

No. 08-56320

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL;
CALVARY CHAPEL CHRISTIAN SCHOOL; A.T., by and through parent
G. Tally; J.G., by and through parent A. Guzon; T.C. by and through parent
J. Cherney; K.B., by and through parent D. Brodmann; G.S., by and through
parent J. Shean; S.O., by and through parent D. Ono; and W.L., by and
through parent W. Lotherington;**
Plaintiffs-Appellants,

v.

**ROMAN STEARNS, in his official capacity as Special Assistant to the
President; SUSAN WILBUR, in her official capacity as Director of
Undergraduate Admissions; JUDY SAKAKI, in her official capacity as
Associate Vice President for Student Academic Services; ROBERT C.
DYNES, in his official capacity as President of the University of California;
and MARK RASHID, in his official capacity as Chair of Board of Admissions
and Relations with Schools;**
Defendants-Appellees.

**On Appeal from the United States District Court
For the Central District of California**

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,**
in support of Plaintiffs–Appellants
Urging Reversal

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, Virginia 23454
Phone: (757) 463-6133 Email: nlf@nlf.net

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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 university admissions should not be contingent upon a student's subscribing 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 Association of Christian Schools International, *et al.* ("ACSI"). Your *Amicus* will argue that the Defendants-Appellees University of California, *et al.* ("UC") has engaged in viewpoint discrimination against ACSI when it rejects certain course offerings based on their religious perspectives. Your *Amicus* will further argue that the discrimination excludes views well founded in the history and traditions of the United States.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING UC SUMMARY JUDGMENT BECAUSE IT FAILED TO PROPERLY CONSIDER THE MEANING OF THE EVIDENCE PRESENTED.

As ACSI has thoroughly argued, the court below erred when it found, *inter alia*, no genuine issue of material fact regarding the allegations of UC’s viewpoint discrimination arising out of its A-G Guidelines (the “Guidelines”).¹ ACSI has also thoroughly argued that the court below erred in applying a rational basis standard instead of strict scrutiny to evaluate ACSI’s viewpoint discrimination claims. Your *Amicus* will not reiterate those arguments here. Rather, your *Amicus* will demonstrate that, in spite of what UC has previously argued, (1) what its representatives have *said* illustrates a unique form of viewpoint discrimination that screens potential incoming students based on exposure to a point of view and not based on knowledge or skills they actually possess; and (2) the criteria in UC’s Guidelines stand in opposition to beliefs commonly held in American history.

¹ The “Guidelines” is short-hand for three aspects of one of UC’s admission processes—namely the process of evaluating students based on seven different categories of high school coursework (labeled A through G) via written guidelines, position statements, and form rejection language used when notifying a school a particular course is non-compliant with the guidelines. (Order, Mar. 28, 2008, at 6.)

- A. The court below erred in finding that UC was simply screening applicants according to reasonable standards of course content and student ability.

This case is not really about standards at all—if it were, UC would simply test the knowledge and skills of its incoming students with standardized tests and essays and admit them accordingly. Again, if this case were truly about standards, UC would screen its out-of-state applicants using the same rubric with which it screens its in-state applicants. (*See* Order, Mar. 28, 2008, at 3.) What this case is really about is a state actor (UC) seemingly attempting to bring the beliefs of incoming students, if not in conformity with UC, at least out of conformity with their forebears. The court below has concluded that the Guidelines are appropriately calculated to find students with good critical thinking skills, requiring that courses be taught with “pluralistic and inquisitive” approaches. (*See* Order, Mar. 28, 2008, at 9.) UC’s official statements notwithstanding, its approach serves to shield the fact that UC simply rejects certain religious worldviews and refuses to see the true pluralism and inquisitiveness that those religious perspectives add to university life.

Furthermore, this viewpoint discrimination is discrimination of a most peculiar kind—it penalizes students based on their *exposure* to a viewpoint, rather than on knowledge or competencies they fail to possess. In other settings, such exposure to alternative viewpoints may be applauded as open-minded or “good for

the youth” to learn about what others believe. However, here, UC’s rejection of such students based on their exposure to a limited viewpoint is similar to a graduate school refusing to admit someone who happened to take a course like Advanced Feminist Theory² at UC-Berkeley as an undergraduate student, because it failed to explore feminism through a “conservative” or religious lens or because it favorably viewed Marxism. Such a graduate school would rightly be criticized as confusing the motives and beliefs of the messenger (in the hypothetical, the UC Gender and Women’s Studies department) with the capabilities of the recipient (the applicant). One could easily respond that Marx and Freud and their ideological progeny are fertile fields for debate and critical thinking, and that students are challenged there to evaluate their world views. Your *Amicus* agrees with the premise that a person likely *would be* challenged to intellectually wrestle through a course such as Advanced Feminist Theory; but it also follows that students matriculating to UC from religiously viewpoint-based high school settings would be similarly challenged.

² Advanced Feminist Theory is part of the Gender and Women’s Studies program at the Berkeley campus being offered during the Spring 2009 semester. See http://womensstudies.berkeley.edu/documents/Spring_CL_2009.pdf (last visited January 31, 2009). The course description explains, in pertinent part, that “[f]eminist theory engages with many currents of thought such as liberalism, Marxism, psychoanalysis, postcolonial theory, and transnational feminist theory.” *Id.*

Put differently, and as will be discussed in more detail below, the issue is not really one of hostility to religious people in the traditional sense of the word, but rather one of the exclusion from higher education those arising from settings of traditionally religious worldviews. And this exclusion is based on nothing more than the fact that those religious worldviews have fallen out of favor with dominant viewpoints at UC. The underlying assumption from the lower court and UC's testimony seems to be that explicitly religious schools positing a "single, unassailable standard for evaluating government, truth, [etc.]" or attributing historical events to "divine providence," produce inferior students with inadequate thinking skills. (Order, Mar. 28, 2008, 9, 18, 41.)

The problem is, however, UC has not suggested that ACSI, or groups similarly situated, have actually produced academically inferior students to their public or non-religious private school counterparts. In fact, prior to 2004, UC did not routinely reject courses similar to those at issue here. (Appellants' Br. at 7.) The district court, therefore, erred in finding that UC's A-G policies and procedures rationally relate to its admission goals—to say nothing of a compelling state interest in setting those procedures. Instead, UC appears to have *a priori* rejected the notion that quality education producing quality students can unapologetically announce moral and historical absolutes. And such an *a priori*

rejection is viewpoint discrimination against many otherwise qualified potential students.

B. The views UC seeks to exclude are part and parcel of the religious heritage of the United States.

UC has stated unequivocally that it will not approve courses which instruct[] that the Bible is the unerring source for analysis of historical events, attributes historical events to divine providence rather than analyzing human action, evaluates historical figures and their contributions based on their religious motivations or lack thereof and contains inadequate treatment of several ethnic groups, women, and non-Christian religious groups.

(Order, Mar. 28, 2008, at 41.) Although not dispositive of the legal questions facing this Court, it is instructive that much of what UC rejects about a “religious” view of history was commonplace at this nation’s founding. The following quotes are simply the tip of the iceberg:

1. **John Adams, Inaugural Address, March 4, 1797:** Relying, however, on the purity of their intentions, the justice of their cause, and the integrity and intelligence of the people, *under an overruling Providence* which had so signally protected this country from the first, the representatives of this nation, then consisting of little more than half its present number, not only broke to pieces the chains which were forging and the rod of iron that was lifted up, but frankly cut asunder the ties which had bound them, and launched into an ocean of uncertainty.

And may that *Being who is supreme over all*, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, *continue His blessing* upon this nation and its Government and *give it all possible success* and duration *consistent with the ends of His providence*.

(http://avalon.law.yale.edu/18th_century/adams.asp (emphases added).)

2. **The Federalist Papers: No. 2:** It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, widespreading country was the portion of our western sons of liberty. *Providence* has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants. A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids, and the mutual transportation and exchange of their various commodities.

With equal pleasure I have as often taken notice that *Providence* has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

This country and this people seem to have been made for each other, and it appears as if it was the design of *Providence*, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.

(http://avalon.law.yale.edu/18th_century/fed02.asp (emphases added).)

3. **Thomas Jefferson, First Inaugural Address, March 4, 1801:** Let us, then, with courage and confidence pursue our own Federal and Republican principles, our attachment to union and representative government. Kindly separated by nature and a wide ocean from the exterminating havoc of one quarter of the globe; too high-minded to endure the degradations of the others;

possessing a chosen country, with room enough for our descendants to the thousandth and thousandth generation; entertaining a due sense of our equal right to the use of our own faculties, to the acquisitions of our own industry, to honor and confidence from our fellow-citizens, resulting not from birth, but from our actions and their sense of them; enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; *acknowledging and adoring an overruling Providence*, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter—with all these blessings, what more is necessary to make us a happy and a prosperous people?

(http://avalon.law.yale.edu/19th_century/jefinau1.asp (emphasis added).)

4. **Thomas Jefferson, Second Inaugural Address, March 4, 1805:**

I shall need, therefore, all the indulgence I have heretofore experienced—the want of it will certainly not lessen with increasing years. I shall need, too, *the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications, that he will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.*

(http://avalon.law.yale.edu/19th_century/jefinau2.asp (emphasis added).)

5. **George Washington, Thanksgiving Proclamation, October 3, 1789:**

Whereas it is the duty of all nations to acknowledge the *providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . .*

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that *great and glorious Being who is the beneficent author of all the good that was, that is, or that will be*; that we may then all unite in rendering unto Him our *sincere and humble thanks for His kind care and protection of the people of this country* previous to their becoming a nation; for the signal and manifold mercies and the favor, able *interpositions of His providence in the course and conclusion of the late war*; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, *in general, for all the great and various favors which He has been pleased to confer upon us.*

(http://avalon.law.yale.edu/18th_century/gwproc01.asp (emphases added).)

6. **George Washington, Farewell Address, 1796:** Who can doubt that, in the course of time and things, the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? *Can it be that Providence has not connected the permanent felicity of a nation with its virtue?* The experiment, at least, is recommended by every sentiment which ennobles human nature. Alas! is it rendered impossible by its vices?

(http://avalon.law.yale.edu/18th_century/washing.asp (emphasis added).)

The above quotes are not “ceremonial deism” or reflexive expressions like saying “God bless you” to someone who sneezes. They are serious reflections on God and his providential workings in the life of this nation. And this nation’s

founders are not the only ones to have engaged in these reflections. The Preamble to California's Constitution is similarly religiously transparent:

We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.

It is a strange irony that a school and its students in the twenty-first century would be penalized for reflecting on our history in a similar way.

One may argue that people of the United States have progressed beyond the crutch of religion and are more aware of the nuances behind the human cause of history. After all, many of those quoted above owned slaves, and would have said similar out-of-date things about people of color. The problem is, however, that the comparison does not work, unless the one arguing wants to equate faith and belief in God with racist convictions. That they are beyond comparison is evinced by the fact that the Thirteenth and Fourteenth Amendments have now been added to the Constitution, and that there is not a "Twenty-eighth Amendment" repealing the Free Exercise and Establishment Clauses of the First Amendment.

What is particularly discouraging is what UC's assumptions demonstrate about the nature of learning. Which type of student is most likely to engage in critical thinking, being forced to ask more questions in order to receive satisfying answers? Basic logic suggests that the one who faces the God of Creation and

must square the concept of *imago dei*³ with the prevailing scientific dogma that people evolved by chance through materialistic processes from single-celled organisms will have some hard thinking to do. Or what of the student who is taught that “we know that all things work together for good to them that love God, to them who are the called according to his purpose,” (Romans 8:28), and thereafter seeks to reconcile this teaching with the Holocaust or the Inquisition. Again, basic logic suggests that the student confronted with these weighty and significant matters will more likely be the one who actually will grapple and think critically, as opposed to the student whose teaching simply conforms neatly to the prevailing cultural and scientific norms with which he is exposed daily.

Simply put, UC rejects courses based on whether the viewpoint is acceptable. No place is that mindset more succinctly stated than in the district court’s own words. “Defendants [UC, *et al.*] explain that the *mention* of God in the explanation of a historical event does not ‘*automatically disqualify* a course for approval.’” (Order, Mar. 28, 2008, at 10 (quoting the declaration of James Given) (emphasis added).) But one wonders why anyone would even consider disqualifying a course because it merely mentions God in the explanation of a historical event.

³ *Imago dei*, Latin for “in the image of God,” refers to the belief that people were specially created in God’s image.

As stated previously, this case is not about standards—it is about whether there is still a place in the public square (or in this case the public university) for vibrant religious faith presented without apology. This Court can show that there still is.

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 4th day of February 2009

s/ Steven W. Fitschen
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2009, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Association of Christian Schs. Int'l, et al. v. Stearns, et al.*, No. 08-56320, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Christopher M. Patti
University of California
Office of the General Counsel
8th Floor
1111 Franklin Street
Oakland, California 94607-5200
Counsel for Defendants-Appellees

s/ Steven W. Fitschen
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Suite. 204
Virginia Beach, Virginia 23454
(757) 463-6133