No. 08-1293

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERICA CORDER,
Plaintiff-Appellant,

v.

LEWIS PALMER SCHOOL DISTRICT NO. 38,
Defendant-Appellee.

ON APPEAL FROM THE DISTRICT OF COLORADO

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Plaintiff-Appellant*
Supporting reversal

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, in particular those in Colorado, are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and expression of students within public schools.

This brief is filed pursuant to consent from Counsel of Record for the Appellant and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

This Brief makes one argument not made by the Appellant (hereinafter "Ms. Corder"). *Amicus* argues that the court below erred in dismissing Ms. Corder's compelled speech claim because it failed to analyze that claim under the unconstitutional conditions doctrine.

The Brief explains that Ms. Corder has alleged sufficient facts to withstand Appellee Lewis Palmer School District No. 38's (hereinafter the "School District") Motion to Dismiss under the unconstitutional conditions doctrine. The court erroneously failed to consider the validity of Ms. Corder's claim under this theory, and, by its own analysis, has implicitly acknowledged the sufficiency of Ms. Corder's pleading.

ARGUMENT

I. THE COURT BELOW ERRED WHEN IT DISMISSED MS. CORDER'S COMPELLED SPEECH CLAIM, BECAUSE IT FAILED TO CONSIDER WHETHER THE SCHOOL DISTRICT'S FORCED APOLOGY WAS AN UNCONSTITUTIONAL CONDITION TO RECEIVE HER DIPLOMA.

The court below erred when it dismissed Ms. Corder's compelled speech claim by misconstruing its legal effect. The court dispatched the compelled speech claim as follows:

> [Ms. Corder] also appears to object to the apology statement because it required her to be painted as "a liar and deceiver" as a condition of receiving her diploma. Since [Ms. Corder] does not assert a *due process claim*, I see no constitutional implication from the school allegedly using the diploma as leverage for the apology.

Corder v. Lewis Palmer Sch. Dist. No. 38, No. 07-cv-01798, 2008 U.S. Dist. LEXIS 57529, at *20 (D. Colo. July 30, 2008) (emphasis added).

Despite accurately characterizing Ms. Corder's argument in terms of the apology constituting a government-imposed condition being used to leverage a benefit (*i.e.*, the diploma), the court failed to consider that a compelled speech claim can implicate the so-called unconstitutional conditions doctrine, *see Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 60-64 (2006) (hereinafter referred to as "*F.A.I.R.*"), rather than a due process claim. Based upon the court's own characterization of the facts, the standard for overcoming a Motion to Dismiss was easily met. "Heightened pleading is not required in § 1983 cases,

rather the pleadings must 'make clear the 'grounds' on which the plaintiff is entitled to relief.'" *Fogarty v. Gallegos*, 523 F.3d 1147, 1164-65 (10th Cir. 2008) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008)). This Brief will "flesh out" the unconstitutional conditions argument based on the facts that the court has already acknowledged it was supposed to "accept as true" for purposes of evaluating the Motion to Dismiss, *Warth v. Seldin*, 422 U.S. 490, 501 (1975). *Accord United States v. Colorado Supreme Court*, 87 F.3d 1161, 1164 (10th Cir. 1996).

The government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (citation omitted). Although a government's imposition of a condition on the benefit will not be considered "unconstitutional if it could be constitutionally imposed directly," improper imposition of speech is not confined to speaking beliefs, but also extends to the speaking of facts. *F.A.I.R.*, 547 U.S. at 59-61. Finally, the benefit to be given may derive from any governmental entity and need not be financial. *See, e.g., Umbehr*, 518 U.S. at 674-75 (reciting the varied applications of the unconstitutional conditions doctrine to government employees). *Umbehr* itself applied the unconstitutional conditions doctrine to a local municipality's treatment of an independent contractor. *See generally id.*

Although the *F.A.I.R.* plaintiffs, despite their assertions to the contrary, were found not to be subject to unconstitutional conditions, such conditions have been pleaded in Ms. Corder's complaint—as acknowledged by the court below. *Corder*, 2008 U.S. Dist. LEXIS 57529, *20. Thus, the court's judgment should be reversed. A comparison of the adjudicated facts in *F.A.I.R.* and the facts pleaded in the instant case will make this proposition plain.

In *F.A.I.R.*, an association of law schools and faculties challenged a federal law requiring them to facilitate military recruiters or else risk losing federal funding. 547 U.S. at 52-53.[1] The *F.A.I.R.* plaintiffs alleged that, because facilitation of the recruiters necessarily meant posting information on campus and distributing emails to students on behalf of the military, the federal law imposed upon the plaintiffs, *inter alia*, an unconstitutional condition of compelled speech. *Id.* at 53.

The Supreme Court rejected the plaintiffs' reasoning, however, concluding instead that the federal law neither "limit[ed] what law schools may say nor require[ed] them to say anything. [The] schools remain[ed] free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."

[1] The plaintiffs resisted accommodating the recruiters because of the military's policies prohibiting open homosexual identification and behavior. *Id.*

Id. at 60.[2]

In marked contrast to the facts in *F.A.I.R.*, here Ms. Corder *was* "limited" in what she could say and was "require[ed]" to say something. *See id.* at 60. Furthermore, she was not "free" under the school's policy to "express whatever views" she may have, "all the while retaining eligibility" to receive her diploma. *See id.* As set out more fully in her complaint, Ms. Corder had not violated any written policy by her graduation speech, (*see* Pl.'s Compl. ¶¶ 26, 30), yet was compelled to speak an apology in accord with the directive of the School District. (*See* Pl.'s Compl. ¶¶ 36-48.)

Such compulsion cuts against the grain of much case law. Even prior to *F.A.I.R.*, "[s]ome of [the Supreme] Court's leading First Amendment precedents [had] established the principle that freedom of speech prohibits the government from telling people what they must say." *F.A.I.R.*, 547 U.S. at 61. In addition to being forced to draft an apology, Ms. Corder was told what she must say—"I realize that, had I asked ahead of time, I would not have been allowed to say what I

[2] The Court especially noted that even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so . . . ." *Id.* at 65. Having found no compelled speech violation, the Supreme Court went on to analyze the expressive component of the regulated conduct under *O'Brien*, concluding the conduct was not "inherently expressive" and thereby not protected under the First Amendment. *Id.* at 66. It is worth noting that the instant case cannot be construed as an expressive conduct case; rather it is a pure free speech case, and the speech required of her was in no sense incidental to some other activity.

did." *Corder*, 2008 U.S. Dist. LEXIS 57529, *4.

This inappropriate compulsion extends to "compelled statements of fact" as well as "compelled statements of opinion" and are subject to First Amendment scrutiny. *F.A.I.R.*, 547 U.S. at 62. The Supreme Court ultimately decided that the statements of fact to which the law schools objected were not compelled because the Solomon Amendment "does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* Thus, the law schools were free to "choose" whether to speak or not to speak. In either event, they would not lose their benefit. There is nothing comparable in the instant case. Even under the School District's view of the case, Ms. Corder was *forced* to make statements of fact that she did not want to make or to lose her benefit.

The court below has acknowledged the School District's use of Ms. Corder's diploma as leverage to force an apology, and such facts clearly state a colorable claim for impermissible compelled speech, and one certainly not susceptible to a Motion to Dismiss. (*See* Appellant's Br. 30-33 (citing in particular *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988) and *Wooley v. Maynard*, 430 U.S. 705 (1977).)

CONCLUSION

For the foregoing reasons, in addition to those presented by Ms. Corder in her brief, this Court should reverse the judgment of the District Court.

Respectfully Submitted,
this 23rd day of October 2008

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CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that the PDF version of this brief has been scanned for viruses using Security Shield 2008 Virus Scan, last updated October 23, 2008, and that it is virus free.

I hereby certify that no privacy redactions were required.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of National Legal Foundation in the case of *Corder v. Lewis Palmer School District No. 38*, No. 08-1293 on all required parties by sending one electronic copy and by depositing one paper copy in the United States mail, first class postage, prepaid on October 23, 2008 addressed as follows:

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