

No. 08-56320

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

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**ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, et al.,**

**Plaintiffs-Appellants,**

**v.**

**ROMAN STEARNS, et al.,**

**Defendants-Appellees.**

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On Appeal from the United States District Court  
for the Central District of California

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**BRIEF OF APPELLANTS**

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**CORPORATE DISCLOSURE STATEMENT**

Calvary Chapel Christian School is a division of Calvary Chapel of Murrieta, Inc. (“CCM”). No corporate appellant (neither CCM nor ACSI) has any parent corporation or any publicly held corporation that owns 10% or more of its stock.

### **STATEMENT OF JURISDICTION**

The district court had subject matter jurisdiction under 28 U.S.C. §1331. The final judgment was appealable under Fed.R.Civ.P. 54(b) and 28 U.S.C. §1291. Judgment was entered August 8, 2008, and the notice of appeal was filed that same day, under Fed.R.App.P. 4(a). This Court has jurisdiction under 28 U.S.C. §1291.

### **REVIEWABILITY AND STANDARD OF REVIEW**

The issues arise from two summary judgment rulings and the final judgment, which disposed of the parties' claims. (ER21, 1, 29.)

The standard of review is *de novo* for summary judgment (all issues, and for denial of associational standing. *Menotti v. City of Seattle*, 409 F.3d 1113, 1119 (9th Cir.2005); *Plans, Inc. v. Sacramento City Unified Sch.Dist.*, 319 F.3d 504, 507 (9th Cir.2003).

### **STATEMENT OF RELATED CASES**

No other cases in this Court are deemed related.

### **STATEMENT OF THE ISSUES**

This case involves University of California's ("UC") claim that it can prohibit private high schools from adding religious viewpoints to standard content and can discriminate in its admissions process against courses adding those prohibited viewpoints, if the schools' graduates are to be eligible for regular admission to California public universities.

In upholding UC's claim, the district court blazed a new trail around the First Amendment and eviscerated its protections of religious speech by erroneously creat-

ing new sub-First Amendment status for added religious viewpoints. It did so by erroneously holding that:

I. A state university may conduct viewpoint discrimination in admissions and in self-appointed review of private high school courses, by rejecting courses with added religious viewpoints and disqualifying the majority of students who take them, despite approving courses with added secular viewpoints.

II. A state university can employ viewpoint discrimination through its policy and practice, evidenced by its course rejections, and statements that, facially and as applied, violate the First Amendment, so long as it gives post hoc explanations in an attempt to sanitize its discrimination.

III. A state university's viewpoint discrimination merely must meet the rational basis test to be upheld, and need not satisfy strict scrutiny.

IV. First Amendment protections are each reinterpreted constrictively, particularly for religious speech, so they do not restrict viewpoint discrimination against religious viewpoints.

Further, the district court erred in holding that:

V. One of the nation's two largest organizations of religious schools is denied standing to represent its members, contrary to the *Hunt* test.

VI. The 150 rejections of courses with an added religious viewpoint provided to the district court are excluded from consideration, contrary to the overbreadth doctrine, among other things, and much of plaintiffs' affidavits are excluded while UC's

declarations contrary to sworn deposition testimony are considered.

VII. Costs are awarded to UC.

## **STATEMENT OF THE CASE**

The nature of the case is a First and Fourteenth Amendment challenge to UC's discrimination against religious viewpoints added by private religious schools to standard content in courses. It is brought by one of the two largest school organizations in the nation, Association of Christian Schools International (ACSI), and a member school, Calvary Chapel Christian School and several of its students (Calvary).<sup>1</sup>

The final judgment followed two rulings granting UC's motions for summary judgment. (ER21,1,29.)

## **STATEMENT OF RELEVANT FACTS**

UC asserts the power to review and approve or reject courses in private as well as public schools (§1.A), to determine whether graduating high school students will be allowed to apply and be considered for regular admission (§1.B). In 2004, UC changed its policies to begin rejecting courses with standard content that add a religious viewpoint (§1.C) in all subjects including religion and ethics, history-social science, English, physics, and biology (§2.A-F), although it allows nonreligious viewpoints (§2.G-H) to be added to standard content.

### **1. UC'S REQUIREMENT FOR APPROVED COURSE DESCRIPTIONS FOR REGULAR ADMISSION.**

#### **A. UC's Unique Review of Private and Public School Course Descriptions**

California is the only state, and UC is the only university, that reviews and either

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<sup>1</sup> Plaintiffs are referred to jointly as "ACSI". ACSI encompasses over 4000 re-

approves or rejects high school course descriptions to determine if they will count toward the required four years of courses for regular admission (described in §1.B) to its state universities (both the ten campuses of UC and the two-dozen campuses of California State University (“CSU”). (ER1048, 1406.) The required high school courses are 16 year-long courses, of which 15 must be approved by UC in the “a-g” subject areas. (ER1436.)<sup>2</sup>

California is also the only state, and UC is the only university, that requires submission by religious and other private schools of course descriptions for this review, if they want their students to be eligible for regular admission at any public university (UC and CSU<sup>3</sup>) campuses. (ER1048.)

However, UC does not find these requirements or this review sufficiently important to require it for out-of-state applicants or foreign applicants. (ER33, described in §III.B.) UC officials candidly admit the evidence is “fairly weak” that grades in approved courses show a student is academically prepared for UC. (ER1614.)

UC only reviews summary course descriptions (typically a few pages), not actual courses, classes or teachers, and only “occasionally” texts (ER33). As the district court acknowledged, “UC does not interview the teachers, observe classroom instruc-

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ligious schools nationally and over 800 in California, in 110 denominations. (ER1519.)<sup>2</sup> Those approved year-long courses are (a) 2 history-social sciences, (b) 4 English, (c) 3 mathematics, (d) 2 laboratory sciences, (e) 3 in languages, (f) 1 arts, and (g) 1 elective. (ER1436.) UC is not unusual in requiring those subject areas, but is unique in reviewing and approving each course description.

<sup>3</sup> CSU requires 15 full-year courses in those areas, and follows UC approvals or rejections. (ER1406.)

tion, or test the students.” (*Id.*)<sup>4</sup>

This review is by UC staff reviewers under the supervision of UC’s Vice President for Admissions, Susan Wilbur. (ER961-62.) It is not by faculty members, except in the rare cases when they are sent a questioned course. (ER1459.)

## **B. Regular Admission and Its Requirement of 15 Approved A-G Courses, and Exceptional Admission to UC**

Regular admission is also called statewide eligibility or local eligibility. “[M]ost students (92.5%...) achieve eligibility through the statewide path,” and 6.3% do so through local eligibility only. (ER1446.) Both require students to have “15 yearlong high school courses” approved in “a-g subjects.” (ER1443.) Thus, UC says 98.8% of its admitted students achieve eligibility through regular admission (ER1446), though a limited number also have high enough test scores to achieve “eligibility by examination” alone (by which about 1% are eligible and admitted, ER1441, 1446).<sup>5</sup> Fewer than 1% are eligible and admitted through “admission by exception” (ER31, “Path 4,”

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<sup>4</sup> The staff reviewers only have a page of general principles per subject under the A-G Guide (*e.g.*, ER1408-14), so “the guidelines are relatively general and thus require staff to use judgment” (ER1457-58, 636-37). One reviewer noted the “problem” that “[t]he faculty guidelines defining the ‘a-g’ requirements are quite general and do not adequately define what students should know and be able to do in order to be ‘college ready.’” (ER1623.) The coordinator and senior reviewer admitted that nothing limited their discretion. (ER843-44, 692-93.) Reviewers do not use the California State Board of Education Standards or any other printed list of required content (ER1690, 843-844, 845-46, 692-93), except that one reviewer has half-page lists for biology and physics (ER1475-76A). Their review of course descriptions cannot discern whether the course will be taught well or poorly; a course with a bad outline could be taught well, or a course with a good outline could be taught poorly. (ER922A-B. See also, ER899-901.) This is not an accurate way of judging whether content is taught or whether students learn, and is like judging a book by its cover. (ER1048, 408-410.)

<sup>5</sup> Regular admission brings in 98.8%. (ER1446.) The district court used an 82% figure for those admitted “only” by regular admission (ER31&n.2) by subtracting the 16% whose scores could have qualified also for admission by examination alone.

which is for athletes, artists, disadvantaged, etc., ER1437).

The court asserted that if “a student attend[ed] a religious school that does not offer approved courses in the A-G Subjects, that student may demonstrate proficiency in a number of alternative ways.” (ER55.) What the court did not say is that such a student is ineligible for regular admission to UC and CSU, and that the “alternative ways” are much more difficult to meet. Requiring religious school students whose courses were disqualified by added religious viewpoints to meet the narrow exceptions or undertake the seldom-used additional SAT II exams (ER32) for each rejected course is discriminatory and resembles 1960s literacy tests (ER612-613).

### **C. UC’s Change of Policies for Course Description Review in 2004**

UC began rejecting courses with added religious viewpoints on a significant scale in 2004. It began enforcing UC’s Policy on Religion and Ethics Courses (ER1485) under a “recent policy clarification” (ER2413), and issued “UC Position Statements” on “history courses from a Christian perspective” (July 2004, ER1996-99) and on “Science Courses Taught from Textbooks from Selected Christian Publishers” (May 2004, ER1477-82). UC slowed implementation when this suit was filed in August 2005 and ceased revoking already-approved courses.

UC’s rejections for added religious viewpoints were not for lack of standard content, because UC did not give that as the basis (*e.g.*, ER1981, 1983, 1991, 1994, 2000, 2009-10, 2016, 2018-19, 2022-25, 2035-37, 2049, 2061, 2077, 2111. *See* CR220, Ex.605-

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(ER32 n.3.) UC only uses 98.9%.

647;CR224, Ex.670-750)<sup>6</sup>, and because UC approves the rejected course descriptions only when one change is made: the references to added religious viewpoints are removed (*e.g.*, ER2025-45, 2061-76, 2131-72, 2177-92). In other words, the courses had the same standard content before rejection and after approval.

ACSI became concerned about rumors of UC's policy change, as the second largest religious school organization in the country. It appealed to UC to reconsider in 2004, but UC declined. (ER1519-29.) California Association of Private School Organizations, the largest in-state private school organization, also became concerned and appealed for reconsideration (ER1452-53), and Catholic law professors later filed an amicus brief (CR111).

ACSI member schools, and many Catholic and Jewish schools, believe that their religious viewpoints should be added to standard content in each class—that is their purpose for existence. (ER733, 643-44, 617, 736.) That does not diminish the teaching of standard content. (ER610.) ACSI schools in California teach standard content such as that required by the California Standards (ER736), and nearly all have WASC regional accreditation which is often granted “collaboratively” with ACSI's accreditation (ER734).

If religious schools cannot get and keep UC approval of the required 15 courses in a-g areas, their students become ineligible for regular admission to UC and CSU.

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<sup>6</sup> “CR” refers to the full Clerk's Record, identified by docket number, exhibit and page numbers, as necessary.

(ER1467-68, 1478-79, 1484, 1530-31, 1685.) Eligibility is important, especially since UC touts its academic excellence and its low in-state tuition. (ER1456.) ACSI filed this suit to protect the rights of religious schools and students to have courses with added religious viewpoints, without being denied credit by UC because of those viewpoints, and without being denied eligibility for regular admission to all California's universities. (ER1296.)

**2. UC'S REJECTION OF COURSES WITH STANDARD CONTENT IF THEY ADD A RELIGIOUS VIEWPOINT.**

California is also the only state, and UC is the only university, that rejects courses in nonpublic schools if they add a single religious viewpoint, regardless of whether those schools do in fact teach standard content. (ER1048, 1485, 1493.)

The district court erred in denying that UC has a policy or practice of doing this. Rather than noting the "more than 150 courses rejected by UC" because of what ACSI claimed were "unconstitutional policies" (ER67-68), or acknowledging that a factual dispute exists (it asserted "the evidence establishes otherwise" (ER37)), the court simply pronounced that "these policies did not exist" (ER68) and that a "well-established practice" did not exist (ER39-41). It relied on UC declarations even though they contradict UC's deposition testimony. (*E.g.*, ER963-64, 966-69.)

The court did recognize that it "must consider the [UC]'s authoritative constructions of the ordinance, including its own implementation and interpretation of it," and including any "well-established practice" as well as policies. (ER36.) *Accord Forsyth*

*County v. Nationalist Movement*, 505 U.S.123, 131 (1992); *City of Lakewood v. Plain Dealer*, 486 U.S.750, 770 (1988); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir.2006); *Menotti*, 409 F.3d at 1147; 42 U.S.C. §1983 (“custom, or usage”).

The following summarizes what is overwhelming evidence of UC’s “implementation” and “well-established practice” of rejecting courses that add a single religious viewpoint, in addition to “the more than 150 courses” rejected (*see* ER443-86) and three UC Position Statements (ER1477-86).

**A. UC Admitted that Its Practice or Policy Is To Reject Courses for Adding a Single Religious Viewpoint to Standard Content**

(i) UC’s Vice President in charge of course review and admissions practices is Defendant Susan Wilbur. Her testimony admitted frankly that UC’s policy or practice is to reject courses in all subject areas, regardless of standard content, if they add a single religious viewpoint (she subsequently modified her position in a contrary post-discovery declaration):

Q Would you approve or disapprove a ‘d’ science course if it gave a Christian religious perspective on the subject matter? . . .

[Objection.]

THE WITNESS: If that was the only perspective that was offered, we would not approve the course.

Q BY MR. BIRD: And would you approve an ‘a’ history or social science course if it gave a Christian perspective on the subject matter?

[Objection.]

THE WITNESS: If that was the only perspective that was offered, we would not approve it.

Q BY MR. BIRD: And would you approve an English course for a-g credit if it gave a Christian perspective on the subject matter?

[Objection.]

THE WITNESS: If that was the only perspective that was offered, we would not approve the course.

Q BY MR. BIRD: And is the same true for *an elective under the 'g' category*?

[Objection.]

THE WITNESS: Yes.<sup>7</sup>

(ER963-64. *Accord* ER966-69.) UC staff reviewers stated the same practice or policy (ER392-405), as did UC faculty reviewers and expert witnesses (ER936, 939-43(religion); ER848-49, 852(history); ER910(history); ER784-86(biology)). UC also admitted this practice or policy in its briefs (ER1181-82), and in its course rejection language (ER443-86).

(ii) This practice or policy was used in the “150 courses rejected.” Even courses on the Holocaust have been rejected for adding only a Jewish viewpoint: UC’s official reasons were that the course “need[ed] to include a different **perspective** and a broader **viewpoint**” (ER2244), and “[n]eed[ed] to expand the **perspectives** for this course” (ER2400). UC’s internal reason was that they were “too slanted towards Holocaust with no other **perspective.**” (ER2411.) As discussed below, religion and ethics elective courses are rejected if added content is “limited to one... **viewpoint,**” under UC’s Statement on Religion and Ethics Courses. (ER1485.) History courses are rejected if added content is “limited to one ... **viewpoint.**” (ER1996.) Biology courses are rejected if their “content ... is not consistent with the **viewpoints** and knowledge generally accepted.” (ER1677-84, 1498.)

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<sup>7</sup> Emphasis in all quotations is added unless otherwise indicated.

UC's rejections are not just of Protestant school courses, but include numerous Catholic (ER461, 465, 470-77, 483-85, 751-58, 2322-93) and Jewish school courses as well (ER461, 475, 477-81, 485-86, 759-65, 2238-63, 2411-2412; CR224, Ex.723-35).

The court's disregard for this policy or practice was based primarily on UC approval of "many high school courses that include religious material and viewpoints." However, UC states it will only approve courses adding multiple religious viewpoints (§2.H), and will continue to reject courses adding the single religious viewpoint of the sponsoring religion. (Many single viewpoint courses were approved before summer 2004, because UC rarely implemented its practice before then; and UC slowed implementation and ceased to revoke already-approved courses after suit was filed in 2005.)

Surprisingly, the court acknowledged that UC's policies did include its Statement rejecting courses with added material "limited to one denomination or **viewpoint**" (ER73), and UC's "form rejection language" for religious school courses (ER41,36). UC's form rejection language addressed courses with added "**content**" that is "not consistent with the viewpoints and knowledge generally accepted" (*i.e.*, an added minority viewpoint). (ER1488-89, 1493-94.) UC only used that language in rejecting religious school courses. (ER780.)

**B. It Is Undisputed that UC's Policy "Statement on Religion and Ethics Courses" Rejects Elective Courses for Adding a Single Religious "Viewpoint"**

UC requires and grants credit for elective courses, including religion or ethics courses.

(i) Nevertheless, UC's "Statement on Religion and Ethics Courses" expressly re-

jects courses with added material “limited to one denomination or **viewpoint**.” (ER1485.) UC interprets the Statement to mean exactly that, by its course rejections.

The lower court agreed that the Statement is a UC policy. (ER73, 36.) Besides the Statement, UC follows the rule that “Religion courses that support only one denomination or **view** are not appropriate” for approval. (ER1688B. *E.g.*, ER1688A, 1722, 2332, 2415, 2417, 2437.) Courses are rejected if they add a single religious viewpoint. (ER941-43, 963-64.)

(ii) UC rejected a large number of such elective courses because, despite their standard content, they added a religious viewpoint—whether Catholic, (ER461, 465, 470-77, 483-85, 751-58, 2322-93), Jewish (ER461, 475, 477-81, 485-86, 759-65, 2238-63, 2411-2412; CR224, Ex.723-35), or Protestant (ER443-60, 462, 465, 468-69, 481-82, 486, 766-77, 2193-2204; CR220, Ex.642-646, CR224, Ex.736-740). UC rejected many “excellent” or “extraordinary” courses on that ground (ER861-81). The rejections often are phrased as “too narrow in its theological scope” (ER2376), or having “Focus too narrow” (*e.g.*, ER1722, 2393-94, 2400, 2415), which for UC means that the “viewpoint is too narrow” (ER1722, 2368). The court conceded that the “majority of courses that Plaintiffs claim were unconstitutionally rejected were rejected under the UC Policy on Religion and Ethics Courses” (ER73)—and then inexplicably denied that a policy or practice existed for rejecting standard courses adding “a single religious viewpoint” (ER39).

(iii) By contrast, UC regularly approves elective courses taught from a single secu-

lar viewpoint. (ER1469.) Examples are “Feminist Issues Throughout U.S. History,” “Women’s Studies and Feminism,” “Diversity Studies,” “Post Modern Questions in Art,” and “Multicultural Perspectives.” (*Id. E.g.*, CR223Ex.751.)

**C. It Is Undisputed that UC Rejects History and Social Science Courses for Adding a Religious Viewpoint or “Attributing Historical Events to Supernatural Causes”**

**1. Prohibition against Added Religious Viewpoints**

UC follows that practice or policy to reject history-social science courses that add a religious viewpoint.

(a) UC’s Vice President in charge of course review and admissions policy, Wilbur, testified that UC’s policy or practice is that the “study of U.S. history from a religious perspective” would not be acceptable if it were “limited to one denomination or viewpoint,” but that it must cover multiple viewpoints or “multi-denominational religious influences on U.S. history” to be acceptable. (ER1996.) Courses adding a single religious viewpoint are rejected. (ER966, 969, 910.)

Thus, UC has form language to reject “History courses from non-secular schools with inappropriate texts and curriculum”:

The *content* of the course outlines submitted for approval is not consistent with the empirical historical knowledge generally accepted in the collegiate community.

(ER1489.) A BOARS member demonstrated the extent to which this form language is contrived: a course is ipso facto “not consistent” if it attributes any historical event to a supernatural cause (ER2036), and a religious college is ipso facto not part of “the

collegiate community” (ER852A). Though professors may add *secular* viewpoints inconsistent with “knowledge generally accepted” (ER1714, 1716-17, 853-56), private high school teachers may not add *religious* viewpoints inconsistent with “knowledge generally accepted.”

(b) UC has rejected a large number of history-social science courses because, despite their standard content, they added a religious viewpoint (whether Protestant, (ER1981-2050), Catholic, (ER2225-37), or Jewish (ER2238-2263)). (*See also* ER443-48, 461-62, 2244 (“need to include a different perspective and a broader viewpoint”).)

UC reaffirmed this practice or policy in what it called the “Position Statement for History Courses at Christian School[s]” (ER1465, 1483-84), which Wilbur said regards “history courses from a Christian perspective” (ER1996; *see also* ER1536-41). The district court characterized it as a UC policy. (ER36.) That Position Statement gives only one alternative for religious schools: “Christian schools can develop and submit for UC approval a **secular** history curriculum with a text and course outline that addresses course content/knowledge generally accepted....” (ER1484.) UC has frequently relied on this provision in rejecting religious school courses that add a religious viewpoint. (ER1981-2050, 2225-2263.)

(c) UC’s A-G Guide for applicants addresses, once, the adding of viewpoints to courses:

U.S. history courses *may* view historical events **from a particular perspective**, such as African-American history, Woman’s history, or the Latin American Experience.

(ER1408. *Accord* ER1546.)<sup>8</sup> Thus, African-American, feminist, and Latino viewpoints are acceptable (as they should be), but “Christianity’s Influence on American History” and “Special Providence: Christianity & the American Republic” (Government) are rejected viewpoints. (ER1981-2008.) Meanwhile, UC allows “an in-depth study of a single culture, such as a yearlong study of Chinese civilization.” (ER1408.) UC has approved a myriad of history courses with added secular viewpoints. (ER1127,1129-31; CR224Ex.678.)

## 2. Prohibition of “Attributing Historical Events to Supernatural Causes”

(a) Vice President Wilbur announced a second history policy or practice and personally revoked approval of several history courses in a religious school for the reason that they “attribute[] historical events to supernatural causes”:

Faculty judged that the course failed to take an adequately academic approach to history in that it *attributed historical events to supernatural causes*, leading to the decision communicated electronically to the school last week via Ms. Squires.

(ER2027.) The “faculty” judgment and the “faculty guidelines” that Wilbur cited—and that the courses did not meet (ER2028)—were the *ipse dixit* of a single faculty member (ER848-49) (Prof. Given, also a BOARS member, who had earlier rejected Calvary’s history course). Given stated his understanding of UC’s policy:

This course takes an ahistorical approach to the study of world history. A fundamental principle of academic history as recognized and conducted by members of the profession is that history is made by human actors. . . . History is not

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<sup>8</sup> When BOARS approved that A-G Guide language, it “discuss[ed] ‘*acceptable perspectives*’.” (ER1543. *See also* ER1542-44.)

made by supernatural agents. Thus, History 9 is *fundamentally flawed*, since it *presupposes that a Christian god* [sic] has created and governed the world since its inception.<sup>9]</sup>

(ER2036.) UC’s expert witnesses reaffirmed that UC would reject any nonpublic school courses that add to standard content the religious viewpoints, taught as true, that “in God we trust,” that America is “one nation under God,” that we are “endowed by our Creator with unalienable rights,” or that “the Ten Commandments are true and should be followed . . . by American law.” (ER923-28. *Accord* ER910.) In other words, UC’s policy is so extreme that a *nonpublic* school may not teach that the religious principles behind (and included in) the National Motto, the Pledge of Allegiance, or the Declaration of Independence are true in a history or government course, or else the course will be rejected.

UC incorporated this requirement into its A-G Guide, by adding a requirement that history-social science courses must be “empirically based.” (ER1408.) The same Professor James Given sponsored the change at the BOARS subcommittee meeting, at the time the history Position Statement was adopted, and sanitized the wording:

History at Christian Schools. . .

Jim—I think **empirically based** will cover it. **God is not empirically based.**

. . . .

3. History Courses

Jim—**We simply do not accept supernatural cases** . . . take a hard line, no waffling. These are not history.

(ER1512, 1516-17.)

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<sup>9</sup> He testified that the lower case in “god” was intentional. (ER851-52.)

(b) UC has rejected a number of history-social science courses on this basis. (*E.g.*, ER2025, 2027-28, 2036, 2046, 2047.) It rejects courses that attribute any event to God (ER903-05), along with courses that add a single viewpoint to standard content.

(c) Yet, as noted above, UC approves courses that add a single secular viewpoint.

#### **D. It Is Undisputed that UC Rejects English and Other Courses for Adding a Religious Viewpoint**

(i) Vice President Wilbur also testified that UC's policy or practice is to reject English courses that add a single viewpoint:

Q ...If a course, an English course **provides all standard material** on English or literature, and **in addition, provides a Christian perspective** on the subject matter but not other perspectives. . . .

A ...if in fact the course included all of that and it was a single perspective, we would probably not accept the course.

(ER967-68.)

(ii) UC has rejected a number of English courses on that basis, whether Protestant, Catholic, or Jewish. (CR220Ex.617-622, ER2264-66, 448-50, 465(citing exhibits).) By contrast, UC regularly approves English courses taught from secular viewpoints. (ER1469.) Examples are "Feminine Perspectives in Literature," "Gender Roles in Literature," "Gender, Sexuality, and Identity in Literature," "Literature of the Counterculture," "Literature of Dissent," "Literature of the 60's Movement," and "Multicultural Literature." (*Id. E.g.*, ER2294-98.) Since high school English courses are "filled with viewpoints" (CR188Otter at 187. *Accord* ER1102-03,1106-07), why reject only religious viewpoints?

**E. It Is Undisputed that UC Rejected Physics and Chemistry Courses for Adding a Religious Viewpoint, and that UC Admitted the Rejections Were Wrongful**

The court below claimed that UC “reviewed and approved some Christian textbooks for use as the primary or sole text, including *Chemistry for Christian Schools* and *Physics for Christian Schools*,” and that “[t]his indicates that Defendants are not withholding approval solely because the course includes a religious viewpoint.” (ER37.)

Yet UC stated it would reject all physics courses using *Physics for Christian Schools* as core instructional material in the UC Position Statement in 2004. (ER1478, 1481.) UC did in fact reject nearly all new physics courses from religious schools (ER1667-75(25 rejections)) (as well as biology courses, discussed below), and similarly rejected many courses using *Chemistry for Christian Schools*. (ER2173-92, 2319-21, 420-21.) UC only reversed its position, admitting that its action was wrong, just before appellants’ summary judgment brief was to be filed in 2007. (ER1914-16.) Because UC then found the same texts acceptable, Defendants *were* “withholding approval solely because the course includes a religious viewpoint” both when the suit was filed and for three more years.

The reason the physics text was “banned from us[e] as a text in science classes” (ER1688) was not its standard content but its addition of a Bible verse to each chapter. The BOARS chair, who rejected the text, said that the text would be approved if the publisher took out the Bible verses. (ER641-42.)

UC’s reversal of its position does not moot ACSI’s claims: “A defendant’s volun-

tary cessation of allegedly unlawful conduct ordinarily does not suffice to moot” the claim. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 174 (2000).

**F. It Is Undisputed that UC Rejects Biology Courses for Adding a Religious Viewpoint, and Being “Not Consistent with the Viewpoints and Knowledge” It Requires**

Vice President Wilbur reaffirmed that UC’s policy or practice is to reject science courses regardless of standard content if they add “a Christian religious perspective.” (ER963.) UC’s science expert agreed (ER784-86), saying a science course would be rejected if it even mentioned scientific problems of evolution (ER793-801, ER2455), theistic evolution (ER791-92), or other alternative views (ER787-90), including the assertion that God created the universe or humans (ER791-92, 784-86, 786A). As the incoming BOARS Chair admitted, UC did not question that the courses teach the required science, but it objected to the added religious viewpoint. (ER638-39.)

The issue here is not whether private schools’ various additions are correct or incorrect, but whether they have the First Amendment right to add viewpoints to standard content. As UC’s science expert said before being involved in this case, “A healthy exposure of ideological differences often yields the best kind of learning.” (ER1778.)

UC created “standard language” to reject courses that add a religious viewpoint:

The *content* of the course outlines submitted for approval is not consistent with the **viewpoints** and knowledge generally accepted in the scientific community. As such, students who take these courses *may* not be well prepared for success if/when they enter science courses/programs at UC.

(ER1497.) UC rejected many religious school courses using that language (*e.g.*, ER1677-84) and added it to UC's form rejection language for "non-secular schools".

(ER1489.)

After using the above rejection language, UC stated what was required:

Should the school choose to adopt a text that is *secular* in nature and teach a biology course that is consistent with the **viewpoints** and knowledge generally accepted in the scientific community, UC would be delighted to review the new course for a-g approval.

(ER1533; *see also* ER2130.) Thus, after rejecting courses on this basis, UC offers to approve them only when the religious references and viewpoints are stricken from the course outline. (*E.g.*, ER1918-79, 2061-76, 2131-92.)

In addition to this, UC adopted a "UC Position Statement: 'A-G' Course Approval for High School Science Courses Taught From Textbooks from Selected Christian Publishers," in May 2004. (ER1477-82.) This Statement is obviously directed at a specific viewpoint.

UC has rejected a large number of biology courses because, despite their standard content, they added a religious viewpoint. (ER450-58(citing exhibits), 1667-75(rejecting 37 courses), 2061-2130, CR220Ex.628-37.) Among these are course outlines that used a secular text but mentioned alternate viewpoints. (ER2061-2128.) UC soon sanitized its initial basis for rejecting courses (ER1454A, 1462), however, by asserting that the rejected viewpoints were minority viewpoints.

By contrast, UC regularly approves biology courses taught from or with secular

viewpoints. (ER982-987.) For example, they regularly teach either a materialist viewpoint or other viewpoint (*Id.*: ER992-93, 1912), or add agricultural content. (ER1411, 2308-18; CR224Ex.688.)

**G. UC's Position on Added Religious Viewpoints Is Itself a Viewpoint, Which Is Hostile toward Religion and Would Exclude Much Human Knowledge**

UC's rejection of courses because of an added religious viewpoint assumes that an added religious viewpoint is harmful to a private school course. That becomes clear since UC does not reject courses because of other added viewpoints (secular viewpoints, as discussed above, or multiple religious viewpoints). That assumption, that a single added religious perspective is toxic, is simply anti-religious. If UC instead made the assumption that a single added African-American or Latino perspective was harmful to a course, it would rightfully be seen as anti-African-American or anti-Latino, and as viewpoint discriminatory. UC's anti-religious viewpoint is based on a materialist viewpoint. (ER1780-82, 2215-16.)

UC's rule requires private schools to exclude much human knowledge if courses are to receive credit. For instance, a Catholic school's course may not teach as true either the philosophy of Thomas Aquinas (ER915), or the content listed by the Supreme Court ("the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,'" or Dr. Martin Luther King's religious rationales for civil disobedience). *Simon & Schuster v. Members*, 502 U.S. 105, 121-22 (1991). A Jewish school may not treat the philosophy of Mai-

monedes or the history of the exodus from Egypt as true. (ER2421-54.) A Protestant school may not teach colonial period religious beliefs as true, nor may it portray as accurate the thesis of *The Closing of the American Mind*. (ER923-30, 933-34.)

#### **H. By Contrast, UC Regularly Approves Courses with Added Secular Viewpoints, and Approves Courses with Acceptable Religious Viewpoints**

UC admits its viewpoint discrimination by regularly approving courses that add a *non*religious viewpoint, as discussed at the end of the above sections on religion and ethics, history, English, and science. Moreover, UC admits that teachers regularly add their own viewpoints to other courses. (ER858-59.) Textbooks in approved courses regularly teach from a viewpoint, whether it be liberal, oppression-studies, materialist, environmentalist, or otherwise (ER1127, 1130-31, 1721, 1718-19, 1912, 1699-1702, 1877-86). UC's regular approval of courses with secular viewpoints is an undisputed fact. Yet UC regularly rejects courses that add a single religious viewpoint. (ER442-48.)

Further, UC discriminates between religions. It allows courses that add multiple religious viewpoints (ER966,1996-97), while rejecting religious school courses that add only the sponsoring school's religious viewpoint.

## SUMMARY OF ARGUMENT

UC claims the right to prohibit private high schools from adding religious viewpoints to standard content, if their graduates are to be eligible for regular admission to UC and CSU.

I. That constitutes viewpoint discrimination, content discrimination, and content-based regulation, which conflict with the First Amendment:

But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted]. . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times v. Sullivan*. . . .

*Police Dep’t v. Mosley*, 408 U.S. 92, 95-96 (1972).

II. UC’s rejection of private school courses for adding a single religious viewpoint is viewpoint discrimination, facially and as applied, as shown in its policy and practice, its statements, and its Calvary course rejections, which the lower court erroneously upheld on UC’s post hoc reasons different from its actual reasons for the discrimination.

III. The district court wrongly used the rational basis test to uphold that viewpoint discrimination and content discrimination.

IV. The district court’s ruling constricted the protections of each First Amendment clause, without precedent and contrary to Supreme Court decisions.

V. The district court refused to grant associational standing to ACSI under *Hunt*,

despite common relief and claims, confusing individualized issues with individual participation as parties.

VI. The district court erroneously ignored the undisputed fact of 150 other courses rejected for adding religious viewpoints to standard content, refusing to apply the overbreadth doctrine, and it erroneously excluded certain opinions of ACSI expert witnesses.

## ARGUMENT

### **I. THE RULING THAT STATE UNIVERSITIES CAN PRACTICE VIEWPOINT DISCRIMINATION AGAINST STUDENTS' PRIVATE HIGH SCHOOL COURSES WAS ERRONEOUS. IT CONTRADICTS THE NUMEROUS SUPREME COURT DECISIONS PROHIBITING VIEWPOINT DISCRIMINATION AND CONTENT DISCRIMINATION.**

#### **A. The District Court Ruled that Viewpoint Discrimination Is Permissible, and Erroneously Recharacterized Viewpoint-Based Regulation as Content-Based Regulation, While Ignoring that UC's Content-Based Regulation Is Also Unconstitutional**

The district court erred in holding that UC may evaluate the academic merit of religious viewpoints<sup>10</sup> that religious schools add to standard content:

Plaintiffs would have to show that Defendants rejected the challenged courses to punish religious viewpoints [animus] rather than out of *rational concern about the academic merit of those religious viewpoints*.

(ER10.) Government may not discriminate based on “rational concern about the academic merit” of “religious viewpoints” added to standard content in private schools. The court further erred in holding that UC may prefer some viewpoints

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<sup>10</sup> Private organizations’ “religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expres-

(secular ones) over others (religious viewpoints), in responding to ACSI's argument that UC unconstitutionally practices viewpoint discrimination by rejecting private school courses with standard content because of added religious viewpoints:

Plaintiffs primarily argue that Defendants engaged in viewpoint discrimination and content regulation prohibited by the Free Speech Clause. . . . *Defendants necessarily facilitate some viewpoints over others* in judging the excellence of those students applying to UC. Therefore, the decision to reject a course is constitutional so long as: (1) UC did not reject the course because of animus; and (2) UC had a rational basis for rejecting the course.

(ER9. *Accord* ER67.) UC need not, and may not, consider viewpoints at all in judging applicants. (The further errors of the animus requirement and rational basis test are discussed below. (§§IV.A, III.A.))

The court was right that this case is about viewpoint discrimination. ACSI religious schools add religious viewpoints to standard content, and UC rejects courses because of them (“out of rational concern about the academic merit of those religious viewpoints,” ER10). While UC rejects courses for added religious viewpoints, it does not reject courses for added secular viewpoints. (§2.A-H.) UC's course rejections were expressly based on the addition of religious viewpoints, in large numbers of Catholic, Jewish, and Protestant school courses. (ER443-86.) UC officials' and experts' testimony admitted and defended rejecting courses because of the addition of a religious viewpoint to the course (§2.A-H) (though UC's post-discovery declarations attempted to recast and sanitize the UC practice, §II.D). UC's Statements were ex-

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sion.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (plurality).

pressly directed at added religious viewpoints. Those are all undisputed facts.

The district court also erred in confusing viewpoint discrimination with “content-based regulations” (ER42 & n.7), responding to our claim that UC practiced viewpoint discrimination by defending “content-based regulations.” It ignored the fact that content discrimination violates the First Amendment when it involves a nonforum or a public forum. Additionally, content-based regulation is only permissible in a nonpublic forum if it is viewpoint-neutral). (§I.F.)

The court went still further, holding that the Free Speech Clause does not prohibit state action that “was not neutral” [viewpoint discrimination] unless it also had “an element of animus”:

In *Locke*, . . . the Supreme Court extended the *Lukumi* test to require an element of animus, even if the government regulation was not neutral. *Id.* at 724 . . . .

Although decided under the Free Exercise Clause, *Lukumi* and *Locke* guide this Court’s analysis of Plaintiffs’ claim under the Free Speech Clause. The animus requirement is equally applicable whether the government is punishing disfavored viewpoints or disfavored religious practices.

(ER54 (footnote omitted)). That is flatly inconsistent with the Supreme Court’s decisions on viewpoint discrimination.

Worst of all, the court upheld UC’s policy or practice, official statements, and course rejections that are viewpoint discriminatory. (§II.)

## **B. Supreme Court Decisions Have Long Prohibited Viewpoint Discrimination**

The Supreme Court, in another public university case, called viewpoint discrimination “an egregious form” of First Amendment violation:

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . *Viewpoint discrimination* is thus an egregious form of content discrimination. The government must abstain from regulating speech when the . . . perspective of the speaker is the rationale for the restriction.

....

The Court [in *Lamb's Chapel*] relied on no such distinction in holding that *discriminating against religious speech was discriminating on the basis of viewpoint*. . . .

*Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 832 (1995). “Religion . . . provides . . . a perspective, a standpoint from which a variety of subjects may be discussed and considered.” *Id.* at 831. “[D]iscriminating against religious speech was discriminating on the basis of viewpoint.” *Id.* at 832. The Supreme Court found viewpoint discrimination in denying equal funding to “publications that ‘primarily promot[e] or manifes[t] a particular belief in or about a deity,” *id.* at 836, or that “offer a Christian perspective.” *Id.* at 826, 830. “For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech,” and “is a denial of their right of free speech.” *Id.* at 836-37.

*Lamb's Chapel*, which *Rosenberger* followed, held that a public school “discriminates on the basis of viewpoint” in violation of freedom of speech, if it permits “presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.” A six-member majority said (the rest concurred):

The principle that has emerged from our cases “is that the First Amendment forbids the government to regulate speech in ways that favor some *viewpoints* or ideas at the expense of others.”

*Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393, 394 (1993). *Accord Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07, 110-12 (2001). Many other Supreme Court and Ninth Circuit decisions agree,<sup>11</sup> including the very ones relied on by the district court (§I.C).

The non-forum decisions say the same thing. *Southworth* told Wisconsin's Board of Regents "[t]he whole theory of *viewpoint neutrality* is that minority views are treated with the same respect as are majority views." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000). *Accord Boy Scouts v. Dale*, 530 U.S. 640, 654, 661 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) ("goes even beyond mere content discrimination, to actual *viewpoint discrimination*. . . . St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.")<sup>12</sup>

This case does not involve a forum (nonpublic or otherwise), but speech in private schools and a state university's viewpoint discrimination against it in reviewing

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<sup>11</sup> *E.g.*, *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969); *Arizona Life Coalition v. Stanton*, 515 F.3d 956, 972 (9th Cir.2008); *Chaker v. Crogan*, 428 F.3d 1215, 1224-27 (9th Cir.2005); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1050-53 (9th Cir.2003), *cert. denied*, 540 U.S.1149 (2004); *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1223 (9th Cir.2003); *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 970-72 (9th Cir. 2002); *Prince v. Jacoby*, 303 F.3d 1074, 1091-92 (9th Cir. 2002); *Gentala v. City of Tucson*, 213 F.3d 1055, 1061 (9th Cir. 2000). These issues are discussed, *inter alia*, by the panel, concurrence, dissent, and dissent from denial of rehearing en banc, in *Faith Center Church Evang. Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007) (citing cases).

<sup>12</sup> *E.g.*, *United States v. Playboy Entertainment Group*, 529 U.S.803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); *Simon & Schuster*, 502 U.S. at 116 ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

courses and selecting students. (This case does not involve speech in a UC forum, but if it did that would be a public forum.<sup>13</sup>) While the majority of viewpoint discrimination cases involve forums, as *Southworth* said, “[o]ur public forum cases are instructive here by close analogy,” “though the student activities fund is not a public forum.” 529 U.S. at 229-30. *Accord Chaker*, 428 F.3d at 1226.

When state action is both viewpoint discriminatory and content-based (§I.F), “viewpoint discrimination is the proper way to interpret” and analyze it. *Rosenberger*, 515 U.S. at 831; *Chaker*, 428 F.3d at 1228 n.10; *Hills*, 329 F.3d at 1050.

There is a narrow exception permitting some content-based regulation *in a nonpublic forum* so long as it is reasonable and *viewpoint-neutral*. Courses in private schools are not a forum at all, and UC’s action was anything but viewpoint-neutral.

It is flagrant viewpoint discrimination for a state university, regulating private school courses that teach standard content with added religious viewpoints, to reject courses because of that viewpoint. It is also flagrant viewpoint discrimination to reject courses “out of rational concern about the academic merit of those religious viewpoints.” (ER10.) The added religious viewpoints, and the “academic merit of those religious viewpoints,” are inappropriate concerns for UC. However, UC’s Vice President in charge of admissions and course review responded defiantly to ACSI’s President (ER1528):

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<sup>13</sup> *Cornelius*, following *Widmar*, said “a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum.” 473 U.S. at 803. *Accord* ER1448-50.

Your position appears to be that as long as a science course contains a certain amount of specified information, it does not matter what else is included in the course, we must approve it or we are violating your rights. We do not agree. . . .

**C. The University Cases Addressing Viewpoint Discrimination Are the Ones Relevant to University Regulation of Private Schools and Selection Among Applicants or Students, Rather than the Three Non-University Decisions Relied on by the District Court**

*Rosenberger*, *Widmar* (§I.F), and *Southworth* involve state universities and their approval or selection among student publications for student fee funding, student groups for facility use, and student organizations for fee funding. Those and other viewpoint discrimination decisions are the most relevant decisions. *E.g.*, *Gentala*, 213 F.3d at 1063. *Good News Club*, *Lamb’s Chapel*, and *Mergens*, involving viewpoint discrimination by public schools, are also relevant.

However, the district court rejected the university precedents and the other viewpoint discrimination precedents, and instead held that “[t]he Supreme Court has repeatedly rejected a heightened standard where the government is providing a public service<sup>14</sup> that by its nature requires evaluations of, and distinctions based upon, the content of the speech.” (ER42.) The court’s use of “repeatedly” refers to the only three Supreme Court decisions in that category: *Finley* (NEA selection for grants based on artistic excellence), *American Library* (public library filtering of pornography), and *Forbes* (public television editorial discretion selecting for televised debates only major candidates). (*Id.*) The court held that, rather than the university cases, “*Finley* is

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<sup>14</sup> UC’s course review is not a “public service,” but a government intrusion into

the closest parallel to the UC admissions process.” (ER44.)

*Finley*, *American Library* (a plurality decision), and *Forbes* are not the relevant precedents, however, for numerous important reasons:

- i. None of those decisions involves a university’s action and students’ rights.<sup>15</sup>
- ii. None allows or involves viewpoint-based selection (or unneutral content-based selection); each expressly forbids it (§I.D). *NEA v. Finley*, 524 U.S.569, 583, 586 (1998); *United States v. American Library Ass’n*, 539 U.S. 194, 213 n.7 (2003); *AETC v. Forbes*, 523 U.S. 666, 669, 682 (1998). Instead, the three decisions involve nonviewpoint selection where the government is the speaker.
- iii. None involves content-based selection remotely like that here (where UC looks not just at the student grades, scores, essays, and applications that other colleges review, but at viewpoints added to private school courses).
- iv. None involves regulation of private schools or other private institutions (whereas here UC asserts a right to approve or reject their courses, and to specify their content and viewpoints, if their students are to be eligible for what other students are eligible). *Finley* acknowledged “the Government may allocate competitive funding according to criteria *that would be impermissible were direct regulation of speech . . . at stake*,” 524 U.S. at 587-88 (as it is here). *American*

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nonpublic schools, decreeing that their students will not be eligible for taxpayer-supported universities unless their courses are reviewed and approved.

<sup>15</sup> While *Forbes* referred in passing to “a university selecting a commencement speaker,” 523 U.S. at 674, it simply recognized that there is usually one speaker and inherently one viewpoint, though many professors and speakers provide multiple

*Library* did not “regulate private conduct,” but government entities. 539 U.S. at 203 n.2. *Forbes*, citing the “requirement of viewpoint neutrality compatible with the university’s funding of student publications in *Rosenberger*,” said non-viewpoint selection was the editorial right of broadcasters under freedom of press. 523 U.S. at 673.

- v. None involves involuntary applicants engaging in private speech (whereas here private schools apply for course approval only because UC imposes regulations requiring it so that their students will not suffer discrimination (ER407)). Instead, all three cases relied upon involve voluntary applicants for governmental speech.
- vi. None involves the involuntary regulation being applied only to some applicants (85%) but not others (here the 15% that are students from out-of-state schools(ER1451, 33) and foreign schools (ER1692)).
- vii. None involves a public benefit, college education, that is a necessary step for most careers and professions (college education), but instead those cases involved a benefit that few members of the public use or need (arts grants, library pornography, or televised panel participation).
- viii. None has been applied by any appellate court to a state university system’s selection of students or review of their courses, to our knowledge.
- ix. All of those decisions involve the government as speaker, not private parties

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viewpoints. This was one page after “the requirement of viewpoint neutrality.”

as speaker. As the Supreme Court said in distinguishing *Forbes*, “the government is itself the speaker,” and in parallel cases, “the government ‘used private speakers to transmit specific information pertaining to its own program.’” *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541, 543 (2001). “It does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak. . . .” *Rosenberger*, 515 U.S. at 834. *Accord American Library*, 539 U.S. at 213 n.7.

These are not the relevant decisions, and their warning language was ignored.

**D. The Three Speech Selection Decisions Relied on Below Similarly Prohibit Viewpoint Discrimination and Content Discrimination, and Their Speech Selection Differs Sharply from UC’s Rejection of Courses and Students Based on Viewpoints and Content Discrimination**

*Finley*, *American Library*, and *Forbes*, though allowing speech selection within *governmental* speech, emphatically prohibit viewpoint discrimination:

*Finley* said “[i]f the NEA were to leverage its power to award subsidies . . . into a penalty on disfavored viewpoints, then we would confront a different case.” 524 U.S. at 587. It condemned “suppression of dangerous ideas,” said a subsidy must not be “‘manipulated’ to have a ‘coercive effect,’” cautioned that “a more pressing constitutional question would arise if Government funding resulted in . . . driv[ing] ‘certain ideas or viewpoints from the marketplace,’” and said the result would differ if the policy “is applied in a manner that raises concern about the suppression of disfavored viewpoints.” *Id. Accord Gentala*, 213 F.3d at 1063. Nevertheless, *Finley* is the decision

the district court called the most similar.

*American Library* emphasized that “viewpoint-based restrictions are improper ‘when the [government] does not itself speak or subsidize transmittal of a message it favors. . . .’” 539 U.S. at 213 n.7. Its restriction was not on private speech but on federal funding of government activity. *Id.* at 203 n.2.

*Forbes* noted “the requirement of neutrality,” that “a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate’s views.” 523 U.S. at 676. “To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker’s viewpoint.” *Id.* at 682.

These decisions also prevent viewpoint discrimination from being repackaged as content-based regulation, emphatically prohibiting content-based regulation that is not viewpoint-neutral. *Finley* said that *Rosenberger* would be relevant if there was selection based on “disfavored viewpoints.” 524 U.S. at 587. *Accord Hills*, 329 F.3d at 1050-52.

These three decisions did not uphold anything remotely like penalizing courses with added religious viewpoints. *Forbes* did not authorize public stations to penalize religious programming. *American Library* did not authorize public libraries to penalize religious books or websites. *Finley* did not authorize the NEA to penalize religious art. Speech selection that penalized religious viewpoints would not be viewpoint-neutral, but viewpoint discriminatory, as *Rosenberger*, *Widmar*, and *Good News* held.

The district court found *Finley* “the closest parallel to the UC admissions process”

because “government is providing a public benefit that is allocated to a limited number of persons through a competitive process.” (ER44.) However, *Rosenberger* rejected a state university’s claim of the same justification for viewpoint discrimination, and with that rejected any “close[] parallel”:

the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.

515 U.S. at 835. The district court also found *Finley*’s selection similar to UC’s in “judg[ing] the excellence of prospective students who apply for a guaranteed spot at UC.” (ER44.) That is a non-sequitur: the issue is not UC’s ability to judge the excellence of prospective students, but its right to judge the viewpoints of their private school courses and to reject courses with added disfavored religious viewpoints, and in doing so, exclude students from regular admission, or make them avoid such courses or take additional replacement courses.

**E. UC’s Need To Select Among Applicants Does Not Justify Either Viewpoint Discrimination or Content Discrimination**

UC can easily select students in a viewpoint-neutral manner, and not intrude into private schools, not arrogate power to approve or reject high school courses, and not assume courses are inadequate if they have added religious viewpoints. In other words, UC can do as 49 other states do, and as all private universities do.

The district court erred in calling it “undisputed that the content of an applicant’s high school courses is an important factor in evaluating the merit of that applicant.”

(ER45.) ACSI's expert witnesses, disputing that strongly, testified that no other state or private university reviews and approves the "content" of high school courses, that UC does not review the "content" of courses but instead short course descriptions, and that UC's review has little relation to the "content" actually taught and whether students learn. Even the head of BOARS' subcommittee concluded that course description review has little to do with the course's content or teaching knowledge and skills (ER1615-17), and even UC's experts admitted review only probabilistically intimates actual content (ER51-52, 899-901). Even if UC's review was meaningful, it would not justify rejecting courses because of added religious viewpoints.

The district court similarly erred in calling it "undisputed that UC can reasonably reject courses that either (1) fail to teach important topics with sufficient accuracy and depth of coverage or (2) fail to teach relevant analytical skills" (ER47. *Accord* ER51), implying that these were the reasons for the challenged course rejections. However, UC's review does not measure either, and UC's actual reasons for rejections were instead because of added viewpoints. (ER443-86, 392-407.)

**F. The UC Practices or Policies Are Not Permissible Content-Based Regulations with Viewpoint Neutrality, but with Viewpoint Discrimination and Content Discrimination**

The court below confused viewpoint discrimination and content-based regulation. It responded to our claim that UC practices viewpoint discrimination by holding that "content-based judgments" are permissible and even required in some governmental programs. (ER42-43.) It ignored that permissible content-based decisions must be

viewpoint-neutral and must involve a nonpublic forum, under the very cases it cited. (§I.D.) UC's practices or policies are instead viewpoint discriminatory and content discriminatory, rejecting courses because of added religious viewpoints or religious content, contrary to *Mosley* (*supra* p.24).

Before *Rosenberger*, another university case resolved this issue: “*content-based exclusion* of religious speech ...violates the fundamental principle that a state regulation of speech should be content-neutral.” *Widmar v. Vincent*, 454 U.S.263, 277 (1981). There, “prohibit[ing] the use of University buildings or grounds ‘for purposes of religious worship or religious teaching’,” *id.* at 265, violated freedom of speech. Here, prohibiting addition in private schools of religious teaching violates freedom of speech, and is content-based if it is not viewpoint-based. “Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” *Forsyth County v. Nationalist Movement*, 505 U.S.123, 135 (1992); *Simon & Schuster*, 502 U.S.at 116; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

## **II. UC’S REJECTION OF PRIVATE SCHOOL COURSES FOR ADDING A SINGLE RELIGIOUS VIEWPOINT IS VIEWPOINT DISCRIMINATION, FACIALLY AND AS APPLIED, AS SHOWN IN POLICY OR PRACTICE, STATEMENTS, AND CALVARY COURSE REJECTIONS, AND CANNOT BE RATIONALIZED POST HOC.**

### **A. UC’s Rejection of Courses for Adding a Single Religious Viewpoint Is a Policy or Practice That is Facially Viewpoint Discriminatory**

As the Statement of Facts shows, UC has a policy or practice of rejecting private

school courses for adding a single religious viewpoint (§2.A-F), in all subject areas, though UC does not reject courses that add a single secular viewpoint (§2.G-H). Its Vice President in charge frankly admits the policy or practice. (*Supra* p.10.) On this basis, UC has rejected at least 38 Protestant school courses (E.g., 1981-2130) and 58 Catholic and Jewish school courses (ER126-35, ER2225-2454).

Adding a viewpoint, including a religious viewpoint, enriches a course and increases knowledge (as ACSI's experts testified); adding a religious viewpoint does not poison a course or diminish knowledge. (ER889-93, 744-45, 253-56, 957-58, 298-99, 381-85, 501-03, 826-40.)

## **B. UC's Policy Statements on Religion, History, and Science Are Facially Discriminatory as Well as Unreasonable**

The district court simply upheld UC's Statements on the basis that they are "reasonable." (ER49.) The district court erred, however, because the policy statements are viewpoint discriminatory.

(i) The "UC Statement on Religion and Ethics Courses" is expressly viewpoint discriminatory: its words reject courses with added material "limited to one denomination or **viewpoint**." (ER1485.)

(ii) The "UC Position Statement" on history and government courses, like that on science courses, gave only one alternative for how religious schools could "Obtain[] 'a-g' Course Approval" for rejected courses: "Christian schools can develop and submit for UC approval a **secular** history [or science] curriculum with a text and

course outline that addresses course content/knowledge generally accepted....” (ER1478, 1484.) Wilbur acknowledged the secular characteristic is a “requirement.” (ER1528.) UC regularly rejected courses for not having “a **secular** science curriculum,” even if they used a secular text alone (ER2061, 2067, 2111, 2120) or a secular text plus a text adding religious viewpoints (ER2077-2108, 2122, 2127). Similarly, UC regularly rejected courses that did not have “a **secular** history curriculum,” even if they used a secular text along with a text adding religious viewpoints (ER1983, 1987).

This and the science position statement are in addition to UC’s practices or policies against adding single religious viewpoints, adding history viewpoints “attributing historical events to supernatural causes” (Facts §2.A,C,F), or adding science viewpoints “not consistent with the **viewpoints**. . . generally accepted” (ER1497).

(iii) The “UC Position Statement” on science courses is discriminatory in its very title: “‘A-G’ Course Approval for High School Science Courses Taught From Textbooks from Selected Christian Publishers.” (ER1477-82.) It rejects courses using “banned” texts even if merely added to an approved secular text. (*E.g.*, 2090, 2104.)

ACSI’s expert witnesses showed that UC’s Statements are viewpoint discriminatory as well as unreasonable. (ER381-85, 872-76, 392-93, 601-02, 607, 617-18.)

### **C. UC’s Rejections of Calvary’s Courses Were Facially Viewpoint Discriminatory**

UC’s stated reasons for rejecting Calvary’s course descriptions were viewpoint discriminatory:

(i) The elective religion course, while having minor defects, would never be approved unless the school “demonstrate[d] how the course treats the study of religion from the standpoint of scholarly inquiry.” (ER2193.) As UC admitted, this language came from, and meant, “consistent with UC’s Policy on Religion and Ethics Courses.” (ER1172.) In other words, the course must not be “limited to one denomination or viewpoint.” (ER1485.)

(ii) The history course was rejected for one reason, according to the formal minutes of UC’s reviewer committee: “Need more than a religious prospective [sic], too slanted toward Christianity.” (ER1994.) UC sanitized this in what was sent to Calvary:

- ✓ Focus too narrow/too specialized
- ✓ Other: See comments below. Comments: . . . The *content* of the course outline submitted for approval is *not consistent with the empirical historical knowledge generally accepted* in the collegiate community. As such, students who take these courses *may* not be well prepared for success if/when they enter history-social science courses/programs at UC.

(ER1981.) The first checkmark was UC’s regular sanitized language for a single religious viewpoint (ER370-71), and the second was its form language to reject “courses from non-secular schools” with an added religious viewpoint (ER1488.) No objection was made to the textbooks (except post hoc).

UC’s own history expert said the course should have been approved. (ER911-12. *Accord* ER233-37.)

(iii) The government course was rejected for one reason, according to the minutes of UC’s reviewer committee: “Textbook is not appropriate. One sided presentation

of history curriculum; needs balance. Government courses usually receive one semester credit only.” (ER2007.) This too was sanitized in what was sent to the school, with the above-indented language and “Texts and/or instructional materials Not Adequate.” (ER2000.) “One-sided” and the text’s inadequacy referred to the added religious viewpoints.

(iv) The English course was rejected, in part, because the course “does not offer a non-biased approach to the subject matter.” (ER2051.) “Not . . . non-biased” referred to the added religious viewpoints, and the textbook was also objected to on that basis.

(v) The biology course of another Calvary was rejected with UC’s form rejection language (ER2077) for “science courses from non-secular schools” (ER1489), on the basis of its “content” (ER2077).

(vi) Religion courses of Cantwell/Sacred Heart of Mary High School and Vebum High School were rejected because “only Catholic texts used,” “need other prospectives [sic],” and “perspective is too narrow.” (ER1663-65.)

Because these were rejected in part for unconstitutional reasons, it is immaterial whether UC can come up with other permissible reasons. *E.g.*, *Board of Educ. v. Pico*, 457 U.S. 853, 875 (1982); *Bakke*, 438 U.S. at 320 n.54; *Gentala*, 213 F.3d at 1063.

#### **D. The Court’s Approval of UC Rejections Was Erroneously Based on UC’s Sanitized Post Hoc Rationalizations Rather Than UC’s Contemporaneous Reasons Given**

The court below upheld UC course rejections not based on UC’s reasons stated at the time, but on UC’s post hoc rationalizations given four years later during litigation.

(ER12-17.) In fact, the court did not even mention UC's stated reasons that were viewpoint discriminatory. UC's sanitized rationalizations were post-discovery and so could not be questioned in depositions or interrogatories, and much of our post-discovery expert opinions disputing them (ER222-424) were excluded (ER8-9).

Post hoc reasons should not be considered at all, as *Bakke* noted:

Having injured respondent solely on the basis of an unlawful classification, petitioner [UC] cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. at 265-266....

*Regents v. Bakke*, 438 U.S.265, 320 n.54 (1978). *Accord Northeastern Fla. Chapter v. City of Jacksonville*, 508 U.S.656, 665, 666 (1993).

Yet post hoc reasons were the district court's basis, not even mentioning UC's actual stated reasons, for Calvary's courses in history (ER13) (*contra* ACSI's expert, ER746-47, 1134-37, 233-37); government (ER14-15, 71-72) (*contra* ACSI's expert, ER528, 1134-37, 237-38); English (ER12-13) (*contra* ACSI's expert, ER955-58, 285-88, 260-82, 1106-07, 299-306); and science (ER17-18, 68-70) (*contra* ACSI's expert, ER978-79, 809-18).

The district court ignored our viewpoint discrimination and other free speech claims, and said that course rejection "must be analyzed under the Free Exercise Clause," and that it would only be unconstitutional if ACSI proved "Defendants had no rational basis for the course rejection"—that it was "irrationally rejected." (ER19.)

#### **E. The Lower Court Ignored the Genuine Issues of Material Fact Raised by Declarations, Affidavits, Exhibits, and Depositions**

The district court, in finding these course rejections “rational” (ER20), ignored its own earlier rulings that “there is a genuine issue of material fact as to whether Defendants’ rejection of Plaintiffs’ religion courses was reasonable” (ER73), and as to whether UC properly rejected history-government courses (ER72), English (ER73), and biology courses (ER70). The earlier ruling was right about the genuine issues of material fact (ER71-94) about Calvary’s courses raised by:

	<i>Declarations</i>	<i>Affidavits</i>	<i>Exhibits</i>	<i>Depositions</i>
History--Vitz	ER1134-36	ER233-37	ER1981	ER746-47
Gov’t--Vitz	ER1134-36	ER237-38	ER2000	ER748
English-Stotsky	ER1094-97, 1102-07	ER285-88, 262-82	ER2051	ER217I-L
Biology--Behe	ER995-99	ER348-57, 310-19	ER2077	
Religion-Guevara		ER361-62	ER2193	

as well as by the Watters Declaration (ER750-77).

**III. THE RULING THAT STATE UNIVERSITY VIEWPOINT DISCRIMINATION AND OTHER FIRST AMENDMENT INFRINGEMENTS ONLY HAVE TO MEET THE RATIONAL BASIS TEST WAS ERRONEOUS. IT CONTRADICTS THE INNUMERABLE SUPREME COURT DECISIONS HOLDING THAT THEY ARE FLATLY PROHIBITED OR MUST SATISFY STRICT SCRUTINY, AND UNDERCUTS THE PROTECTIONS OF THE FIRST AMENDMENT.**

Strict scrutiny applies (§III.A), and is not met (§III.B). The rational basis test is not justified by the cases relied upon by the district court (§III.C), and the wrong state interest test was used (§III.D).

The district court erred in applying the rational basis test. (ER9.) Astoundingly, in discussing the free speech claim, it held that “[i]f the A-G Guidelines and Policies are *rationally related* to the goal of selecting the most qualified students for admission, they do not violate the First Amendment’s guarantee of free speech.” (ER46-47. *Accord* ER9, 42-43, 51, 52, 67.) Similarly, “Defendants’ course approval decisions are subject to *rational basis review*” (ER11), requiring ACSI to show each “course was *irrationally rejected*.” (ER19.) The court similarly applied the rational basis test to claims based on the hybrid free exercise-freedom of association-free speech claim (ER66, 19 n.19) and the equal protection claim (ER66-67, 19). The court then used the least rigorous version of that test:

“[T]he burden is on the one attacking the [regulation] to negative every conceivable basis which might support it.”

....

Government action “may be based on rational speculation unsupported by evidence or empirical data.” [Citations omitted.]

(ER47, 52 n.20. *Accord* ER11.)

**A. Supreme Court Decisions Have Long Held that Viewpoint Discrimination Is Prohibited, and Only a Compelling Interest Served by the Least Burdensome Means Can Justify Content Discrimination or Content-Based Exclusion or Other First Amendment Infringements**

Strict scrutiny is the general rule for First Amendment violations, and *American Library* and *Forbes* are the only exceptions.

Strict scrutiny is the standard for content-based regulation (*Capitol Square*, 515 U.S. at 761; *Simon & Schuster*, 502 U.S. at 118; *Board of Airport Comm’rs v. Jews for Jesus*, 482

U.S. 569, 573 (1987); *Widmar*, 454 U.S. at 269-70; *Playboy Ent. Group*, 529 U.S. at 813-14); for freedom of association (*Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973)); for hybrid cases based on free exercise and other first amendment rights (*Employment Div. v. Smith*, 494 U.S. 872, 881, 882 (1990)), or discrimination against religion<sup>16</sup> (*Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 546 (1993)); and for unchecked discretion (*Board of Airport Comm'rs*, 482 U.S. at 573). It is the general standard for First Amendment violations. (E.g., *FEC v. Wisconsin Right To Life*, 127 S.Ct. 2652, 2671 (2007); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 800 (1988).)

For viewpoint discrimination, the standard is higher. “Discrimination against speech because of its message is presumed to be unconstitutional.” *Rosenberger*, 515 U.S. at 828. *Accord Good News*, 533 U.S. at 111-12. It is difficult or impossible to find any case upholding viewpoint discrimination against private speech. Cases strike it down without evaluating the state interest or least burdensome means (such as *Rosenberger*, *Lamb's Chapel*, *Good News*, and *Southworth*). E.g., *Arizona Life*, 515 F.3d at 972; *Hills*, 329 F.3d at 1050-53; *Brown*, 321 F.3d at 1223-25; *Gentala*, 213 F.3d at 1061-65.

## **B. The Supreme Court's Strict Scrutiny Test Is Not Met by UC's Practice or Policy**

### **1. UC's Rejections Are Not Justified by a Compelling Interest**

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<sup>16</sup> *Lukumi* subjects to strict scrutiny state actions that “restrict practices because of their religious motivation,” or “discriminate on [a law's] face.” “A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in

UC has no compelling interest that requires the review or exclusion of courses simply because a course adds a religious viewpoint.<sup>17</sup>

First, as the district court admitted, “UC does not review courses taken by applicants from out-of-state high schools. . . , which comprise approximately fourteen percent of the applicant pool and about nine percent of admitted students.” (ER33. *Accord* ER1691,1451.) Similarly, UC does not review courses of foreign applicants (ER1692), which amount to 4.5% of applicants (ER1451). (UC admits those students under a process “the same as described under Eligibility in the Statewide Context,” except for a-g course review. (ER1711.))

Second, UC’s top two campuses only use a-g course lists “in a limited way,” as Vice President Wilbur admitted, leading her to question whether there is even a “need” for a-g course review. (ER1621.)

Third, no other state university (or other state instrumentality) reviews for and excludes religious viewpoints, or reviews and approves high school courses at all. (ER1048.)

Fourth, UC approves courses that add single secular viewpoints and multiple religious viewpoints (§2.H) It follows that UC cannot have a compelling interest in restricting courses adding a religious viewpoint. In fact, there is no state interest what-

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rare cases.” 508 U.S. at 533, 546.

<sup>17</sup> However, UC’s education expert asked, “What knowledge is most worth knowing, and who should decide that?... In California, we’ve decided the state.” He said that “Big Brother has to come in.” (ER1844.) Religious schools want to see Big Brother fix his house, not break theirs.

soever in inquiring into added religious viewpoints.

“Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.” *Lukumi*, 508 U.S. at 546-47.

## 2. UC’s Interests Are Not Served by the Least Burdensome Means

There are alternative means—better ones—than a-g approval, according to UC’s Chair of the BOARS Subcommittee on Articulation and Evaluation:

Another option would be to develop a much more specific list of the actual concepts and skills that students are expected to acquire in each of the ‘a to f’ subjects. . . .

. . . [T]here are several options for assessing students’ academic readiness more directly. . . .

UC could develop its own assessments, tests, or on-demand tasks to measure students’ knowledge and skill in different subjects. . . .

(ER1617-18.) CSU already developed its own tests (ER1843), and UC’s Admission by Examination uses tests instead of a-g review.

Further, it would be less burdensome on ACSI if UC treated religious school courses the same as out-of-state courses by not requiring review and approval for regular admission. Lastly, it would be less burdensome if UC followed a similar approach to admissions used by other state universities that do not review individual course outlines and exclude religious viewpoints.

“The existence of adequate content-neutral alternatives thus ‘undercut[s] significantly’ any defense of such a statute.” *R.A.V. v. City of St. Paul*, 505 U.S. at 395. *Accord*

*Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Because there are less burdensome means that could have been applied, UC policies and practices do not satisfy strict scrutiny.

Instead of applying the appropriate standard of review, all the district court found was that, for each Calvary course, ACSI's experts did "not opine that Defendants unreasonably rejected this course" (ER15) and that the "course was irrationally rejected" (ER19). For each facial constitutional challenge, all the court said was ACSI did not prove UC's viewpoint-based regulations were irrational (ER49, 50, 52, 66, 67). It ignored ACSI expert testimony that rejection of courses that add a religious viewpoint is unreasonable and that rejection of students from regular admission who lack 15 UC-approved courses is unreasonable. (ER392-93, 656-62, 1048, 601-02, 607, 617-18.) Further, the district court ignored the depositions of ACSI experts (ER656-662) and excluded that part of their affidavits. (ER362, 236, 238, 288, 327.) The First Amendment requires far more than the district court's rationale to overcome strict scrutiny.

**C. The Supreme Court Decision Most Relied On by the Court Below (*Finley*) Does Not Support the Rational Basis Test; the Other Two Decisions Relied on (*American Library-Forbes*) Only Allow That Test for Government Speech Selection Among Students for Their Merits Unrelated to Viewpoints, and Not for Rejection of Courses and Students for Their Viewpoints**

The district court described *Finley* as the "closest" decision, but that decision did not discuss or use the rational basis test at all. The court's use of the rational basis test is squarely and solely based on *American Library* and *Forbes*.

Those decisions do not justify rational basis review of viewpoint discrimination, of content discrimination, or of content-based regulation that is not viewpoint-

neutral, or of unchecked discretion, hostility toward religion, violations of free exercise-association-speech rights, or violations of equal protection. (§IV.)

**D. The Court Erroneously Weighed the Entire UC “Course Review Process,” Rather Than Just the Challenged Practice or Policy of Rejecting Courses with Standard Content Because of Added Religious Viewpoints**

The court erred in weighing the government interest in the entire “A-G Guidelines and Policies” (ER52, 47, 58, 63, 66, 67), rather than in the challenged practice or policy of rejecting courses because of added religious viewpoints. Thus, it rejected free speech claims because “*the A-G Guidelines and Policies* survive rational basis review” (ER52), and rejected free exercise and equal protection claims with similar language (ER66, 67).

The Supreme Court consistently holds that it is the particular regulation challenged, not the overall regulatory scheme, that is strictly scrutinized. “A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech.” *FEC v. Wisconsin Right To Life*, 127 S.Ct. 2652, 2672 (2007).

**IV. THE DISTRICT COURT’S TORTURED INTERPRETATIONS THAT CONSTRICT FIRST AND FOURTEENTH AMENDMENT RIGHTS WERE ERRONEOUS. THEY CONTRADICT SUPREME COURT PRECEDENT.**

The court below erred in its highly unusual interpretations of each First Amendment clause to remove their protections.

**A. The Court Erred in Requiring Animus (as well as Rational Basis) for Freedom of Speech Violations, and in Allowing UC To Abridge Freedom of Speech if Animus Cannot Be Shown**

The court added an animus requirement and a rational basis test for *freedom of speech* claims: “the decision to reject a course is constitutional as long as: (1) UC did not reject the course because of animus; and (2) UC had a rational basis for rejecting the course.” (ER9. *Accord* ER67, 43, 53-54.) The test was used not just for the Free Exercise Clause but for the Free Speech Clause, including for viewpoint discrimination claims: “The animus requirement is equally applicable whether the government is punishing disfavored viewpoints or disfavored religious practices.” (ER54.)

The court’s interpretation is unique among cases involving viewpoint discrimination, and is unique among free speech cases (including among hybrid-rights free exercise cases). It acknowledged there was no Ninth Circuit or Supreme Court authority for its newly created approach: “there is no guidance from the Ninth Circuit or the Supreme Court regarding government animus in the specific arena of free speech.” (ER53.) However, the Supreme Court has addressed the issue not only by not adopting the requirement, but by stating:

[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment. [Citations omitted.] Simon & Schuster need adduce ‘no evidence of an improper censorial motive.’

*Simon & Schuster*, 502 U.S. at 117. *Accord City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993)(no “animus,” but “expressly rejected the requirement” in *Simon*).

As the court admitted, its interpretation was unique because it was reducing free speech protection to the lower level of free exercise claims not involving hybrid rights:

Although decided under the Free Exercise Clause, *Lukumi* and *Locke* guide this Court's analysis of Plaintiffs' claim under the Free Speech Clause.

(ER54. *Accord* ER53.) There certainly is “no guidance from the Ninth Circuit or the Supreme Court” for eviscerating freedom of speech protections to this level, or applying the accompanying rational basis test. This unique approach effectively allows UC to abridge free speech so long as it does not overtly reject a course because of religious animus.

Furthermore, its viewpoint discrimination establishes that UC acted with animus in rejecting the courses. *E.g.*, *City of Cincinnati*, 507 U.S. at 429; *Arnold v. Tiffany*, 487 F.2d 216, 217 (9th Cir. 1973). In fact, the court elsewhere “used that term to describe the punishment of disfavored viewpoints....” (ER10. *Accord* ER53.) However, when the court described “Plaintiffs’ best evidence of animus” (ER55), it ignored viewpoint discrimination as evidence.

#### **B. The Court Erred in Limiting the Unbridled Discretion Rule to Licensing Cases, and in Allowing UC To Exercise Unbridled Discretion Over Private School Courses**

The court created a license requirement for the unbridled discretion rule, and held that “Plaintiffs cannot challenge the A-G Guidelines and Policies under the ‘extraordinary doctrine’ that prohibits unbridled discretion,” because unbridled discretion is only prohibited by “licensing statutes.” The court denied “that standardless discretionary power creates a prior restraint.” (ER60.) To reach that conclusion, it had to ignore decisions that struck down “virtually unrestrained power” where there was no

license at all, such as the unanimous decision in *Board of Airport Comm'rs*, 482 U.S. at 576, or *Healy v. James*, 408 U.S. 169, 184 (1972) (“College’s denial of recognition was a form of prior restraint”). *Accord Arizona Life*, 515 F.3d at 973. The court also ignored the plain language of *Forsyth County* that “an ordinance that delegates overly broad discretion” is a constitutional problem. 505 U.S. at 129.

The court’s interpretation again is unique, formulating a new rule to restrict First Amendment challenges. It did not provide any supporting citation. It effectively allows UC to exercise unbridled discretion over private schools’ courses, if there is no formal license. The court added a second unique interpretation, that the “unbridled discretion doctrine[] only appl[ies] to facial challenges.” (ER67 n.34.) Again, it gave no citation. Yet unbridled discretion can be as damaging in an as-applied case as in a facial case.

UC and its reviewers have unchecked discretion, as described *supra*, note 4. UC discretionarily rejects courses with an added religious viewpoint, but not an added secular viewpoint. It discretionarily requires course review for its 85% of in-state applicants, but not its 15% of out-of-state applicants. The reviewers testified that nothing limited their discretion (ER844, 691-93), and that they had no checklists or content standards (ER692-93, 843-44). Yet the district court ruled summarily that UC reviewers “have sufficient guidance to defeat a challenge of unbridled discretion.” “To allow these illusory ‘constraints’ to constitute the standards necessary to bound a licensor’s discretion renders the guarantee against censorship little more than a high-

sounding ideal.” *City of Lakewood*, 486 U.S. at 769-70. *See also* 763-64.

**C. The Court Erred in Limiting the Prohibition of Hostility Toward Religion, Allowing UC To Be Hostile to Religious Viewpoints if That Was Not the Primary Effect of Its Admission Policies, and in Requiring Animus To Have an Establishment Clause Violation**

The district court limited four decades of Supreme Court language, prohibiting hostility toward religion,<sup>18</sup> to only hostility so great as to have a “primary effect” of inhibiting religion (ER63),<sup>19</sup> and required animus to show a violation of the Establishment Clause. (ER19 n.19.)

The court’s interpretation again is unique among cases involving hostility toward religion, making up another new rule to restrict First Amendment protections.

**D. The Court Erred in Limiting the Free Exercise Clause’s Protection Where There Are Hybrid Rights or Discriminatory Regulations, and in Attempting To Overrule *Sherbert*, Allowing UC To Discriminate against Religious Viewpoints and Other Speech**

The court below ignored the crucial point that the complaint did not allege a free exercise violation solely based on free exercise rights. Instead, it alleged a hybrid-rights claim based on free exercise, freedom of association, and freedom of speech. (ER1350.) Thus, the court erroneously addressed only the free exercise issue (ER61, 19, 36, 41), not hybrid rights; and only discussing two types of violation (hostility toward religion and prescription of orthodoxy) (ER61, 65-66), not discrimination

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<sup>18</sup> *E.g.*, *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). *Accord Van Orden v. Perry*, 545 U.S. 677, 684 (2005); *Rosenberger*, 515 U.S. at 845-46; *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

<sup>19</sup> This also required compliance with the *Lemon* test that *Van Orden* said fre-

and other alleged violations. Consequently, the court applied *Smith* under the rational basis test (ER19, 65-66), and created an animus requirement (ER65-66), rather than applying *Smith*'s standard for hybrid free exercise claims, 494 U.S. at 881, 882, or *Lukumi*'s standard for discrimination claims, *id.* at 886 n.3, 508 U.S. at 546-47.

This ruling is unique, post-*Smith*, in ignoring the distinctions between non-hybrid and hybrid-rights cases, and between discriminatory treatment and neutral treatment, thereby restricting First Amendment protections.

Moreover, the court below erroneously said that the Supreme Court “effectively overrul[ed] *Sherbert* in *Department of Human Resources of Oregon v. Smith*” (ER65), to justify its refusal to apply *Sherbert*'s requirement of strict scrutiny of individualized determinations. The Supreme Court has not been informed that *Sherbert* was overruled. *Gonzales v. O Centro*, 126 S.Ct.1211, 1221 (2006). What *Smith* did was limit *Sherbert* to cases that involve “individualized governmental assessment.” 494 U.S. at 884; *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004). Here, *Sherbert* applies because UC has such a system of individualized course assessment.

Thus, UC must meet strict scrutiny for the hybrid-rights free exercise claims.

**E. The Court Erred in Limiting the Equal Protection Clause's Shelter of Religious Speech to the Rational Basis Test, and in Allowing UC To Practice Religious Discrimination if It Has That Minimal Basis**

The court erred in holding that “claims based on religious discrimination that survive the *Lemon* test are subject to rational basis scrutiny under the Equal Protection

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quently need not be met. 545 U.S.at 685-86.

Clause.” (ER19. *Accord* ER66-67, 78.) Yet *Smith* said clearly “we strictly scrutinize governmental classifications based on religion.” 494 U.S. at 886 n.3. *Lukumi* said emphatically “the minimum requirement of neutrality is that a law not discriminate on its face,” or strict scrutiny applies. 508 U.S. at 533, 546. Moreover, discrimination against religious speech is as unconstitutional as discrimination against speech, because religious speech is “fully protected under the Free Speech Clause.” *Supra* n.10. *Bakke* applied strict scrutiny and found an equal protection violation from discrimination against fundamental rights--exclusion of Caucasians from 15% of seats--whereas this case involves exclusion of religious school students from the 85% of regular admission seats.

The court’s interpretation here too is unique among cases involving equal protection claims and speech and association rights, creating a new rule to eviscerate those rights. It allows UC to practice religious discrimination so long as it has a rational basis.

**V. THE RULING THAT A NATIONAL ASSOCIATION DOES NOT HAVE STANDING TO REPRESENT ITS MEMBERS IN AN AS-APPLIED CHALLENGE WAS ERRONEOUS. IT CONTRADICTS THE HUNT LINE OF SUPREME COURT DECISIONS, AND FEDERAL RULE OF CIVIL PROCEDURE 26(E).**

**A. ACSI Has Standing To Raise Its Member Schools’ Claims, under *Hunt***

The court erred in ruling that “ACSI does not have associational standing to pursue as-applied claims based on individual course rejections.” (ER7.) The court recognized that the applicable test is from *Hunt*, which provides,

Thus, we have recognized that an association has standing to bring suit on

behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The court found prongs (a)-(b) to be met (ER3), but found prong (c) not met.

*Hunt* itself unanimously found associational standing in a declaratory and injunctive suit, similar to this one, over a constitutional violation. Immediately before the test, *Hunt* showed what prong (c) means by quoting and following *Warth*: “[W]hether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought” and “all cases in which we have expressly recognized standing in associations to represent their members” were injunctive or declaratory suits, while damages cases do not confer associational standing because “damages claims are not common to the entire membership, or shared by all in equal degree.” *Id.* at 343, quoting *Warth v. Seldin*, 422 U.S.490, 515, 511 (1975).

The present case does not “require[] the participation of individual members in the lawsuit” as parties, because their course submissions and UC’s rejections were all on paper, in UC files, and exhibits herein. (ER1981-2204.) In *Hunt*, “participation” means as necessary parties, and not as witnesses.

Instead, the as-applied claims of ACSI schools seek common relief: a declaratory judgment that UC violates First Amendment rights by rejecting courses because of an

added religious viewpoint, or an injunction against that practice and policy. Further, the as-applied claims of ACSI schools are common among its members in that UC wrongly rejected courses, and continues to reject courses, in five subjects on the basis that they added a religious viewpoint. Thus, the Court in *Hunt* held that the association could raise the common interstate commerce claims of various apple growers “in a group context.” 432 U.S. at 344.

### **B. ACSI Raised, and Did Not Waive, Its Member Schools’ Claims**

The district court was mistaken that ACSI’s raising of its members’ 38 claims was “recently disclosed” in May 2008. (ER7.) While that was the date the district court itself set (ER1178) for ACSI to file a list of its as-applied challenges (ER1173, ER203), following the partial summary judgment ruling in March 2008, the 38 claims had been disclosed earlier in several ways.

First, 38 of those ACSI courses were disclosed during discovery as numbered exhibits. (ER118-24.) All were in UC’s document production. (*Id.*) UC or Plaintiffs questioned witnesses during discovery about 37 of them. (*Id.*) Second, 38 of those ACSI courses were listed in the Watters Declaration in August 2007 (among 46 total Protestant courses). (*Id.*; ER766-777.) Therefore, the district court erred by rejecting to consider these as-applied claims brought by ACSI.

## **VI. THE RULING ERRED IN IGNORING THE UNDISPUTED FACTS OF 150 OTHER UC REJECTIONS OF COURSES THAT ADD A SINGLE RELIGIOUS VIEWPOINT (CATHOLIC, JEWISH, OR PROTESTANT). IT CONTRADICTS THE OVERBREADTH DOCTRINE.**

The court below, while acknowledging the existence of “more than 150 courses rejected by UC” (ER67-68), erred in entirely ignoring them and refusing to apply the overbreadth doctrine (ER57-58). *See Forsyth County*, 505 U.S. at 129-30. The evidence reflects that they were all rejected because of added religious viewpoints in five subjects. (ER461-86, 222-385, 2225-2454.)

The court did not rule that the 58 non-ACSI Catholic and Jewish course rejections (ER126-135) were somehow waived; it simply failed or refused to consider them to show a practice or policy, or under the overbreadth doctrine. (The courses were nearly all disclosed during discovery as numbered exhibits, and listed in the Watters Declaration. (ER751-777.))

The court similarly erred in excluding certain opinions in ACSI’s affidavits about the 58 Catholic and Jewish course rejections and the 38 ACSI course rejections (§V). (ER8-9.)

## **CONCLUSION**

The summary judgment rulings should be reversed, along with the cost award.

Dated January 26, 2009, and respectfully submitted,

BIRD, LOECHL, BRITAIN & McCANTS,  
LLC

By: s/Jonathan T. McCants  
Wendell R. Bird, P.C.  
Jonathan T. McCants

ADVOCATES FOR FAITH & FREEDOM  
Robert H. Tyler

Counsel for Appellants

**CERTIFICATE OF COMPLIANCE**  
**(Pursuant to Fed. R. App. P. 32(a)(7)(C) and Form 8)**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,998 words.

This 26th day of January, 2009.

s/Jonathan T. McCants  
Attorney for Appellants

**ADDENDUM OF RULES (UC POLICIES)**  
**(Pursuant to Fed. R. App. P. 28(f))**

Attached are excerpts from Exhibits 241-243 in the district court record, which are further described below:

ER1477 Ex. 241 “UC Position Statement: ‘A-G’ Course Approval for High School Science Courses Taught from Textbooks from Selected Christian Publishers” (5/16/2004)

ER1483 Ex. 242 “UC Position Statement: ‘A-G’ Course Approval for High School [History] Courses” (7/23/2004)

ER1485 Ex. 243 “UC BOARS Statement on Religion & Ethics Courses”

## University of California Position Statement: "A-G" Course Approval for High School Science Courses Taught From Textbooks from Selected Christian Publishers

### The University of California "a-g" Course Approval Process

The University's Academic Senate has been given the responsibility from the UC Regents to set the conditions for admission to the University, subject to final approval of the Board of Regents. The Board of Admissions and Relations with Schools (BOARS), a committee of the University's Academic Senate, establishes the subject areas and pattern of courses required for minimum eligibility for freshman admission to the University of California.

The general purposes of the a-g subject area requirements are to ensure that entering students:

1. Can participate fully in the first year program at the University in a broad variety of fields of study;
2. Have attained the necessary preparation for courses, majors and programs offered at the University;
3. Have attained a body of knowledge that will provide breadth and perspective to new, more advanced studies; and
4. Have attained essential critical thinking and study skills.

(<http://pathstat1.uconn.edu/ag/a-g/purpose.html>)

The faculty set guidelines for prerequisite secondary school course content that UC students need to be prepared to take and pass University courses and meet University major requirements. Not every secondary school course meets these criteria. In the sciences, for example, courses and texts that provide general overviews or perspectives without providing strong basic information can be determined to be unsuitable in meeting the prerequisite criteria that fulfill the "d" laboratory science requirement.

- a. For example, a course in agricultural science that does not adequately cover the core biological concepts expected by faculty would not be approved.
- b. A course emphasizing ecology and value of preserving and protecting nature also may be deficient in providing a structured scientific overview of important biological principles.

UCOP staff reviews course descriptions submitted by high schools to determine if the course content meets the faculty's guidelines for a-g certification. In situations that are difficult or not routine, faculty are consulted directly to determine if a course meets their criteria of providing secondary students with the basic background that is expected of University students who will enroll in University level courses.

UC reviewers do not usually review individual textbooks, but rather seek to determine if the course seems appropriate for meeting the a-g criteria. In some subject areas (i.e., history, mathematics, science) where selected texts tend strongly to guide course content, the acceptability of the text plays a greater role in the course approval process. Where course outlines raise concerns about whether the course meets faculty

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guidelines, additional materials may be reviewed. UC faculty directly reviewed applicant courses that would utilize science texts from Bob Jones University Press and A Beka Books to see if they met the a-g criteria.

The University of California welcomes and encourages students from a wide variety of high school backgrounds to apply for UC admission. In the past 3 years, applicants have been admitted to UC from a broad range of California high schools (1,617 total high schools, 1,091 public and 526 private). Of the 526 private schools, 344 are religiously-affiliated high schools.

The University fully recognizes and respects the right of public and private school personnel to select instructional materials to be used by their students in their courses of instruction. The University also recognizes that not all high school courses need or should be geared toward satisfaction of UC preparatory requirements, and that public and private schools are free to pursue other educational objectives, whether in some or all of their courses.

The faculty's primary interest is that students entering the University have achieved a basic level of education, as evidenced by completing courses in all of the "a-g" subject areas.

**Concerns About "A-G" Course Approval For High School Science Courses Taught From Textbooks From Selected Christian Publishers**

The texts in question are primarily religious texts; science is secondary. The textbook authors and publishers are quite clear and direct about their approach and provide evidence of this approach in both the texts and general marketing materials such as their web sites. Refer to Appendix A for examples.

As a result of the orientation/approach of the texts in question, which expressly prioritize religion over science, a course relying on these texts as core instructional materials does not meet the faculty's criteria for the UC subject "d" laboratory science requirement.

Courses that utilize these texts teach students that their conclusions must conform to the Bible, and that scientific material and methods are secondary. Students who graduate from high school having been taught -- in their high school science courses -- to discount the scientific process and the scientific conclusions validated by a wealth of scientific research are not being provided with an understanding of scientific principles expected by UC faculty.

**Options for Christian School Students For Fulfilling UC's "D" Subject Requirement**

Christian schools and their students have a number of alternatives to fulfill the "d" requirement in science for UC and CSU admission.

**1. Obtaining "a-g" Course Approval**

As many have done, Christian schools can develop and submit for UC approval a secular science curriculum with a text and course outline that addresses course content/knowledge generally accepted in the scientific community. To assist teachers and other school personnel in creating approved course outlines, UC has developed a comprehensive a-g Guide web site, at [www.uoop.edu/doorways/guide](http://www.uoop.edu/doorways/guide). This web site clearly describes the "a-g" requirements, provides dozens of sample course descriptions for both standard and innovative courses, offers useful tools and resources, and answers frequently asked questions. The University is happy to provide additional assistance to high schools, including Christian schools, through a collaborative consultation process, in order to help the schools create course outlines that meet the faculty's "a-g" course requirements.

## University of California Position Statement: "A-G" Course Approval for High School Courses

### The University of California "a-g" Course Approval Process

The University's Academic Senate has been given the responsibility from the UC Regents to set the conditions for admission to the University, subject to final approval of the Board of Regents. The Board of Admissions and Relations with Schools (BOARS), a committee of the University's Academic Senate, establishes the subject areas and pattern of courses required for minimum eligibility for freshman admission to the University of California.

The general purposes of the "a-g" subject area requirements are to ensure that entering students (<http://pathstat1.ucop.edu/ag/a-g/purpose.html>):

1. Can participate fully in the first year program at the University in a broad variety of fields of study;
2. Have attained the necessary preparation for courses, majors, and programs offered at the University;
3. Have attained a body of knowledge that will provide breadth and perspective to new, more advanced studies; and
4. Have attained essential critical thinking and study skills.

The faculty sets guidelines for prerequisite secondary school course content that UC students need to be prepared to take and pass University courses and meet University major requirements. Not every secondary school course meets these criteria.

UCOP staff reviews course descriptions submitted by high schools to determine if the course content meets the faculty's guidelines for a-g certification. In situations that are difficult or not routine, faculty are consulted directly to determine if a course meets their criteria of providing secondary students with the basic background that is expected of University students who will enroll in University level courses.

The University of California welcomes and encourages students from a wide variety of high school backgrounds to apply for UC admission. In the past 3 years, applicants have been admitted to UC from a broad range of California high schools (1,617 total high schools, 1,091 public and 526 private). Of the 526 private schools, 344 are religiously-affiliated high schools.

The University fully recognizes and respects the right of public and private school personnel to select instructional materials to be used by their students in their courses of instruction. The University also recognizes that not all high school courses need or should be geared toward satisfaction of UC preparatory requirements, and that public and private schools are free to pursue other educational objectives, whether in some or all of their courses.

The faculty's primary interest is that students entering the University have achieved a basic level of education, as evidenced by completing courses in all of the "a-g" subject areas.



[TO CALVARY]  
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## Options for Christian School Students For Fulfilling UC's "A" Subject Requirement

Christian schools and their students have a number of alternatives to fulfill the "a" requirement in history for UC and CSU admission.

### 1. Obtaining "a-g" Course Approval

As many have done, Christian schools can develop and submit for UC approval a secular history curriculum with a text and course outline that addresses course content/knowledge generally accepted in the History/Humanities/Social Sciences community. To assist teachers and other school personnel in creating approved course outlines, UC has developed a comprehensive a-g Guide web site, at [www.ucop.edu/doorways/guide](http://www.ucop.edu/doorways/guide). This web site clearly describes the "a-g" requirements, provides dozens of sample course descriptions for both standard and innovative courses, offers useful tools and resources, and answers frequently asked questions. The University is happy to provide additional assistance to high schools, including Christian schools, through a collaborative consultation process, in order to help the schools create course outlines that meet the faculty's "a-g" course requirements.

### 2. Other Options for Students to Meet the Subject "a" Requirement

Students at schools without UC-approved courses in history have several alternatives to fulfill their history requirements via other means:

- A. Students can take a UC-transferable community college history course; or
- B. Students can meet the requirement through testing:
  - 1) Score of 540 or higher on the SAT II: Subject Test in World History
  - 2) Score of 550 or higher on the SAT II: Subject Test in US History
  - 3) Score of 3, 4, or 5 on the Advanced Placement History and/or Government exams
  - 4) Score of 5, 6, or 7 on the Int'l Baccalaureate Higher Level History exams

### 3. Eligibility by Examination

A student who does not meet the Subject and Scholarship requirements (including "a-g" coursework) may be able to qualify for admission to the University by examination. To qualify by examination alone, a student must achieve a total score of at least 1400 on the SAT I, or a composite score of 31 or higher on the ACT. The total score on the three SAT II: Subject Tests must be 1760 or higher, with a minimum score of 530 on each test.

### 4. Admission by Exception

Because all students have not had the same opportunities to prepare for higher education, the University gives special consideration to a limited number of freshman and transfer applicants who show potential to succeed at the University even though they do not meet the minimum admission requirements. Each campus has specific requirements for admission by exception.

CONFIDENTIAL

UNIVERSITY OF CALIFORNIA  
BOARD OF ADMISSIONS AND RELATIONS WITH SCHOOLS  
SUBCOMMITTEE ON HIGH SCHOOL ARTICULATION

Statement on Religion and Ethics Courses

In order, to be considered as history, social science, and English courses, courses in religion or ethics taught in schools should have the following characteristics in order to satisfy the 'f' requirement:

1. The course should treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint.
2. The course should not include among its primary goals the personal religious growth of the student.

BOARS wishes to reiterate its recognition that there are many courses which are valuable for the student and appropriate for the setting in which they are given but which do not meet the 'f' requirement for admission to the University. Failure to meet the 'f' requirement does not detract from the value of such courses but simply means that BOARS would not want to see the student take them to the exclusion of other courses described in the 'f' requirement.

April 1987

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**PROOF OF SERVICE**

STATE OF GEORGIA, CITY OF ATLANTA:

The undersigned declares: that I am employed in the County of Fulton; I am over the age of 18 years and not a party to the within action; my business address is 1150 Monarch Plaza, 3414 Peachtree Road, N.E., Atlanta, Georgia 30326.

On **January 26, 2009**, I electronically filed the documents below 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 I served upon counsel for all parties in this action the following documents, by placing a true and correct copy addressed as stated on the attached service list to a third party commercial carrier for delivery within 3 calendar days, specifically by Federal Express, overnight delivery:

**Brief of Appellants**

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