No. 09-55299

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALPHA DELTA CHI—DELTA CHAPTER, a sorority at San Diego State University; ALPHA GAMMA OMEGA—EPSILON CHAPTER, a fraternity at San Diego State University; MELISSA PEREA; JACKIE LEWIS; JAMES ROSENBERG; and JAMES SHOKAIR;

Plaintiffs-Appellants,

v.

CHARLES B. REED, in his official capacity as Chancellor of the California State University; STEVEN L. WEBER, in his official capacity as President of San Diego State University; DOUGLAS CASE, in his individual and official capacity as Coordinator of Fraternity and Sorority Life at San Diego State University;

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of California

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiffs–Appellants
Urging Reversal

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INTEREST OF THE *AMICUS*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF, as a public interest law firm, has an interest, on behalf of its constituents and supporters, and in particular those in California, in arguing on behalf of people of faith. The NLF believes that universities lack an ability to do indirectly that which they are unable to do directly—namely deny recognition to student groups based on an impermissible requirement that the groups subscribe to a specific set of values held by certain members of the university community.

This Brief is filed pursuant to consent of all parties.

SUMMARY OF THE ARGUMENT

This Brief expands on one argument made by the Plaintiffs-Appellants Alpha Delta Chi, *et al.* (collectively "ADX"). The Defendants-Appellees Charles B. Reed, *et al.* (the "University") have attempted to accomplish indirectly against ADX a constitutional infringement that they would never have been permitted to do directly. Therefore, the conditioning of official recognition by the University upon adoption of an anti-discrimination policy (the "Policy") is an unconstitutional condition in violation of ADX's rights under the First Amendment.

ARGUMENT

I. THE COURT BELOW ERRED BY FAILING TO CONSIDER ADX'S EXPRESSIVE ASSOCIATION CLAIM IN LIGHT OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.[1]

As ADX has thoroughly argued, the court below erred in several ways, all pointing to the University having denied ADX's rights under the Constitution. To expand on one theme, however, not only did the court below wrongly conclude the outcome of ADX's expressive association claim, it failed to analyze it under the appropriate authority. Under the unconstitutional conditions doctrine as set out in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (hereinafter "*FAIR*"), the University has failed to show, nor could it, that its conditioning official recognition of student organizations upon their adopting the Policy was an action it could have taken directly against ADX.

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[1] Although ADX has not set forth in its brief an explicit "unconstitutional conditions" *argument*, the *issue* of the constitutionality of the condition placed upon student organizations to receive University recognition is pervasive throughout. In *Wisconsin v. Weber*, 476 N.W.2d 867, 868 (Wis. 1991), the Wisconsin Supreme Court helpfully distinguished between issues and arguments. "[I]ssues before the court are the issues presented in the petition for review and not discrete arguments that may be made, pro or con, in the disposition of an issue either by counsel or by the court." *Id.* The court noted that an argument is a "reason given for or against a matter under discussion" or a "coherent series of reasons, statements, or facts intended to support or establish a point," while an issue *is* that "point in question[,] of law or fact[,]" for which the arguments are being made. *Id.* at 868 n.2. "Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or *utilized by this court*." *Id.* (emphasis added). Thus, to the extent your *Amicus* is introducing anything new, it is introducing new argumentation upon an issue fairly before this Court.

"Where a constitutional right 'functions to preserve spheres of autonomy . . . [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands.'" *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) (alterations in original) (quotation omitted). Put differently, the essence of an unconstitutional condition is an attempt by the government to implement indirectly that which it could not do directly. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958). The rationale behind the doctrine is that

> [i]t may be tempting to say that . . . waiv[ing] certain rights in exchange for a valuable benefit the government is under no duty to grant . . . [is] always permissible and, indeed, should be encouraged as contributing to social welfare . . . . But our constitutional law has not adopted this philosophy wholesale. The "unconstitutional conditions" doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary. Government is a monopoly provider of countless services . . ., and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

Scott, 450 F.3d at 866.

These foundational principles, so well articulated by this Court in *Scott*, have also been applied in expressive association cases. For example, in *San Francisco County Democratic Central Committee v. March Fong Eu*, 826 F.2d 814, 827 (9th Cir. 1987), this Court, relying on multiple Supreme Court precedents as well as on

Ripon Society Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975), wrote:

> "The right of individuals to associate for the advancement of political beliefs" is fundamental, *Williams v. Rhodes*, 393 U.S. 23, 30, (1968), and includes the "freedom to identify the people who constitute the association, and to limit the association to those people only." *Wisconsin ex rel. La Follette*, 450 U.S. [107,] 122 [(1981)]; *see also Tashjian [v. Republican Party of Connecticut]*, 107 S. Ct. [544,] 549 [(1986)]. Because the right of association would be hollow without a corollary right of self-governance, "there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective." *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C.Cir. 1975). "The Party's determination . . . of the structure which best allows it to pursue its political goals is protected by the Constitution." *Tashjian*, 107 S. Ct. at 554; see also *Ripon Society Inc.*, 525 F.2d at 585 ("a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution . . . .") (emphasis in original).

San Francisco County, 826 F.2d at 827 (parallel citations and subsequent history omitted).

It is clear that the cases that this Court relied upon in its *San Francisco County* opinion were applying broader principles to the election law facts before them. In other words, it is not just political associations that have the rights to decide who constitutes the association and to organize and direct themselves. Those rights belong to all associations. For example, the *La Follette* Court added a footnote to its analysis that clearly demonstrates that the principles it invoked are of broad, general application: "'Freedom of association would prove an empty

guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' L. Tribe, American Constitutional Law 791 (1978)." 450 U.S. at 122, n.22.

Similarly, the *Tashjian* Court wrote:

> The nature of appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." The freedom of association protected by the First and Fourteenth Amendments *includes* partisan political organization.

107 S. Ct. 544 at 548 (citations omitted; emphasis added).

Furthermore, this Court's analyses in *Scott* and *San Francisco County* are consonant in all material respects with the Supreme Court's later opinion in *FAIR*. In *FAIR*, an association of law schools and law school faculties brought several constitutional challenges to the Solomon Amendment, a statute conditioning the receipt of certain federal funds upon each law school's willingness to host military recruiters on campus. *FAIR*, 547 U.S. at 51-52. In analyzing the constitutionality of the condition, the *FAIR* Court rooted its reasoning in the fact that Congress possesses "broad authority to legislate on matters of military recruiting" and simply *chose* an indirect route to accomplish its recruiting goals—namely conditioning a benefit to law schools on their willingness to host military recruiters rather than simply mandate compliance from the schools. *FAIR*, 547 U.S. at 58.

Therefore, the question facing this Court is whether, but for the carrot of official recognition by the University, could the University use the stick of non-recognition on ADX for failing to adopt the University's anti-discrimination policy. Surely the answer to that question is "no."

It would be helpful to consider a hypothetical with facts very similar to those of the instant case to best illustrate how the University lacks the constitutional authority to compel ADX to adopt the Policy. Suppose a group of Christian women students at the University begin to spend time together and ultimately decided that it would be mutually beneficial to their spiritual development to live together as a group. The women select an apartment adjacent to the campus in the same area of town as several university-recognized sororities. (*See* Greek Life Q&A, http://www.sa.sdsu.edu/cfsl/faq.html (last visited June 18, 2009).) The women decide to give themselves the name "Alpha Delta Chi." The women further conclude that they would like to become active with other like-minded Christian women from the University who also desire to "liv[e] a Christian lifestyle and [be] active in Christ's service." (Appellants' Br. at 12.) Thus, the women draft a charter and bylaws, which include, among other things, the following oath to be taken by all would-be members:

> With the Lord Jesus Christ as my Guide and my Strength, I will strive to perpetuate Christian living, by the development of a well-rounded womanhood, and to reflect Christ to others both in ideals and actions.

> In becoming an active member of Alpha Delta Chi, I will conscientiously accept its standards and responsibilities.

(Appellants' Br. at 28.)

Eventually, the women become more organized, hosting social gatherings at the apartment, making T-shirts displaying the "AΔX" logo, and speaking to classmates about their sorority. Upon the University's learning of the group's activities, officials inquire about what AΔX is and what it stands for. The University insists the women adopt a non-discrimination policy which would require them to admit into membership anyone from the University, including homosexual people with whom they have strong disagreement. The women refuse on the grounds that adopting the non-discrimination policy, especially as it pertains to sexual orientation, would violate their oath to "perpetuate Christian living" and to "reflect Christ to others both in ideals and actions." (Appellants' Br. at 28.) As mentioned above but stated slightly differently here, the question is whether the University may *compel* a private group of women to adopt the University's non-discrimination policy by requiring they accept as members any and all comers, including those with no desire to conform their behavior to the tenets of the Bible? This is the quintessential example of an infringement on a private organization's associational rights.

Although it is almost self-evident that the University would have no authority to compel adoption of the non-discrimination policy by the women in the

hypothetical, a review of several expressive association cases helps illustrate the point. The Supreme Court "has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or *religious activities*." *Board of Dirs. of Rotary Int'l v. Rotary Club of Durante*, 481 U.S. 537, 544 (1987) (emphasis added). "The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). This freedom to associate necessarily implies "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends." *Id.* at 622 (emphasis added).

Rotary and *Jaycees* both involved the forced inclusion of women. In the latter case, the Supreme Court wrote:

> Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group . . . and it may try to interfere with the internal organization or affairs of the group . . . . By requiring the Jaycees to admit women as full voting members, the Minnesota Act works an infringement of the last type. There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Id. at 623 (citations omitted).

What ADX desires is exactly the type of religious association the Constitution protects under *Rotary* and *Jaycees*. Just as the forced inclusion of women intruded on the free association rights of the Rotary and Jaycees organizations, so the forced inclusion of those unwilling to sign ADX's statement of faith violates ADX's free association rights. ADX exists for the mutual spiritual edification of its members, each desiring the common goal of being a more devoted follower of Jesus Christ. For ADX to be forced to accept members not sharing this common goal plainly violates the protections described in *Rotary* and *Jaycees*.

Although the *Rotary* and *Jaycees* Courts ultimately rejected the constitutional challenges in those cases, they did so on narrow factual grounds quite different from those present in the instant case. In affirming the California Court of Appeal, the *Rotary* Court agreed that the organization at issue was a "business establishment" and, therefore, subject to California's Unruh Civil Rights Act. *Rotary*, 468 U.S. at 542, 544. Similarly, the *Jaycees* Court upheld the constitutionality of Minnesota's Civil Rights Act as it pertained to *places of public accommodation*. *See Jaycees,* 468 U.S. at 612, 616. The *Rotary* and *Jaycees* Courts were comfortable with applying those labels to the organizations at issue there because of the type of membership and the activities of the organizations. *See Rotary,* 481 U.S. at 547 ("Rotary Clubs, rather than carrying on their activities

in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole world.'" (quotation omitted)); and *Jaycees*, 468 U.S. at 621 ("[T]he local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship."). Clearly here, ADX is neither a business establishment nor a place of public accommodation; rather, it is a private association of members with shared beliefs.

Here, the University has done what it must not do—it has attempted to do indirectly that which it could not otherwise have done directly. It has conditioned the benefit of recognition of ADX on the adoption of a policy that cuts to the heart of what ADX is. Religious teachings on human sexuality are explicitly set out in the Bible, and ADX has unsurprisingly sought to conform to the Bible rather than the University's Policy. It would be impossible for the University to compel ADX's adoption of the Policy if ADX were simply a non-recognized sorority or fraternity. The University, therefore, cannot compel it as an inducement to recognition. This is an unconstitutional condition in the spirit of *FAIR* and *Scott*, and has no place on a state university's campus.

CONCLUSION

For the foregoing reasons, and for additional reasons stated in the Appellants' Brief, the judgment of the district court should be reversed.

Respectfully submitted,
this 19th day of June 2009

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Alpha Delta Chi, et al. v. Reed, et al.*, No. 09-55299, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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