively requires the parties to bargain, discuss, or negotiate an accommodation for the plaintiff, which increases the likelihood that discriminatory intent or animus would manifest itself. Furthermore, even with the potential drawbacks, the test proffered above combines aspects of the intent-oriented and effect-oriented aspects of the burden-shifting approach in a way that more accurately addresses discrimination that can arise in several ways and encourages the parties to address their differences outside of the court system.

This hybrid test would apply more ideally in the BYU CHI and USA Ultimate dispute than conventional discrimination tests would. While a burden-shifting test appears to offer USA Ultimate a favorable outcome, this Comment's dual test cuts much more closely to the meat of the issue. First, the fact finder would determine whether BYU CHI has standing under the statute as a member of a protected class that attempted to access or enjoy a place of public accommodation but was denied even though the space was open to others outside the class. The fact finder would then assess whether USA Ultimate constructed the weekend tournament format with discriminatory intent or animus.[341] If the fact finder were to find such animus, the analysis would end and BYU CHI would win. On the other hand, if the fact finder were not to find such animus, then she would assess whether the tournament format resulted in discriminatory effect. If so, then the fact finder would undertake the final part of the analysis and ascertain whether USA Ultimate

340. In other words, not all parties acting with discriminatory intent will manifest that intent such that the plaintiff can prove it. Sophisticated parties conscious of anti-discrimination laws may be shrewd or well counseled enough to avoid expressing its animus. This fact, of course, intersects with the burden-of-proof issue discussed *supra* note 339. Directly proving discriminatory intent may be difficult for the plaintiff, but shifting the burden to the defendant easily allows it to craft creative reasons for the refusal to accommodate after the discriminatory act. Someone must carry the burden, however, and it makes sense to require the party alleging discrimination to prove it. Perhaps courts could allow plaintiffs to allege lack of alternative reasons to accommodate as probative of intent in order to shift some of the upper hand back to the plaintiff.

341. In other words, the court would determine whether USA Ultimate created the weekend tournament format in order to block Mormons from participating.

exhibited discriminatory intent or animus in its refusal to accommodate BYU CHI. Discussions between the parties concerning accommodation would provide some prediscovery evidence that the court could analyze, and later discovery could provide further evidence potentially probative of the defendant's intent.[342] Of course, issues concerning USA Ultimate's proffered reasons for refusal to accommodate—namely, convenience for the participating student-athletes—would arise too. If the fact finder discovered discriminatory intent at this stage, then BYU CHI would have a much better chance of succeeding. If not, then USA Ultimate likely would win. Either way, the test would have better captured and addressed the issue that the parties were facing.

CONCLUSION

BYU CHI has developed from a good team to a powerful program in the past several years under Coach Bryce Merrill. Time and again, the team has proven its national relevance, beating ranked teams and earning its own high rankings in the process. The team's desire to seek an accommodation from USA Ultimate that would allow them to participate meaningfully in the postseason—what any athlete in any sport desires—is elementally understandable and reasonable. To their credit, the team has continued to petition USA Ultimate and generate conversation in the ultimate community in a professional and productive manner.

With the threat of litigation looming over the parties and the effective strike-suit precedent laid down by BYU's men's rugby team, however, an analysis of the potential founts of legal recourse is prudent. As the analysis above shows, current federal and state laws appear to heavily favor USA Ultimate because of the prevalence of burden-shifting approaches or the wording of statutes. In reality, these approaches do not optimally cut to the center of conflicts that involve facially neutral structures or systems that have a discriminatory effect. That is the conflict developing between BYU CHI and USA Ultimate.

To address the gap that results from the burden-shifting approach, this Comment proposes a new test that retains desirable features of the conventional tests while also better addressing instances where nuanced discriminatory intent or effect may not be

342. Ideally, courts would allow only a limited form of discovery in order to help the parties avoid significant litigation costs at this stage. If full discovery were allowed too early, then strike-suit concerns would continue to play too great a role and potentially force settlements on frivolous claims.

adequately addressed by the conventional tests. Using the ultimate dispute that frames this Comment as an example, the proposed test more neatly dissects the issues embedded within the potential discrimination and is thus more likely to bring about a just result.

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