

# OFFICE OF THE GENERAL COUNSEL

## First Amendment Working Group Advisory

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### SUMMARY

Last year, the U.S. Supreme Court held that a nondiscrimination policy requiring registered student organizations to allow any interested students to participate is constitutional. The Ninth Circuit has now held that a more specific prohibition (e.g., a prohibition of discrimination specifically based on religion but not political beliefs) may also be constitutional.

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### San Diego State's Nondiscrimination Requirement for Registered Student Organizations Held Constitutional

Last year in *Christian Legal Society v. Martinez*, the U.S. Supreme Court held that a nondiscrimination policy requiring registered student organizations to allow the participation of any student (i.e., "all comers"), was constitutional. (See prior Legal Advisory at [http://www.ucop.edu/ogc/documents/legaladv\\_100629.pdf](http://www.ucop.edu/ogc/documents/legaladv_100629.pdf)) It did not address whether a more specific policy that prohibited discrimination only on certain bases and not others (e.g., a prohibition of discrimination specifically based on religion but not political beliefs) would also have been upheld. This month, in *Alpha Delta Chi v. Reed*, the federal Ninth Circuit Court of Appeals answered this open question affirmatively and upheld San Diego State University's requirement that registered student organizations not restrict membership "on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition." The University of California has a similar nondiscrimination policy.

Plaintiffs in *Alpha Delta Chi v. Reed* are a Christian fraternity and sorority whose membership requirements include "personal acceptance of Jesus Christ as Savior and Lord." SDSU rejected their applications for official recognition based on its nondiscrimination policy. Plaintiffs sued, alleging violations of their First Amendment rights to free speech, association, and free exercise of religion and their Fourteenth Amendment right to equal protection of the law.

The court found that the nondiscrimination policy was constitutional as written, making the following findings:

- **Free speech.** SDSU's student organization program is a "limited public forum" in which government restrictions are permissible if they are reasonable and viewpoint-neutral.
  - **Reasonableness.** One purpose of the program is to promote diversity and nondiscrimination, and the nondiscrimination requirement was found reasonable in light of that purpose. The court also noted that plaintiffs had alternative avenues for communication.
  - **Viewpoint neutrality.** The court rejected plaintiffs' argument that the policy's prohibition of discrimination on only certain specific grounds, and not others, distinguished it from the "all comers" policy held constitutional by the U.S. Supreme Court because there was no evidence that the policy's purpose was to suppress plaintiffs' viewpoint. Rather, the court found that the policy was a permissible attempt to "ensure equal access to the benefits of society" and to "remove access barriers" for certain historically excluded groups.
- **Expressive association.** The court also rejected plaintiffs' argument that the policy forced them to include members who disagree with their beliefs, holding that the university's withholding of the benefits of recognition did not force plaintiffs to do anything, and plaintiffs "simply cannot oblige the university to subsidize them."
- **Free exercise of religion and equal protection.** The policy as written did not target religious groups and thus did not violate these constitutional protections.

However, the court went on to hold that plaintiffs may still prevail on their claim that the policy was unconstitutionally applied, based on evidence that other student groups (such as the Catholic student center) may have been exempted from the nondiscrimination policy. The Ninth Circuit sent the case back to the district court to determine whether there were such exemptions and whether plaintiffs were denied an exemption based on their religious viewpoint. Notably, it suggested that, if recognized groups had agreed to abide by the university's nondiscrimination policy notwithstanding any discriminatory language in their applications, this fact would weigh in favor of finding that the policy was also constitutional as applied.