

Case No. 08-56320

**In the United States Court of Appeals
For the Ninth Circuit**

**ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,
Plaintiffs-Appellants,**

v.

**ROMAN STEARNS, *et al.*,
Defendants-Appellees.**

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

***Amici Curiae* Brief of the American Center for Law and Justice,
Catholic League for Religious and Civil Rights, Common
Good Foundation, and Seventh-day Adventist Church
State Council in Support of Plaintiffs-Appellants**

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Dated February 2, 2009

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INTEREST OF *AMICI*¹

Amicus, American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have presented arguments in numerous cases before the Supreme Court of the United States and other federal and state courts involving the First Amendment. *See, e.g., Pleasant Grove City v. Summum*, Case No. 07-665 (U.S. argued Nov. 12, 2008); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

Amicus, Catholic League for Religious and Civil Rights, is the nation’s largest Catholic civil rights organization. The Catholic League defends the right of Catholics—lay and clergy alike—to participate in American public life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League works to safeguard the religious freedom and free speech rights of Catholics whenever and wherever they are threatened.

Amicus, Common Good Foundation, is an ecumenical Christian organization committed to education, inspiration, motivation and missionary activity. The Foundation supports parental authority in education and views public, private, parochial, and charter schools as an extension of parental educational choice.

¹ Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

Amicus, Church State Council of Seventh-day Adventists, is the oldest public policy organization in the southwestern United States devoted exclusively to liberty of conscience and the separation of church and state. The Council serves the Seventh-day Adventist Church, which operates one of the largest Protestant school systems nationally and internationally, including an extensive network of elementary, secondary and postsecondary schools in California. The Council is concerned that the University of California's policy and practice imposes a profound secularizing influence on private religious schools which undermines public policy that respects the autonomy of private schools.

The proper resolution of this case is a matter of substantial concern to *amici* due to the impact it will likely have on religious education in California and across the country. *Amici* urge this Court to rule in Plaintiffs-Appellants' favor because the First Amendment prohibits the religious discrimination that is pervasive in the University of California's selective scrutiny of the curriculum of religiously affiliated private schools. California students should be considered for admission to a state university without regard to their religious worldviews.

SUMMARY OF ARGUMENT

This case presents a quintessential example of government hostility toward religion that violates the Establishment Clause of the First Amendment.² As part of its review of California private high school courses, the University of California (UC) seeks to identify the religious or non-religious viewpoint or set of viewpoints from which courses are taught. UC has repeatedly rejected courses from religious high schools solely or primarily due to *the theological positions that are emphasized*, claiming that the courses fail to adequately prepare students for study at UC. In many cases, the rejected courses include a wide variety of religious and non-religious perspectives and are geared toward developing students' critical thinking skills and preparing them for college study, yet UC posits that the courses' emphasis on a particular religious viewpoint or set of viewpoints renders them inadequate.

In particular, UC has targeted courses that emphasize disfavored religious viewpoints, such as the idea that God has influenced human history and provides a

² While this *amici curiae* brief focuses on the Establishment Clause, *amici* also support Appellants' other claims and arguments. In addition, UC's rejection of private high school courses due to their religious perspectives endangers the fundamental constitutional right of parents to direct the education of their children. *See generally Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *In re Carl R.*, 27 Cal. Rptr. 3d 612, 622 (Ct. App. 2005) (citation omitted) (noting that "parents' rights to direct their child's upbringing is a compelling right . . . ranked among the most basic of civil rights"). UC seeks to do something prohibited by constitutional law and unsupported by public policy, namely, dictate to private schools the curriculum taught in their classrooms.

universal, unchanging standard of truth and morality. Moreover, UC has frequently rejected courses that emphasize the principles, history, or philosophies of one religion, highlight the impact that historical events have had upon a particular religious group, or identify the religious elements present within a non-religious subject matter. UC has even required Jewish high schools to “expand the perspectives” and provide “a broader viewpoint” in courses on the Holocaust and has stated that such courses must cover other human tragedies to be worthy of recognition.

By contrast, UC approves of specialized *non-religious* History and Social Science courses, stating that

World History courses do not need to cover every culture or period in the history of humankind. For example, a suitable course could be an in-depth study of a single culture, such as a yearlong study of Chinese civilization. . . . 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. However, it is expected that the course still include the full span of U.S. history or at least key events in U.S. history.

ER1408.

UC’s exacting scrutiny of the theological viewpoints of religious high school courses furthers no legitimate, much less compelling, educational purpose. Applicants’ religious worldviews bear no relationship to their likelihood of succeeding at UC. A reasonable observer would conclude that the primary effect of UC’s policy and practice is to display hostility toward religion in general and

certain religious perspectives in particular. As such, UC has violated the Establishment Clause.

ARGUMENT

UC targets and rejects courses from religious high schools that emphasize disfavored religious viewpoints, such as the idea that God or divine providence has played a role in human history. UC has violated the Establishment Clause because it has penalized applicants for the theological positions they hold without any compelling (or even legitimate) educational purpose for doing so.³ The primary effect of UC's policy and practice is to display hostility toward religion in general and certain religious viewpoints in particular.

I. UC Has a Wide-Ranging Policy and Practice of Targeting High School Courses that Emphasize Disfavored Religious Viewpoints for Rejection.

UC's exacting scrutiny of the theological viewpoints of courses taught by religious high schools is both over-reaching and unsupported by any legitimate, must less compelling, educational purpose. As explained in the following Section, UC has rejected courses from religious high schools that

- focus on the history, philosophies, or principles of the religion or denomination that the school is affiliated with (while discussing a variety of

³ The fact that UC's rejection of high school courses due to their religious viewpoints makes it *much more difficult* for students from those schools to be admitted to UC, *but not impossible*, is of no moment because the First Amendment bans all forms of governmental hostility toward religion.

viewpoints from within the religion as well as other religious and non-religious perspectives);⁴

- examine Jewish perspectives on the Holocaust and its impact on the Jewish faith and people;⁵
- state that God or divine providence has played an active role in shaping human history or that a certain religion or religious text is an incontrovertible source of truth;⁶
- emphasize one religious viewpoint or set of viewpoints (while discussing numerous other religious and non-religious viewpoints) in courses dealing with morality, ethics, and social justice;⁷
- analyze the religious themes present in non-religious subject matter such as secular literature, films, and music;⁸ or
- provide a variety of religious and non-religious viewpoints throughout the course while emphasizing one religious viewpoint or set of viewpoints in one unit of the course.⁹

The cumulative impact of UC's overassertive cleansing of religious schools' distinctive approaches in their courses strikes at the heart of religious education and the First Amendment. The District Court's conclusion that UC does not reject courses due to their religious perspective is unsupported by the record.¹⁰

⁴ See, e.g., ER2351, ER2381-88, ER2393-99, ER2421-36.

⁵ See, e.g., ER2238-44, ER2400-11.

⁶ See, e.g., ER13, ER39-40, ER2036.

⁷ See, e.g., ER48, ER2322-26, ER2332-40, ER2356, ER2363-65, ER2415, ER2417.

⁸ See, e.g., ER2376-80.

⁹ See, e.g., ER2368-75.

¹⁰ UC's rejection of courses from religious high schools that are not parties to this case is certainly relevant as evidence of *what UC's policy and practice is* given the minimal written guidance provided to UC course reviewers and the *ad hoc* nature of the review process.

A. *Courses Emphasizing the History, Philosophies, or Principles of One Religion*

One area of particular interest to religious high schools that UC has targeted is courses that emphasize the history, philosophies, or principles of the religion or denomination that the school is affiliated with. It is not surprising that these schools would offer courses that highlight how their faith has developed over time, how it has influenced and been influenced by society at large, and what its past and present leaders have said about a variety of topics. Many of these courses introduce students to a wide array of competing viewpoints and schools of thought from within their own faith and compare them to viewpoints from other religions and from non-religious sources. UC has rejected numerous such courses, however, saying that they must shift their focus to a group of religions and that discussing a variety of viewpoints from members of one religious faith is too “one-sided.”

For example, comprehensive courses offered by New Community Jewish High School were rejected because, in UC’s view, considering a wide range of Jewish perspectives is like considering *one single perspective*. New Community’s Jewish Leadership course “intends to study major social movements, the role of leadership in those movements, and their connection with Judaism” and also “examine[s] general principles of leadership and use[s] social movements as real life case studies of leadership in action.” ER2396.

A variety of movements will be discussed including the movements for civil rights, women's rights, the rights of Soviet Jewry, and workers' rights. Within each movement we will explore the background and how the movement emerged, the variety of responses to that issue, Jewish sources regarding the issue and Jewish involvement with the campaign.

Id. The goals of the course include “[d]emonstrat[ing] understanding of the concept of leadership both in a Jewish and worldly framework[,] . . . [using] critical thinking and analytical skills to complete challenging assignments and [a] final project[,] . . . [and] [a]nalyz[ing] leadership through a critical approach.” ER2396. The course covers a wide variety of subjects, Jewish viewpoints, and materials, ER2397-99; UC even said, “You may want to expand this course to a full year,” ER2394. However, UC rejected the course and stated, “It needs to show more perspectives and have a more inclusive reading list.” *Id.* UC must have been referring to the inclusion of more *non-Jewish* perspectives since the course covers a large number of Jewish thinkers.¹¹

Moreover, New Community's Jewish Philosophy course allows students to “hone critical thinking skills as they engage in an in depth study of Jewish philosophy” by considering the writings of “[s]ome of Judaism's most important

¹¹ When UC rejected Cathedral Catholic High School's course on the History of Christianity, it stated, “We would expect a course in the History of Christianity to include *more than one Christian viewpoint.*” ER2328 (emphasis added). It is apparent, however, that UC has taken the position that including multiple perspectives *from one religion* is not sufficient to make a course diverse enough for UC recognition.

thinkers.” ER2423. The course is specifically tailored to help prepare students for college study:

This class is the school’s culminating experience in Jewish studies and will be a preparation for the college experience. As such, this class enables students to attain the rigor of a college level class. . . . As students enter university and are exposed to a diversity of philosophies, it is important that they have already attained a high level of understanding through academic sources about Judaism’s philosophy.

Id. Key assignments in the course include “[o]p-ed essays that apply philosophical views to different Jewish denominations’ policy on a given subject” and “[d]ebates between opposing philosophical schools of thought.” ER2429. While the course emphasizes a wide variety of classical and modern Jewish thinkers, it also includes coverage of Plato, Aristotle, Catholicism, Protestantism, Islam, Buddhism, and Hinduism. ER2430-31. UC rejected the course, however, saying, “*One-sided perspective. If expanded, has potential. Needs to be more inclusive.*” ER2436 (emphasis added). UC also stated, “Need more comparatives, too slanted,” ER2433, and “Need to expand philosophical comparisons.” ER2421.

In addition, San Domenico School offers a History of Christianity course that includes a broad range of Roman Catholic, Orthodox, and Protestant Christian perspectives. ER2386-88. The course also considers the Jewish roots of Christianity and Islam’s impact on the Christian faith during the Middle Ages. *Id.* UC rejected the course, stating that it “needs more perspective on *the history of*

other religions for a more comparative point of view.” ER2381 (emphasis added). In the same vein, UC rejected a course called Catholic Traditions from Saint Joseph Notre Dame High School, stating, “We would like to see other religions discussed and compared in this type of course.” ER2393. A Women in Scripture course from that school was also rejected because it “would need to cover other religions.” ER2351.¹²

UC’s discrimination against religious content and viewpoints in courses such as Jewish Philosophy and History of Christianity is highlighted by comparing UC’s stated reasons for rejecting those courses with its treatment of non-religious specialized History and Social Science courses:

World History courses do not need to cover every culture or period in the history of humankind. For example, a suitable course could be an in-depth study of a single culture, such as a yearlong study of Chinese civilization. . . . 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. However, it is expected that the course still include the full span of U.S. history or at least key events in U.S. history.

ER1408. There is no reasonable, religion-neutral explanation for why UC considers courses in Chinese civilization or African-American history to

¹² The fact that UC has, on occasion, approved some courses that include a religion-specific focus, such as “Western Civilization: The Jewish Experience,” ER37, ER40, while rejecting others *specifically due to their religion-specific focus* amplifies the problematic nature of UC’s review of the religious viewpoints of high school courses. This suggests that UC has discriminated between courses with “acceptable” and “unacceptable” theological viewpoints and bolsters Appellants’ argument that UC reviewers have unfettered discretion to reject religious courses.

adequately prepare students for college while it simultaneously rejects courses in Jewish philosophy or Christian history due to their supposed “one-sided” nature. Allowing students to get an in-depth look at one culture, ethnic group, religion, or historical period serves to enhance, not diminish, their education, regardless of whether the course is taught from a religious perspective.

In addition, UC’s suggestion that courses that focus on the history, philosophies, or principles of one religion are necessarily “slanted” or “one-sided” is incorrect. For example, the course outline for New Community’s Jewish Philosophy course lists over thirty different authors and other thinkers that will be discussed. ER2429-31. The list represents a wide array of perspectives from people who lived in varying cultures and time periods. *Id.* It is simply absurd for UC to declare that a course offering students such a rich diversity of viewpoints is “one-sided” simply *because it focuses on Jewish thought and experience*, just as it would be absurd to reject a course highlighting African-Americans’ contributions to philosophy as one-sided *because it focuses on African-Americans’ thoughts and experiences*. See generally *Grutter v. Bollinger*, 539 U.S. 306, 319-20 (2003) (emphasis added) (citing testimony that, “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn *there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students*”).

B. Courses Highlighting the Impact of the Holocaust on the Jewish Faith

UC's systematic exclusion of courses due to their religious perspectives has led to absurd results in practice such as the rejection of courses at Jewish high schools dealing with the Holocaust *due to their religious viewpoint and their emphasis on the Holocaust*. For example, a Shoah–Holocaust Studies course offered by San Diego Jewish Academy “examine[s] the history of the annihilation of European Jewry by the Nazis” and

trace[s] the rise of Nazism, the evolution of Nazi policy toward the Jews, the response of the Jewish community to that policy, the reaction of the nations of the world to Nazi antisemitism, and attempts to rescue and aide Jews and the role of Christian and humanitarian institutions in the unfolding of the Holocaust.

ER2240. UC rejected the course, however, stating that it must include “a different perspective and *a broader viewpoint*,” ER2244 (emphasis added), and also “a correlation between The Holocaust and similar events worldwide (*e.g.*, atrocities in America (American Indians, African Americans) Sierra Leon[e], Uganda, Bosnia, etc.).” ER2238.

Similarly, a Holocaust and Human Behavior course at New Community Jewish High School allows students to “study the Shoah (Holocaust) as a unique historical event,” “examine its moral, philosophical and sociological implications,” and “examine what causes people to act as perpetrators, bystanders, or resisters,

and what dilemmas of choice face the victims in a time of evil.” ER2405.

Moreover,

[t]hrough analysis of primary sources and student research reports, students will recognize that many of these forces—discrimination, racism, and antisemitism—exist in our own society today. Students analyze the decision-making process based on outcomes, and are able to apply this to present day communities, nations and the world at large.

Id. In the course, “[s]tudents will deepen their critical thinking, research and writing skills while dealing with a variety of source types, media, and personal interactions” and will also “internalize that history is a series of choices made by individuals, organizations and governments, and that through this history they will understand what it means to be a responsible citizen.” ER2406. UC rejected this course, stating that it is “too slanted towards Holocaust with no other perspective,” ER2411, and that New Community “[n]eed[s] to expand the perspectives for this course.” ER2400.

It is simply bizarre for UC to require Jewish high schools to “expand the perspectives” and provide “a broader viewpoint” in courses on the Holocaust. Must these courses include additional study and consideration of Nazi perspectives on the Holocaust to appease the sensibilities of UC reviewers? These schools should not have to spend class time seriously considering Iranian President Mahmoud Ahmadinejad’s claim that

[t]hey have invented a myth that Jews were massacred and place this above God, religions and the prophets. . . . If somebody in their country questions God, nobody says anything, but if somebody denies the myth of the massacre of Jews, the Zionist loudspeakers and the governments in the pay of Zionism will start to scream.¹³

Such a requirement would be intolerable if it were unrelated to the religious aspects of these courses, but it is all the more revolting since it is *precisely because the courses take a faith-based perspective* that they were rejected.

Even if UC retracted the requirement that a Holocaust course be taught from a broad array of perspectives, the claim that a course focusing on the Holocaust must be expanded to cover other human tragedies to be worthy of recognition is equally outrageous. The enormity of the impact of the Holocaust on the global community, and Jews in particular, should go without saying. World-class museums are devoted entirely to the Holocaust, and the United States Holocaust Memorial Museum in Washington, D.C. has explained that

[p]rofessionals from the fields of law enforcement, the judiciary and the military, as well as diplomacy, medicine, education and religion study the Holocaust, with emphasis on the role of their particular professions and the implications for their own responsibilities. These programs intensify their sense of commitment to the core values of their fields and their roles in the protection of individuals and society.¹⁴

¹³ CNN, *The CNN Wire: Iranian president calls Holocaust 'a myth'*, Dec. 14, 2005, <http://www.cnn.com/2005/US/12/14/wednesday/>.

¹⁴ United States Holocaust Memorial Museum, *About the Museum*, <http://www.ushmm.org/museum/mission/>.

UC's irrational insistence that Jewish high schools "expand the perspectives" of their courses on the Holocaust is a particularly egregious example of the anti-religious purpose and effect of UC's policy and practice.

C. Courses That State That God or Divine Providence Has Influenced Human History or That There is One Source or Standard of Truth

One religious perspective that UC has taken strong issue with is the idea that God or divine providence has played an active role in shaping human history. UC rejected Appellant Calvary's History course entitled "Christianity's Influence on America" because the primary text was deemed inadequate since it

instructs that the Bible is the unerring source for analysis of historical events, attributes historical events to divine providence rather than analyzing human action, evaluates historical figures and their contributions based on their religious motivations or lack thereof and contains inadequate treatment of several major ethnic groups, women, and non-Christian religious groups.¹⁵

While UC has stated that including the viewpoint that historical events were influenced by God or divine providence will not "automatically disqualify a course for approval," it has stated that "'excessive reliance' on these explanations may prevent approval." ER40 (citation omitted). For example, Professor James Given's rejection of The King's Academy's World History course stated that "[t]his course

¹⁵ ER13. The rejection of certain courses on both viewpoint-based and non-viewpoint based grounds does not shield UC's conduct from this Court's review because many courses were rejected *primarily or solely due to their religious viewpoint*. In addition, UC's viewpoint discrimination likely affected its decision to add non-viewpoint based reasons for denial in some instances.

takes an ahistorical approach to the study of world history” because “history is made by human actors History is not made by supernatural agents. Thus, [the course] is fundamentally flawed, since it presupposes that a Christian god has created and governed the world since its inception.” ER2036. By contrast, UC does not disqualify courses that rely on the theological position that historical events are attributable solely to human actors and are not influenced by God or divine providence. As such, UC has violated the Establishment Clause by penalizing applicants solely because they hold a disfavored position in a theological debate (whether and to what extent God has influenced human history).¹⁶

In addition, UC rejects government courses that declare that God or a specific religious text provides the ultimate source of truth. UC’s government expert, Professor Mark Petracca, stated that “any government course that presents a ‘single, unassailable standard for evaluating government, truth, civic and political

¹⁶ See generally *County of Allegheny v. ACLU*, 492 U.S. 573, 590, 594 (1989) (“[T]his Court has come to understand the Establishment Clause to mean that government . . . may not discriminate among persons on the basis of their religious beliefs and practices [or] appear[] to take a position on questions of religious belief”); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (“[The Establishment Clause] means at least this: No person can be punished for entertaining or professing religious beliefs or disbeliefs”). This applies with special force when public education is involved. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968) (citation omitted) (“the State may not adopt programs or practices in its public schools or colleges which ‘aid or oppose’ any religion. . . . [The Establishment Clause] forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.”).

leaders, culture, and justice’ . . . fails to ‘prepare students adequately for study at UC.’” ER39 (citation omitted). In Professor Petracca’s view, courses based on the belief that God or a religious text provides the correct reference point for reviewing government affairs and claims of truth “contradicts ‘the pluralistic and inquisitive approach’ to the study of government ‘used by professors and expected of students at UC.’” *Id.* UC’s exclusion of applicants based on their beliefs about the proper balance between religious and non-religious sources of “truth” is another example of improperly penalizing applicants for their theology.

D. Courses Dealing with Morality, Ethics, and Social Justice

UC’s scrutiny and rejection of religious high school courses dealing with morality, ethics, and social justice is particularly detrimental to the ability of religious schools to function, as these subjects are inexorably linked to a school’s theology. One of the core functions of a religious school is to instill the moral and ethical principles of the particular faith while ensuring that students learn about a variety of other moral worldviews and philosophies and can intelligently discuss and analyze them. UC’s policy and practice, however, is to reject ethics, morality, and social justice courses that discuss multiple religious and non-religious viewpoints if, in UC’s view, one religious viewpoint or set of viewpoints is emphasized throughout the course.

For example, Bellarmine College Preparatory School's Moral Theology: An Introduction to Ethics course "introduce[s] the student to the moral theological tradition *while including ethical views from various philosophical, religious, and cultural traditions.*" ER2324 (emphasis added). While the course emphasizes a Catholic perspective, it also examines classical Greek, Buddhist, Confucian, Taoist, Islamic, United States cultural, and indigenous cultural ethical perspectives. ER2326. Nevertheless, UC rejected this course because, in UC's opinion, it "*appears to address ethics from a Christian/Catholic perspective, making it too subjective to meet UC Guidelines.*" ER2322 (emphasis added).

Similarly, Damien High School's course in Moral Theology discusses a wide array of religions, schools of thought, and historical figures, including Buddhism, Hinduism, Confucianism, Judaism, Islam, Christianity, Socrates, Plato, Aristotle, Dorothy Day, Gandhi, Martin Luther King, Jr., the Berrigans, the Dalai Lama, and Mother Theresa. ER2339-40. When UC rejected this course, however, it stated "[w]e would expect to see a more varied reading list, *not just one viewpoint represented by the main text.*" ER2332 (emphasis added). There are numerous other similar examples where UC rejected a religious school's ethics, morality, or social justice course because UC believed it emphasized the school's

religious viewpoint while discussing other religious and non-religious viewpoints.¹⁷

As these and other examples demonstrate, UC has taken the position that courses that expose students to a wide variety of ethical worldviews in an academic environment where one religious ethical system is viewed as being *the correct ethical system*—or is at least emphasized—are inadequate to equip students with the kind of “critical thinking” skills necessary to succeed as a UC student.¹⁸ Thus, an otherwise acceptable course that provides students with the ability to discuss and critique various moral arguments may become unacceptable by emphasizing the viewpoint that a particular set of ethical positions is right or wrong. In the same

¹⁷ See, e.g., ER2363, ER2365 (rejecting Servite High School’s Moral Philosophy Ethics course, which addresses values “from historical, t[h]eological positions as well as a more objective philosophical perspective as seen in great works of literature and classical and modern philosophy,” by stating that it “focuses on specific religious tenets/doctrine” and “would need broader comparative focus”); ER2415 (rejecting Damien High School’s Social Justice course by stating, “[a]lthough this course has potential, we would expect to see a broader/different perspective other than the Judeo-Christian view”); ER2417 (rejecting Notre Dame High School’s Moral Decision Making course by stating, “Not enough reading. Course appears to have too limited of a perspective on moral values.”); ER2356 (rejecting Saint Mary’s College High School’s Ethics and Values course by stating, “It appears the text for this class is written from a single point of view and thus does not address a variety of viewpoints and standards”).

¹⁸ It is quite apparent that UC has broadly interpreted its stated policy of rejecting Religion and Ethics courses that, in UC’s view, are “*limited to one denomination or viewpoint*” to include courses that are not limited to one denomination or viewpoint but merely *emphasize* one more than others. See ER48 (emphasis added). UC’s position is that such courses inherently fail to provide students with “the ability to take a more observer-independent view.” *Id.*

vein, an unacceptable course may be approved if its emphasis on one religious viewpoint is dropped. The idea that a public university system would consider students who hold particular religious viewpoints on issues of morality, ethics, or social justice to be less capable of succeeding in college than other students *due to those religious viewpoints*—and would take steps to make it much more difficult for those students to gain admission—flies in the face of the First Amendment.

E. Courses Highlighting Religious Elements Within a Non-Religious Subject Matter

UC also rejects courses that emphasize the religious themes and viewpoints present within a non-religious subject matter, even when the course emphasizes the development of college-level writing and critical thinking skills. For example, Santa Margarita Catholic High School offers a Theology in Literature, Film, and Music course that “is college preparatory in requiring critical thinking and writing skills.” ER2379. Santa Margarita explained that “[t]he course was modeled after a course in Theology & Literature at Santa Clara University. *Our course requires greater written assessment.* There are also similar courses of study available at Aquinas College (TN), University of Glasgow (UK), and the University of Edinburgh (UK).” *Id.* (emphasis added). The course’s goals are that “[s]tudents will be able to analyze and critique works of literature, film and music on a thematic basis” and also “express critical thought in discussion and written work.” *Id.*

In addition to a variety of readings, the Theology in Literature, Film, and Music course's materials include Steven Spielberg's *Schindler's List* and *The Color Purple*, Joel Zwick's *My Big Fat Greek Wedding*, and Rebecca Wells's *Divine Secrets of the Ya-Ya Sisterhood*. ER2380. Despite the course's broad coverage and emphasis on preparing students for college study,¹⁹ UC rejected the course because it "appears to be too narrow in its theological scope." ER2376. It is abundantly clear that UC's objection was to the course's focus on *theological* themes in various media; UC would likely not reject courses that focus on non-religious themes such as diversity, racism, or stereotypes in various media.

F. Courses Emphasizing Religious Viewpoints in One Unit

Given UC's targeted review of religious school courses for any hint of one religious viewpoint being over-emphasized (in UC's view), some high schools are undoubtedly enticed into self-censorship of their courses. A religious high school might conclude that, despite its mission to provide an education that supplements standard content with emphasis on certain religious philosophies or viewpoints, it must limit its emphasis on religious themes to *one unit of its courses*. Even when a religious school's course includes an over-abundance of religious and non-

¹⁹ UC even used the fact that the course is at a college level *against* Santa Margarita, stating, "We are not interested in courses modeled after college courses; we are interested in those modeled after UC approved high school courses." ER2376. It is highly doubtful that UC has consistently rejected *all* courses offered by religious and non-religious high schools that are modeled after college courses.

religious perspectives, however, UC will reject it unless *each unit of the course* can be shown to emphasize a variety of viewpoints.

For example, UC rejected a Women's Studies course offered by Saint Mary's Academy that "is designed to introduce students to a historical and sociological background of various issues concerning women" and includes "units on pre-Christian and Judeo-Christian feminine images of God, the suffrage and temperance movements in 19th and early 20th century America, the women's liberation movement, and gender dynamics including body image and gender roles." ER2371. The course falls squarely within UC's guideline that "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.

Among the course's objectives is to ensure that "[s]tudents will develop the tools necessary to think critically about their place as women in society," "learn the skills needed to look critically at both [fiction and non-fiction works]," and "develop a critical lens through which they will be able to see and question women's roles throughout history and around the world." ER2372. The course's broad range of coverage includes discussions of the development of the National Organization for Women, Betty Friedan's *The Feminine Mystique*, Anita Diamant's *The Red Tent*, and Ada Maria Isasi-Diaz's *Hispanic Women: Prophetic*

Voice in the Church. ER2373-74. Moreover, the class will “hear from women in non-traditional roles including a member of the armed forces and a former female gang member.” ER2374. Saint Mary’s described the course by saying,

It was decided early on that this course would be an upper-division class because of the maturity level and critical thinking skills it would require. The texts to be used in this course were selected because they reflect the Catholic faith tradition of this school and the age and ethnic background of the students.

ER2375.

Despite the Women’s Studies course’s broad range of coverage and emphasis on the development of critical thinking skills, one UC reviewer stated,

Does anyone think this is too narrow a viewpoint? *I was going along and thinking it was a pretty good course until the outline mentioned the Catholic point of view in the texts*, which I am not sure I saw. For instance, Anita Diamant, the author of “The Red Tent” is Jewish.

ER2369 (emphasis added). In addition, UC told Saint Mary’s Academy that “the focus at times is very narrow in scope (for instance, *parts of unit one are too specific in viewpoint*)” ER2368 (emphasis added).²⁰ While portions of unit one emphasize a Catholic perspective, the unit also “look[s] at images of female deities throughout the ancient world and in today’s polytheistic religions.” ER2372. In UC’s view, however, emphasizing a Catholic perspective in *certain*

²⁰ In addition, UC claimed that the course “covers too much ground for a semester course.” ER2368. It is ironic that this course and others were apparently *too rigorous* for acceptance, see, e.g., ER2376, while other courses from religious schools were deemed *not rigorous enough*.

portions of a broad-ranging course was enough to make *the entire course* unworthy of recognition.

II. UC Has Violated the Establishment Clause Because the Primary Effect of Its Exclusion of Courses Due to Their Theological Positions is to Demonstrate Hostility Toward Religion in General and Certain Religious Viewpoints in Particular.

A reasonable observer would conclude that the primary effect of UC’s exclusion of courses from religious high schools due to their emphasis on certain religious viewpoints is to demonstrate hostility toward those viewpoints and the religious denominations and students who hold them. “The government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion.” *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (citations omitted); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1255 (9th Cir. 2007); *Am. Family Ass’n v. City & County of San Francisco*, 277 F.3d 1114, 1120-21 (9th Cir. 2002).

In particular, “the First Amendment mandates governmental neutrality *between religion and religion*,” *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citation omitted) (emphasis added), and “forbids an official purpose to disapprove of a particular religion” *Church of Lukumi Babalu Aye v. City of*

Hialeah, 508 U.S. 520, 532 (1993) (citations omitted); *see also Epperson*, 393 U.S. at 103-04; *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

A. *Hostility Toward Religious Viewpoints is the Natural and Primary Effect of UC's Policy and Practice.*

As explained in the previous Section (and the Appellants' Brief), UC rejects high school courses that emphasize the religious viewpoint (or set of viewpoints) that the school adheres to while presenting standard content from a wide range of religious and non-religious perspectives. In essence, UC posits that courses that teach relevant subject matter from the perspective that the school's religious belief system *is true*—while offering students ample opportunity to study many other religious and non-religious belief systems—necessarily fail to equip students to be critical thinkers and, by extension, successful UC students, *because of the religious belief system*. UC's selective tolerance of some courses that emphasize an *assortment* of religious viewpoints does not excuse its deliberate intolerance of courses that emphasize a *particular* religious viewpoint more than others, or that assert that there are some unchangeable moral or religious truths. As such, the District Court's reliance upon its conclusion that "UC approves many courses that include religious perspectives or are submitted by religious schools" was misplaced. ER63.

UC's targeted discrimination against otherwise qualified applicants due to their commitment to their sincerely held religious beliefs bears no relationship to

an accurate determination of whether their high school courses provided them “with the knowledge and skills to succeed in their studies at UC.” *See* ER2. It is clear that what UC is seeking from potential students from religious high schools is not a “skill” like reading and writing but rather a *way of thinking and belief system* that can be easily dislodged from any particular religious viewpoint. High school courses that seek to instill a value system or other religious viewpoint in connection with more general instruction are unacceptable to UC because they may succeed in their goal, thus making it more difficult for UC instructors to mold incoming students’ impressionable minds as they see fit.

The idea that applicants who have an unassailable commitment to a particular religious and moral worldview lack the academic acumen and skill set needed to succeed at UC—akin to students with failing grades or inadequate reading and writing abilities—is outrageous and evidences an unveiled hostility toward religion. The damaging impact upon California’s religious high schools and their students is not an unfortunate byproduct of a religiously neutral review process; to the contrary, it is the natural and logical consequence of a policy designed to identify and suppress religious viewpoints with which UC reviewers disagree. This is the essence of governmental hostility toward religion.

B. UC's Exclusion of Applicants Due to Their Religious Viewpoints Causes Them Concrete Harm and Serves to Undermine Diversity.

The reasonable observer would realize that UC's singling out of schools that teach from a disapproved religious belief system inflicts concrete harm upon applicants beyond hostility toward their religious beliefs. The Supreme Court has noted that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all," *Plyler v. Doe*, 457 U.S. 202, 221 (1982), and is "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Doe v. Kamehameha Schs./ Bernice Pauahi Bishop Estate*, 470 F.3d 827, 841 (9th Cir. 2006) (en banc) (citing cases). The Establishment Clause forbids UC and other public universities from excluding otherwise deserving applicants from admission—and, by extension, the opportunity to become better educated citizens and more marketable in the workforce—due to their religious way of thinking.

In addition, the reasonable person would understand that UC's rejection of students who hold disfavored religious viewpoints and belief systems serves to sharply undermine UC's stated commitment to diversity. For example, UC's Diversity Statement declares that UC "must seek to achieve diversity among its student bodies" to "broaden and deepen both the educational experience and the scholarly environment, as students and faculty learn to interact effectively with each other, preparing them to participate in an increasingly complex and pluralistic

society.”²¹ UC’s use of the term “diversity” refers to “the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance” such as, *inter alia*, religion. UC’s targeted exclusion of students due to their disfavored religious viewpoints directly undermines the achievement of UC’s stated goals because, as Justice Frankfurter once explained, “[b]y working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences.” *Cooper v. Aaron*, 358 U.S. 1, 20 (1958) (Frankfurter, J., concurring).

In the same vein, the Supreme Court has highlighted the importance of a “highly individualized, holistic review” process that considers a “broad[] array of qualifications and characteristics” that “may contribute to student body diversity” in recent cases involving diversity in public school admissions. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753 (2007) (quoting *Grutter*, 539 U.S. at 325, 337). The Court has noted that “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds’” and also cited the fact that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and

²¹ Regents of the University of California, *University of California Diversity Statement*, <http://www.universityofcalifornia.edu/diversity/diversity.html>.

viewpoints.” *Grutter*, 539 U.S. at 330 (citations omitted). While UC’s exclusion of students from schools that emphasize one particular religious viewpoint or set of viewpoints directly harms those students and the schools they attend, it also needlessly minimizes the UC student body’s “exposure to widely diverse people, cultures, ideas, and viewpoints” and lessens the variety of classroom discussion and debate. *See id.*

C. This Court’s Prior Cases Do Not Support UC’s Exclusion of Applicants Due to Their Religious Viewpoints.

UC can find no support in previous cases from this Court rejecting hostility to religion claims under the Establishment Clause because they are clearly distinguishable from the instant case. For example, *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994) and *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007), are distinguishable because both cases involved “governmental actions primarily aimed at avoiding violations of the Establishment Clause [which] have a legitimate secular purpose.” *Vernon*, 27 F.3d at 1397 (LAPD conducted an investigation to “determin[e] whether Vernon’s alleged on-duty conduct violated the Establishment Clause”); *Vasquez*, 487 F.3d at 1248 (county removed a cross from official seal to avoid possible Establishment Clause violation). Here, by contrast, UC has not attempted to defend its actions by claiming that they are required by the Establishment Clause (such a claim would be frivolous), and its actions lack the primary purpose or effect of achieving any other secular objective.

Moreover, *American Family Association v. City & County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), is distinguishable from the present case for at least two reasons. First, *AFA* involved government speech in response to the Plaintiffs' public expression on a matter of public concern, and the *AFA* Court concluded that the Plaintiffs had suffered *no concrete harm* from San Francisco's critical words (e.g., actual or threatened prohibitions or sanctions, denial of funding). *Id.* at 1124-25. Here, by contrast, Appellants have been directly and unquestionably harmed by UC's admissions restrictions that make it much more difficult for their students to gain admission to UC, a benefit of immeasurable value.

Second, the *AFA* Court concluded that San Francisco's letters and resolutions were a reasonably tailored means of "promoting equality for gays and discouraging violence against them" in response to Plaintiffs' public expression of their viewpoint. *Id.* at 1122. Here, by contrast, the exclusion of applicants due to the religious perspectives expressed inside their high schools bears no relationship to any compelling or legitimate secular goal and is certainly not a necessary or reasonable means of achieving such a goal. *See generally id.* at 1126-27 (Noonan, J., dissenting) (noting that the government may not pursue a plausibly secular purpose through means that are overtly hostile toward religion).

In sum, rather than allowing students with deeply held religious belief systems to compete with other applicants for admission to UC on an evenhanded

basis based on the strength of their academic records and demonstrated potential for success, UC has targeted such students for discriminatory treatment *due to the beliefs that they hold*. A reasonable person with knowledge of UC's policy and practice would undoubtedly conclude that the purpose and effect of UC's actions is to demonstrate hostility toward students and schools that emphasize disfavored religious belief systems.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court to reverse the District Court's decision and hold UC's policy and practice unconstitutional.

Dated February 2, 2009

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amici* brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less (6,448 words in total).

Dated February 2, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have sent the foregoing document by Federal Express, overnight delivery, to the following non-CM/ECF participants:

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