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26 UNITED STATES DISTRICT COURT  
27 CENTRAL DISTRICT OF CALIFORNIA

28 ASSOCIATION OF CHRISTIAN  
SCHOOLS INTERNATIONAL, et al.,

Plaintiffs,

vs.

ROMAN STEARNS, et al.,

Defendants.

CASE NO. CV 05-06242-SJO (MANx)

**DEFENDANTS' REPLY  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT ON  
PLAINTIFFS' AS-APPLIED  
CLAIMS**

Date: July 18, 2008

Time: 10:00 a.m.

Room: Ctrm. 880

Judge: Honorable S. James Otero

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1 **I. INTRODUCTION**

2 Plaintiffs have tried to salvage their case by throwing a mountain of new  
3 evidence, mostly inadmissible, at this Court. Even if the Court considers all of it,  
4 there would still be no genuine issue about the reasonableness of UC's course  
5 decisions and Defendants would be entitled to summary judgment on Plaintiffs'  
6 purported as-applied claims, because the evidence would show at most that  
7 reasonable minds may differ about those decisions.

8 What Plaintiffs' opposition papers demonstrate, however, is that: (1) ACSI  
9 indeed lacks associational standing to raise as-applied claims on behalf of its  
10 member schools, because those claims require individualized proof; (2) Plaintiffs  
11 waived any as-applied claims about courses from schools other than Plaintiff  
12 Calvary Chapel, by failing to identify what courses were the subject of those claims  
13 at any time before submitting their new List of As-Applied Challenges ("Plaintiffs'  
14 List"); (3) even if Plaintiffs had not waived animus, which they did, Plaintiffs'  
15 current animus argument fails; and (4) in order even to hope to dispute the  
16 reasonableness of UC's course decisions, Plaintiffs realized they needed to offer  
17 extensive new expert testimony—all of which is inadmissible, because it was never  
18 disclosed pursuant to Rule 26 and for myriad other reasons, and, in any event, it  
19 does not create a genuine issue as to reasonableness.

20 **II. ARGUMENT**

21 **A. Plaintiffs Lack Associational Standing to Bring As-Applied Claims**  
22 **About Non-Calvary Courses.**

23 Plaintiffs do not dispute that they may bring as-applied claims about non-  
24 Calvary courses only if ACSI has associational standing. The third prong of the  
25 *Hunt* test for associational standing requires that "neither the claim[s] asserted nor  
26 the relief requested require[] the participation of individual members in the  
27 lawsuit." *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434,  
28 53 L. Ed. 2d 383 (1977). That prong is not satisfied here because both the "claims

1 proffered” and the “relief requested . . . demand individualized proof” from  
 2 individual schools. *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ.*  
 3 *Equity*, 950 F.2d 1401, 1408 (9th Cir. 1991) (“AGCC”).

4 **1. Seeking only equitable relief does not automatically satisfy *Hunt*.**

5 Plaintiffs err in arguing that the mere fact that they seek equitable as opposed  
 6 to monetary relief satisfies *Hunt*’s third prong. *See, e.g., Bano v. Union Carbide*  
 7 *Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (association did not “automatically  
 8 satisf[y] the third prong of the *Hunt* test simply by requesting equitable relief rather  
 9 than damages”); *Ga. Cemetery Ass’n v. Cox*, 353 F.3d 1319, 1322-23 (11th Cir.  
 10 2003) (no associational standing on injunctive claims requiring member  
 11 participation); *Am. Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 766  
 12 (N.D. Cal. 1989) (no associational standing for free exercise claims seeking only  
 13 equitable relief). Although some of the cases Plaintiffs cite held that an  
 14 organization’s request for equitable relief did not require individual proof from  
 15 members, those cases involved substantive claims that did not turn on individual  
 16 members’ circumstances and requests for generalized relief, not injunctions relating  
 17 separately to individual members. *See Alaska Fish & Wildlife Fed’n & Outdoor*  
 18 *Council, Inc. v. Dunkle*, 829 F.2d 933, 934-35 (9th Cir. 1987) (challenge to  
 19 allowance of subsistence hunting where neither claim nor relief turned on facts  
 20 about plaintiff conservation organization’s members); *Olagues v. Russoniello*, 770  
 21 F.2d 791, 801-05 (9th Cir. 1985) (challenge to government investigation of voter  
 22 registration where neither claim nor relief turned on any individual’s voter-  
 23 registration history or citizenship); *United States v. Comprehensive Drug Testing,*  
 24 *Inc.*, 513 F.3d 1085, 1103-13 (9th Cir. 2008) (challenge to government seizure of  
 25 confidential drug test materials where neither claim nor relief turned on any  
 26 individual player’s drug testing history).

27 **2. Individualized proof from ACSI members would be required here.**

28 Plaintiffs try to satisfy *Hunt*’s third prong by mischaracterizing their as-

1 applied claims as being “common to all ACSI schools—courses were rejected  
 2 because of adding the same single viewpoints . . . , contrary to UC rules and  
 3 policies.” *See* Pltfs’ Opp. Brief at 7-8. But that describes Plaintiffs’ *facial* claims,  
 4 which this Court has rejected, not Plaintiffs’ as-applied claims. Their as-applied  
 5 claims challenge UC’s “*application of the A-G Guidelines and Policies to specific*  
 6 *courses.*” *See* Mar. 28, 2008 S.J. Order at 37:9-12 (emphasis added). Those claims  
 7 and their requested relief *do* require proof of individual schools’ circumstances.

8 Plaintiffs’ own submissions demonstrate that even they realize that UC’s  
 9 paper files do not contain all the relevant information and that individualized proof  
 10 would be necessary here. Plaintiffs have submitted new affidavits from ACSI  
 11 member schools discussing 17 of the more than 41 courses on Plaintiffs’ List.  
 12 While these affidavits say the schools remain interested in a-g approval for 14 of  
 13 the courses,<sup>1</sup> they do not address many other individualized issues that would need  
 14 to be resolved on each of Plaintiffs’ as-applied claims. Far from curing ACSI’s lack  
 15 of associational standing, the affidavits illustrate the need for individualized proof  
 16 and therefore further demonstrate ACSI’s lack of standing.<sup>2</sup>

17 That Plaintiffs submitted evidence of the relevant schools’ interest in  
 18 obtaining a-g approval for only 14 of the courses proves that ACSI is not a proper  
 19 party to bring as-applied challenges on behalf of non-party schools. Even after  
 20 apparently attempting to provide individualized proof, Plaintiffs still have offered  
 21 no evidence whatsoever of schools’ interest in more than half of the courses on  
 22 Plaintiffs’ List. If the schools are still interested in obtaining a-g approval, then

23 \_\_\_\_\_  
 24 <sup>1</sup> The Fenderson Affidavit explains that Oaks Christian’s English 12 course has  
 25 already been approved. Fenderson Aff. ¶ 3. The Kellogg Affidavit discusses UC’s  
 26 denial of a-g approval for King’s Academy’s World History courses but does not  
 27 say whether the school is still interested in obtaining approval for those courses.

28 <sup>2</sup> All of the ACSI schools’ affidavits say that their graduates have attended UC.  
 That is precisely the sort of individualized proof UC would be entitled to elicit in  
 discovery and present *against* each school’s claim, because it undermines any  
 allegation by the school of burden or discriminatory exclusion by UC.

1 Plaintiffs' inability to offer proof of that fact demonstrates that ACSI cannot  
 2 adequately represent them in their absence.<sup>3</sup> If the schools are not still interested in  
 3 obtaining a-g approval for the specific courses at issue, then ACSI is not actually  
 4 representing the schools' interests here and is wasting this Court's time.<sup>4</sup>

5 **3. Plaintiffs' cases are not to the contrary.**

6 Plaintiffs' cases fail to support their argument that no individualized proof is  
 7 required here.<sup>5</sup> Those cases involved claims—generally, facial challenges—and  
 8 requests for relief that did not require individualized proof and so were not remotely  
 9 analogous to the as-applied claims and relief sought here. *See, e.g., Hunt*, 432 U.S.  
 10 at 339 (challenge to state statute that discriminated against apples imported from  
 11 Washington that did not turn on any individual apple grower member's particular  
 12 circumstances); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers*  
 13 *v. Brock*, 477 U.S. 274, 287, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986) (facial  
 14

15 <sup>3</sup> ACSI's inability to represent its member schools in their absence is further  
 16 confirmed by Plaintiffs' frivolous assertions that Dr. Stotsky did not match  
 17 rejection forms to the wrong course applications, *see* Opp. at 18, nn.8 & 9;  
 18 insistence that they are challenging the rejection of a Bethel Baptist biology course  
 19 that was never in fact rejected, *see id.* at 21 n.13; and inaccurate description of the  
 20 events leading to the approval of Saddleback Christian's biology courses, *id.* n.14.  
 21 *See* Second Costales Decl. ISO Defs' Mot. for SJ on As-Applied Claims ¶¶ 2-22.

22 <sup>4</sup> In an apparent admission that not all of the schools do still want to teach the  
 23 courses on Plaintiffs' List, Plaintiffs claim that unanimous agreement of ACSI's  
 24 members with ACSI's litigation positions is not required. Opp. at 12. In support,  
 25 Plaintiffs cite *AGCC*, 950 F.2d 1401, which held that members do not have to  
 26 unanimously support an organization's *facial* challenge to a statute for the  
 27 organization to have associational standing. *Id.* at 1409. That holding in no way  
 28 suggests that ACSI has standing to bring *as-applied* claims on behalf of individual  
 members who do not support those claims, seeking relief *for the individual*  
*members* that the members themselves *do not want*.

<sup>5</sup> Defendants nowhere argued that "speech and equal protection claims always  
 require individual participation," *contra* Opp. at 8, although the Supreme Court *has*  
 indicated that free exercise claims will always require individual participation. *See*  
*Harris v. McRae*, 448 U.S. 297, 321, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980)  
 ("Since it is necessary in a free exercise case for one to show the coercive effect of  
 the enactment as it operates against him in the practice of his religion" free exercise  
 claims "ordinarily require[] individual participation.") (internal citations omitted).

1 challenge to agency interpretation of Trade Act presented “a pure question of law”  
2 that could be resolved without “consider[ing] the individual circumstances of any  
3 aggrieved . . . member”).<sup>6</sup>

4 Plaintiffs’ citations also fail to support their argument that the need for  
5 individualized proof does not defeat associational standing. Opp. at 7. In *Playboy*  
6 *Enterprises, Inc. v. Public Service Commission of Puerto Rico*, 906 F.2d 25 (1st  
7 Cir. 1990), associational standing depended on “individualized proof” only that  
8 each member cable operator had designated a television channel as a “leased  
9 access” channel, which was a simple, uncontested issue. *Id.* at 35-36. The legal  
10 claim itself involved a pure “question of law . . . not particular to each member,”  
11 and the plaintiff sought generalized relief. *Id.* Here, in stark contrast, Plaintiffs’ as-  
12 applied claims *and* requests for relief turn on the nature of each individual course  
13 and the circumstances of each individual school and its curricular plans, and each  
14 injunction would be targeted at a particular course. In *Hospital Council of Western*  
15 *Pennsylvania v. City of Pittsburgh*, 949 F.2d 83 (3d Cir. 1991), a hospital  
16 association had standing to challenge a local government practice of “forc[ing] tax-  
17 exempt member hospitals to make payments” or face sanctions. *Id.* at 85. There, the  
18 equitable relief sought was equivalent to facial invalidation of a statute—it would  
19 have benefited all members simultaneously and in the same manner by ending the  
20 government practice, and it did not require any individual participation. *Id.* at 89.  
21 The court noted that testimony from *some* members would be necessary, but only to  
22 establish the existence of the practice challenged on its face; here, in contrast, the

23 <sup>6</sup> See also *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 11, 108 S. Ct. 2225, 101  
24 L. Ed. 2d 1 (1988) (organization brought “suit challenging the constitutionality of  
25 [a local antidiscrimination] Law *on its face* before any enforcement proceedings  
26 were initiated against any of its member[s]”; resolution did not require  
27 consideration of any individual member’s circumstances) (emphasis added); *Boston*  
28 *Stock Exch. v. STC*, 429 U.S. 318, 320, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977)  
(facial Commerce Clause challenge to state tax laws requiring no analysis of  
individual members’ circumstances); *AGCC*, 950 F.2d at 1405 (facial challenge to  
affirmative action law that did not turn on facts about individual members).

1 participation of all schools whose courses are on Plaintiffs' List would be required.  
 2 *See also Int'l Bhd. of Teamsters v. Am. W. Airlines, Inc.*, No. CIV-95-2924, 1997  
 3 WL 809760, at \*3-5 (D. Ariz. Sept. 25, 1997) (rejecting associational standing  
 4 because claims depended on whether individual members "indeed felt coerced").<sup>7</sup>

5 **4. UC did not waive its associational standing objections.**

6 Plaintiffs argue that UC waived any objection to ACSI's associational  
 7 standing. But the Ninth Circuit has not treated *Hunt's* third prong as waivable,  
 8 instead reviewing challenges to associational standing, including specifically  
 9 whether an organization satisfied *Hunt's* third prong, even when standing had not  
 10 been raised in the district court. *See AGCC*, 950 F.2d at 1405, 1408; *see also, e.g.*,  
 11 *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994)  
 12 ("Standing, whether constitutional or prudential, is a jurisdictional issue which  
 13 cannot be waived or conceded."); *Thompson v. County of Franklin*, 15 F.3d 245, 248  
 14 (2d Cir. 1994) (same).<sup>8</sup> Moreover, even if *Hunt's* third prong could be waived, UC  
 15 raised Plaintiffs' lack of associational standing at the first opportunity. As explained  
 16 in more detail below, *see infra* section II.B, Plaintiffs had never raised as-applied  
 17 claims about non-Calvary courses until they produced Plaintiffs' List on May 1,  
 18 2008. Contrary to Plaintiffs' arguments, while the Complaint refers generally to  
 19 "Christian Schools" when describing UC's *policies* (which were challenged on their

20 <sup>7</sup> Defendants do not agree with Plaintiffs' assertion that the cases they cite in  
 21 section I.C.8 found associational standing for as-applied claims. *See Opp.* at 10-11.  
 22 In any event, even if there could be associational standing to raise as-applied claims  
 23 that do not in fact require individualized proof, that would not mean ACSI has  
 standing to bring *these* as-applied claims, for which both the claims and the relief  
 sought require individualized proof.

24 <sup>8</sup> Plaintiffs argue that, because the third prong of *Hunt* is prudential, it can be  
 25 waived. *United Food & Commercial Workers Union Local 751 v. Brown Group,*  
 26 *Inc.*, 517 U.S. 544, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996), the sole basis for  
 27 Plaintiffs' argument, held only that Congress may grant standing to organizations  
 28 that would otherwise fail *Hunt's* third prong. *Id.* at 558; *see also Or. Advocacy Ctr.*  
*v. Mink*, 322 F.3d 1101, 1113 (9th Cir. 2003) (association had standing because  
 federal statute had "abrogated the third prong of the *Hunt* test"). Plaintiffs can point  
 to no statutory grant of associational standing here.

1 face), it nowhere identifies courses from schools other than Calvary as the subject  
 2 of any as-applied claims. *See, e.g.*, Compl. ¶ 67.<sup>9</sup>

3 **B. Plaintiffs Waived Any Claims About Non-Calvary Courses.**

4 Both sides have long known which ACSI courses were not approved for a-g  
 5 credit, but it was not until May 1, 2008—almost a year after the close of  
 6 discovery—that Plaintiffs disclosed which of those hundreds of course decisions  
 7 they claim violated the Constitution. Plaintiffs argue that six earlier “disclosures”  
 8 sufficiently informed UC of ACSI’s as-applied claims—including UC’s own  
 9 document production and UC’s own selection of exhibits for use in taking  
 10 depositions. *See Opp.* at 12-14. Even by Plaintiffs’ description, however, five of  
 11 these purported “disclosures” did not mention all of the courses on Plaintiffs’ List;  
 12 only UC’s comprehensive document production contained information relating to  
 13 all of the courses. *Id.* Moreover, each of these “disclosures” contained many course  
 14 rejections other than those on Plaintiffs’ List. *See, e.g.*, Jones Decl. ¶¶ 3-8  
 15 (Defendants’ production of documents shows that at least 175 courses from ACSI  
 16 schools were denied a-g approval from 2003-2005, but only 25 of those are on  
 17 Plaintiffs’ List). There is thus no way UC could have discerned which courses were  
 18 the subject of Plaintiffs’ as-applied claims and which were not. Plaintiffs’  
 19 arguments absurdly suggest that UC should have taken discovery of every ACSI  
 20 member school that had any course rejected since 2003, because the fact that  
 21 documents relating to all such rejections were produced by UC in this litigation put  
 22 UC on notice that those rejections were being challenged—even though only about  
 23 1/7 of those rejections are now on Plaintiffs’ List (and the ACSI schools in question  
 24 apparently care about fewer than half of those). *See id.*

25  
 26  
 27 <sup>9</sup> Plaintiffs’ argument that UC’s course rejections are continuing violations and so  
 28 none of their claims are time barred is defeated by *Ledbetter v. Goodyear Tire &  
 Rubber Co.*, 127 S. Ct. 2162, 2166-72, 167 L. Ed. 2d 982 (2007).

1 **C. There Is No Genuine Issue as to the Reasonableness of UC's Course**  
2 **Decisions.**

3 **1. Plaintiffs waived any animus argument, and their current animus**  
4 **argument fails in any event.**

5 Plaintiffs wrongly claim that they did not waive any argument based on  
6 animus when they told this Court that they did “not intend to argue the case based  
7 on proving animus.” Opp. at 2. Plaintiffs now assert that they meant only that  
8 animus should not be “the standard,” *id.*, but this is flatly contradicted by the  
9 record. First, Plaintiffs argued in their motion for summary judgment that UC  
10 “shows hostility toward . . . religious schools” and cited purported evidence of such  
11 animus. *See* Pltfs. Mot. at 24-25. Then, this Court issued an order instructing the  
12 parties to be prepared to address “whether the UC regulations were implemented  
13 because of animus towards religion.” Minute Order Feb. 8, 2008. At oral argument,  
14 this Court then twice asked Plaintiffs whether there was any “evidence in the record  
15 of animus?” *See* Tr. 38:20-22, 40:10-11. Both times, Plaintiffs’ counsel responded  
16 unequivocally that Plaintiffs were not going to argue animus. *Id.* at 39:13-14 (“We  
17 do not intend to argue the case based on proving animus.”); 40:13-15 (“[W]e have  
18 cited in our brief the primary evidence that would support a finding of animus. We  
19 are not doing so to argue animus.”). This was undoubtedly a waiver of any  
20 argument that there is sufficient evidence in the record to find animus, not a  
21 statement about what standard should apply.

22 Waiver aside, all Plaintiffs now argue is that this Court should infer animus  
23 from course rejections purportedly made pursuant to a policy of rejecting courses  
24 that teach “standard content” but add a single religious viewpoint. *See* Opp. at 2,  
25 15-16. This Court has already held that such a policy does not exist. S.J. Order at  
26 38:1-4. To the extent that Plaintiffs are making a veiled request for reconsideration  
27 of that ruling, they do not and cannot justify such a request. *See* L.R. 7-18  
28 (reconsideration requires “(a) a material difference in fact or law from that

1 presented to the Court before such decision that in the exercise of reasonable  
2 diligence *could not have been known to the party moving for reconsideration at the*  
3 *time of such decision*, or (b) the emergence of new material facts or a change of law  
4 *occurring after the time of such decision*, or (c) a manifest showing of a failure to  
5 consider material facts presented to the Court before such decision”) (emphasis  
6 added). Moreover, Defendants’ experts’ reports demonstrate that it was reasonable  
7 to believe the courses at issue would not prepare students for UC, so the premise of  
8 Plaintiffs’ animus argument—that good courses were rejected (and so a nefarious  
9 motive should be inferred)—is false.

10 **2. Plaintiffs’ experts’ new opinions are inadmissible and would not**  
11 **create a genuine issue as to reasonableness anyway.**

12 Plaintiffs have submitted five new affidavits from their designated experts.  
13 The affidavits are inadmissible for many reasons, *see* Defendants’ Objections to  
14 Plaintiffs’ Purported Expert Affidavits, including: (1) The opinions were not  
15 disclosed as required by Federal Rule of Civil Procedure 26(a)(2)(B). *See Wong v.*  
16 *Regents of the Univ. of Cal.*, 379 F.3d 1097, 1103-05, 1110 (9th Cir. 2004)  
17 (excluding expert testimony for violation of Rule 26(a) and granting summary  
18 judgment where opposing party’s argument depended upon the excluded  
19 testimony), *amended & superseded on other grounds*, 410 F.3d 1052 (9th Cir.  
20 2005). (2) The purported experts lack expertise in the fields about which they opine  
21 or have views so outside the mainstream of the relevant field as to be unreliable.  
22 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594, 113 S. Ct. 2786, 125  
23 L. Ed. 2d 469 (1993) (including in “reliability assessment” for admissibility under  
24 Rule 702 “identification of a relevant scientific community and . . . degree of  
25 acceptance within that community”). (3) The opinions address issues this Court has  
26 already decided and so are irrelevant. (4) The Affidavits contain numerous  
27 assertions of fact that entirely lack foundation and make arguments on subjects  
28 outside any conceivable area of proper expert testimony. (5) Dr. Stotsky’s new

1 opinions about the A Beka American Literature anthology and the Calvary English  
2 course contradict her deposition testimony. *United States v. TRW Rifle*, 447 F.3d  
3 686, 692 n.10 (9th Cir. 2006) (“[A party] cannot create a genuine issue of material  
4 fact by submitting a contradictory declaration [from his expert], which appears to  
5 be offered to avoid summary judgment.”).

6 Finally, even if this Court were to consider the new expert opinions, there  
7 would still be no genuine issue as to reasonableness. In *Regents of the University of*  
8 *Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985), the  
9 Supreme Court directed courts not to override university educators’ professional  
10 judgments unless they reflect “such a substantial departure from accepted academic  
11 norms as to demonstrate that the person or committee responsible did not actually  
12 exercise professional judgment.” *Id.* at 225. Defendants’ experts, unquestioned  
13 leaders in the relevant fields, have provided detailed opinions why UC’s decisions  
14 were correct and reasonable.<sup>10</sup> Even if Plaintiffs’ new expert affidavits were  
15 admissible, they would at most demonstrate that reasonable minds could differ  
16 about the textbooks and courses. This would not create a genuine issue whether  
17 UC’s decisions were reasonable—the only issue before the Court. *See Reynolds v.*  
18 *County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996) (“The fact that an expert  
19 disagrees with an officer’s actions does not render the officer’s actions  
20 unreasonable.”), *overruled on other grounds by Acri v. Varian Assocs., Inc.*, 114  
21 F.3d 999 (9th Cir. 1997).

22 DATED: July 7, 2008 MUNGER, TOLLES & OLSON LLP  
23  
24 By: /s/ Michelle Friedland  
Michelle Friedland  
25 Attorneys for Defendants  
26

27 <sup>10</sup> Defendants’ expert reports did not address the textbooks used in or syllabi from  
28 every course on Plaintiffs’ List because Plaintiffs had not put the non-Calvary  
courses at issue at the time Defendants’ expert reports were due.