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, Case No. CV-05-6242-SJO

The Honorable James Otero, United States District Judge

BRIEF OF DEFENDANTS-APPELLEES

BRADLEY S. PHILLIPS
STUART N. SENATOR
REBECCA G. LYNCH
MICHELLE FRIEDLAND
SORAYA C. KELLY
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

CHARLES F. ROBINSON
CHRISTOPHER M. PATTI
MARGARET L. WU
UNIVERSITY COUNSEL
UNIVERSITY OF CALIFORNIA
1111 Franklin Street
Oakland, CA 94607
Telephone: (510) 987-9800
Facsimile: (510) 987-9757

Attorneys for Defendants-Appellees

ROMAN STEARNS, et al.

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INTRODUCTION

Plaintiffs challenge the right of the University of California ("UC") to apply the same educationally reasonable standards for undergraduate admission to applicants from certain religious schools as it applies to all other applicants. Under the guise of a "discrimination" claim, Plaintiffs seek exemption from the UC's reasonable and generally applicable admissions standards.

Plaintiffs' brief is based on three fundamental but false factual premises. Contrary to Plaintiffs' claims, and as the district court correctly found:

(1) There is no evidence that UC's challenged standards prohibit or prevent schools, religious or otherwise, from teaching whatever and however they choose or students from taking any course they wish.

(2) UC has not, as plaintiffs endlessly assert, denied credit to courses that "add" religious viewpoints to the teaching of "standard content," if teaching "standard content" means teaching the knowledge and analytical skills that UC considers important college preparation. Rather, UC has denied credit for courses that *fail* to teach such knowledge and skills, regardless of whether that failure is claimed to stem from a school's religious beliefs. Approved courses may include religious viewpoints as long as they do not *substitute* the teaching of religious belief for the teaching of academic content and skills.

(3) UC does not discriminate against religious schools or their students. UC has approved full slates of preparatory courses at most religious high schools, including many members of plaintiff Association of Christian Schools International ("ACSI"). Moreover, students who do not

take approved courses can obtain admission credit by scoring above approximately the bottom third of test takers on an SAT II subject exam. No student has been denied UC admission because of her beliefs or because of any of the practices challenged in this case. Plaintiffs' (and Amici's) assertions and implications to the contrary are baseless.

Because Plaintiffs' factual premises are false, Plaintiffs' claims fail even before consideration of the fundamental flaws in their legal arguments, which are also discussed below.

STATEMENT OF JURISDICTION

Appellees agree with Appellants' statement.

STATEMENT OF THE CASE

In August 2007, after discovery, Plaintiffs moved for summary judgment on all claims. Defendants ("UC") simultaneously moved for partial summary judgment on Plaintiffs' facial challenges. In March 2008, the district court denied Plaintiffs' motion and granted UC's. ER29.

The parties then jointly requested permission for UC to move for summary judgment on Plaintiffs' as-applied challenges. The court granted that request and ordered Plaintiffs to identify "the specific . . . courses they wish to include in their as-applied challenges." ER1178.

Plaintiffs listed approximately 40 courses in May 2008. ER1173-76. Plaintiffs later withdrew three courses. ER203.

In opposition to UC's motion, Plaintiffs proffered previously undisclosed expert opinions. The district court granted UC's motion and excluded the untimely expert opinions. ER1, ER8-9.

STATEMENT OF FACTS

I. THE A-G GUIDELINES IMPOSE NO SUBSTANTIAL BURDEN ON PLAINTIFFS.

UC, one of the world's great universities, comprises 10 campuses. Each year, UC must decide which 60,000+ of California's over 360,000 high school seniors to admit. UC guarantees admission to all "eligible" students. SER3653 ¶ 4. Most students become eligible by achieving sufficiently high grades in specified "a-g" courses and scores on standardized tests. SER3654 ¶ 7. UC's a-g guidelines and course review ensure that these students have earned their grades in courses that prepare them for study at UC. SER0168-69 ¶¶ 6-7. Nothing in Plaintiffs' religion is inconsistent with courses that satisfy the a-g guidelines.

A. Multiple Paths to UC Eligibility

1. Eligibility in the Statewide Context

Under this most common path to eligibility, students must demonstrate proficiency in the "a-g" subject areas. SER3654 ¶ 7. Students may demonstrate proficiency in several ways, including by earning good grades in approved courses (approximately 3.75 courses per high school year, *id.* ¶ 9) and/or scoring above the bottom third of test takers on SAT II subject tests. SER3654-56 ¶¶ 8-13; SER3659-73.[1]

[1] This is the most common path to what Plaintiffs call "regular admission." *See* Plaintiffs' Opening Brief (hereinafter "POB") 6. Because of the SAT II

a. a-g courses and course review

The a-g course requirements are:

"a": two years history/social science;

"b": four years English;

"c": three years mathematics;

"d": two years laboratory science;

"e": two years of another language;

"f": one year visual/performing arts;

"g": one elective.

SER1453-61. Students may take additional courses not qualifying for a-g credit, and most do. SER0167-68 ¶ 5.

To obtain approval of their courses for a-g credit, California high schools must submit course descriptions to UC. UC then considers whether the courses "involve substantial reading and writing," "show serious attention to analytical thinking as well as factual content," are "academically challenging," and will sufficiently prepare students for UC. SER3657 ¶ 19; SER1453. High schools often advertise UC approval of their courses. *See, e.g.*, SER2913-40; SER2941-43; SER3658 ¶ 22.

To assist schools, UC maintains a dedicated website, containing extensive interpretive notes, "helpful hints," hundreds of pages of sample course descriptions, and two "Statements of Competencies." SER1226-369; SER0873. UC reviews courses in light of all of these website materials. SER0178 ¶ 3. Reviewers can obtain additional guidance from faculty and

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option, among others, a student from a school without an approved a-g curriculum is *not* "ineligible for regular admission." *See id.*; *infra* note 3.

the Academic Senate's Board of Admissions and Relations with Schools ("BOARS"). SER3676-77 ¶ 6; SER0179 ¶ 6; SER0876-83.[2]

If UC disapproves a course, it explains why. *E.g.*, SER0145-64; ER2193-94. Schools may resubmit courses with either revisions or explanation why the disapproval was mistaken. SER0127-28 ¶¶ 19-22; SER0139-40, SER0143.

b. SAT II tests

Students may also satisfy a-g subject areas (except the "f" Visual and Performing Arts area) by scoring above the bottom third of test takers on the relevant SAT II tests. SER3655-56 ¶¶ 10-15; SER3659-73.[3] Several ACSI schools (including Plaintiff Calvary) testified that they advise students of this alternative. SER2944-68.

Plaintiffs have no religious objection to SAT II tests, and tout standardized tests as the optimal means of determining college preparation. SER2970-71; SER3627-35; ER1337-38 ¶ 63. All deposed ACSI schools testified that taking the SAT II does not interfere with students' exercise of religion. SER2975-97. To the extent students "don't want to" take an SAT II test, it is not based on religion but, as one ACSI principal testified, because they would, for example, "rather watch the ball game." SER2998-3001.

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[2] Reviewers are thus guided by more than "a page of general guidelines per subject." POB 6 n.4. Plaintiffs' cited testimony (ER843-44) refutes their claim that "[t]he coordinator and senior reviewer admitted that nothing limited their discretion in reviewing courses," POB 6 n.4.

[3] UC also allows students to satisfy a-g areas with International Baccalaureate or Advanced Placement exams or college courses. SER3654 ¶ 8.

2. Other Eligibility Paths

Students may also become eligible for admission by:

- placing in the top 4% of students (by GPA in a-g courses) at their school ("Eligibility in the Local Context") (SER3656-57 ¶ 16; SER3002);
- receiving sufficiently high standardized test scores (SER3657 ¶ 17; SER3003); or
- demonstrating potential to succeed based on campus-specific criteria (SER3657 ¶ 18; SER3004).

B. The a-g Guidelines Are Not Inconsistent with Plaintiffs' Religion.

Plaintiffs' religion does not *forbid* ACSI schools from teaching any material required for a-g approval. Plaintiffs admit that they do not "object to understanding the major strands of scientific thought, methods, facts, hypotheses, theories, and laws." ER1320 ¶ 35. Plaintiffs "hold a . . . religious faith that they *should* present and study . . . all standard subject matter in science." *Id.*; *see also* ER1322-30 ¶¶ 37A, 44, 50 (same for other subjects); SER3068.01-3068.03; SER3070.

Plaintiffs' religion also does not *mandate* teaching, in an a-g subject, any material that would disqualify a course. Indeed, many ACSI schools offer a full set of a-g approved courses. SER3072-381. ACSI's President and ASCI school representatives are unaware of any ACSI schools' a-g approved courses having been contrary to the ACSI Statement of Faith. SER3382-84; SER3405-34. Plaintiff Calvary had a full a-g curriculum during 2006-2007, and those courses were fully consistent with the school's Statement of Faith. SER3021-22, SER3405-08; *see also* SER3440-52. In

discovery, Plaintiffs identified no specific material that their religion requires in any course—let alone anything inconsistent with the a-g guidelines. SER3388-400 (Responses 29-32).

ACSI schools similarly acknowledged there is *no* religious mandate to use textbooks from religiously affiliated publishers or prohibiting more common texts. SER3649-51, SER3464-86; SER3504-13; SER3527-41. Three ACSI schools testified that they chose not to use science texts from Bob Jones University ("BJU") and A Beka Books ("Beka") (both found problematic by UC) due to concerns about content and rigor. SER3487-503.

Virtually all schools offer additional courses not submitted and/or approved for a-g credit. SER3005-27. As one ACSI school testified, UC does not "regulate what [ACSI schools] may teach." SER3402-04; *accord* SER3028-68. For example, most ACSI students take a yearly Bible course. SER3514-26. If, in its Bible courses, an ACSI school wants to teach students to question scientific methodology or theories, that does not affect approval of its other courses or admission of its students.[4] SER0167-68 ¶ 5. As ACSI schools testified, their religion courses have not been changed or omitted due to UC's policies. SER3542-44, SER3545-48. Calvary's "kids take more than enough [a-g] classes to graduate without having the Bible [courses]" qualify for a-g credit. SER3549-51.[5] UC allows unapproved

[4] Amicus National Legal Foundation's arguments are premised on the false understanding that students are rejected from UC for taking courses not approved for a-g credit. *See* Amicus Br. 4.

[5] Amici American Center for Law and Justice, et al. ("AACLJ") asserts that UC's course review "is particularly detrimental to the ability of religious schools to function." Amici Br. 17. That is flatly contradicted by the evidence cited above.

courses to count toward graduation, which is itself a step toward eligibility. SER2909.

California's religious schools thus fulfill their religious missions while also offering full a-g curricula. These include schools of other faiths—none of which is a plaintiff here—in addition to ACSI schools. Jewish and Catholic schools have testified that the a-g guidelines are unobjectionable. SER2828-31 ¶¶ 7, 8; SER1215-19 ¶¶ 6-11.

II. THE GUIDELINES ARE A REASONABLE EXERCISE OF UC'S ACADEMIC JUDGMENT.

The a-g guidelines constitute a reasonable exercise of UC's academic judgment in setting admission standards. The guidelines reflect a decades-long consensus among faculty about the academic value of standards for UC-preparatory high school courses.[6] SER3677 ¶ 7; SER0325-26. The guidelines help ensure that students:

(1) Can participate fully in the first year UC program in a broad variety of fields;

(2) Have necessary preparation for UC courses, majors and programs;

(3) Have knowledge that provides breadth and perspective to new, more advanced studies; and

(4) Have essential critical thinking and study skills.

SER1453. It is uncontroverted that the faculty's goals are legitimate and the guidelines a reasonable means to meet those goals.

[6] Plaintiffs make various unsupported and irrelevant claims about when UC "began" or "slowed" implementation of aspects of a-g course review. *See, e.g.*, POB 7, 12; SER0298 ¶ 20.

Dr. Michael Kirst, an authority on college-preparatory curricula and admission standards (SER2880-908), testified that course content is a "crucial variable in predicting whether students will succeed at very selective post-secondary institutions such as [UC]." *See* SER2841. Because taking courses with merely the "right" *titles* does not indicate sufficient preparation, Kirst testified that UC's guidelines and course review are reasonable ways to ensure that admitted students are prepared. *See id.* SER2840-45, SER2847-49; SER2853.

Dr. Donald Erickson, *Plaintiffs'* education expert, agreed that it is "educationally reasonable" to have content-knowledge admission requirements. SER3552-61. Erickson testified that UC has an affirmative "responsibility" to "determine what knowledge [UC] expects its students to know before they get there." SER3647. Dr. Derek Keenan, Plaintiffs' other education expert, testified that it is reasonable to require that applicants have learned both specified content and critical thinking skills (SER3571-74) and agreed with UC's "interest in admitting students who can succeed at the university." SER3563; *see also* SER3565-70.

Plaintiffs' experts additionally believe it is educationally reasonable that students not be excused from these requirements on religious grounds. SER3575-88. Keenan testified that it would be appropriate for UC to disapprove courses where the "faith perspective in the content and pedagogy of the Christian classroom diminish the acquisition of core content information, requisite skills, and preparation for higher education." SER3590-91; *see also* SER3593-99.

Plaintiffs' experts testified that, the more information a university reviews about students' preparation, the better its admissions process.

SER3600-08. Both agreed that the course descriptions submitted to UC give guidance about the content actually taught. SER3609-18.[7] Keenan also agreed that UC's course review "would give a better indication of what was actually taught in the course than a course title." SER3621.

Further, Plaintiffs' experts testified that it is reasonable to use standardized tests to gauge college preparedness, as UC does when a-g areas are not satisfied by coursework. SER3628-35. Plaintiffs' experts believe the required test scores should be within UC's academic discretion. SER3636-45.

Plaintiffs complain that review of course descriptions does not *guarantee* that the course will be adequately taught. POB 6 n.4. But given the impracticability of observing all classes, UC reasonably relies upon a good description (presumably prepared by the teacher) to indicate an adequate course, and a poor description to indicate inadequacy. *See* SER0889-90.

It is also reasonable for UC to review only courses from California schools. Californians make up more than 90 percent of UC's admitted students and about 12.5% are guaranteed admission based in part upon satisfaction of the a-g guidelines. SER3653 ¶ 4; SER0307 ¶ 53. Out-of-state students are admitted based upon more stringent standards and are *never* guaranteed admission based on coursework. SER0306 ¶¶ 50-55. It would be unreasonable to expect UC to review courses from all schools nationwide.

[7] ACSI similarly requires schools to prepare course descriptions for its review in assessing whether to grant accreditation. SER3623-26.

III. THE COURSES AND TEXTS AT ISSUE DID NOT MEET FACULTY'S LEGITIMATE EXPECTATIONS.

Plaintiffs' arguments are premised on the myth that the courses and texts at issue were disapproved because they simply "added" a "religious viewpoint" to standard content. *E.g.*, POB 9, 10. No admissible evidence supports this characterization. Uncontroverted evidence demonstrates that the courses and texts were disapproved because they did not satisfy UC's legitimate academic expectations.

A course or text is not acceptable if it, among other things, fails to teach (1) topics with sufficient accuracy and depth or (2) relevant analytic skills. It is uncontroverted that the textbooks and courses at issue were unacceptable under one or both of these measures.[8]

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[8] Plaintiffs refer repeatedly to "150 courses rejected," a phrase taken from the district court's 3/28/2008 Partial Summary Judgment Order: "Plaintiffs do not provide an analysis of why any of the more than 150 courses rejected by UC should have been approved." ER67-68. Plaintiffs have still not provided any such analysis. It is not clear to which courses Plaintiffs refer with their "150 courses rejected" mantra. Plaintiffs cite only an attorney's "compilation" of snippets from disapproved courses and lists of titles of *approved* courses. POB 10 (citing ER442-86). That "compilation" is inadmissible. SER0015-17. Moreover, the compilation (like many other portions of the ER, including pages 1917-2458) was not submitted until June 2008, long after the ruling on Defendants' first summary judgment motion, and it quotes documents related to many courses not mentioned in connection with that motion—so it cannot relate to the same courses earlier referenced by the district court. *Compare*, *e.g.*, ER470 (listing "Moral Theology" from Damien High School and "Women in Scripture") *with* ER751-55 (mentioning neither). Plaintiffs certainly have not made specific enough arguments about the "150 courses" to preserve as-applied challenges. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("issues which are not specifically and distinctly argued . . . in a party's opening brief are waived"). Plaintiffs also lack standing with

A. Biology

Plaintiffs' complaint about biology courses is based upon UC's disapproval of such courses because they used the BJU or Beka biology books as the primary text.[9] UC Professor and BOARS Chair Sawrey reviewed these textbooks and concluded they were inappropriate for use as primary texts in college preparatory science courses due to their characterizations of religious doctrine as scientific evidence, scientific inaccuracies, failure to encourage critical thinking, and overall un-scientific approach. SER0496-98 ¶¶ 3, 6; SER0537-39; *see also* ER1477-82. The BOARS High School Subcommittee agreed. SER0497-98 ¶ 4.

These texts teach, for example, that: (1) any conclusion reached by the scientific method is false if it conflicts with the "Word of God"

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respect to nearly all of the courses (which are almost all from schools other than Plaintiff Calvary). *See infra* at 51-53.

Plaintiffs cannot use the "150 courses" to contest the district court's determination that there was no UC policy of rejecting courses that "add a single religious viewpoint." ER37. The cited compilation was submitted only after that determination. *Elder v. Holloway*, 984 F.2d 991, 998 (9th Cir. 1993) ("review of summary judgment is based on the record *as it existed at the time the motion was considered*").

[9] The Calvary Baptist biology course—the only specific one Plaintiffs discuss (*see* POB 42)—used the Beka book as its primary text. ER2083. The other course documents cited at POB 21 (as opposed to inadmissible attorney "compilations" or privileged documents (SER-289-90)) were not submitted until June 2008 and may not be used to challenge the ruling that UC does not reject biology courses because "they add[] a religious viewpoint." Plaintiffs lack standing for as-applied challenges on these non-Plaintiff courses. *See infra* at 51-53. UC's reasonable grounds for those course decisions are shown in the original documents. SER0128-31; SER0143.01-0143.78; SER0061-63 ¶¶ 24-27; SER0071.01-71.09**;** *see also* SER0015-19; SER0020-24; SER0025-41.

(SER0567A); (2) the theory of evolution is false (SER0575A, SER0602A, SER0638A, SER0647A; (3) the human life span averaged 912 years before Noah's Flood created the fossil record (SER0582A, SER0584A); and (4) HIV is the result of immorality against God (SER0629A). All of this is presented as literally true.

UC faculty summarized the rationale for disapproving such courses in a Position Statement: "the texts teach students that their conclusions must conform to the Bible, and that scientific material and methods are secondary." ER1478; SER0497-98. Despite Plaintiffs' assertion otherwise (*see* POB 40), the Position Statement left open that otherwise adequate courses may obtain "d" credit using these as supplemental texts (ER1477-82), as has occurred several times. ER10-11; SER0295 ¶ 7; *e.g.*, SER0264-70.[10]

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[10] The Position Statement originally covered the BJU Physics book, based on concerns about its treatment of the scientific method and inaccuracies regarding radiocarbon dating. SER0496-97 ¶ 3. UC faculty later decided that, despite those reasonable concerns, "d" courses may rely on the book as a primary text. SER0299 ¶ 24. Contrary to Plaintiffs' and AACLJ's assertions, Professor Sawrey never said the BJU physics text would have been approved originally if the publisher removed Bible verses. As shown below, the testimony proffered by Plaintiffs is inadmissible and false—Professor Sawrey never reviewed the edition containing Bible verses so could not have made the statement attributed to her. SER0498 ¶ 5; SER0300 ¶ 27.

UC also determined that two chemistry courses that used the BJU textbook may have been mistakenly disapproved. UC found the chemistry book acceptable and approved other courses using it. SER0496-97 ¶ 3; SER0295 ¶ 7. When UC learned of the two possible mistakes, UC contacted the relevant schools, which were offering approved chemistry courses using other textbooks, and invited new course submissions for expedited review. SER0081 ¶ 23; SER0083-86. In any event, mistakes are not constitutional

Defendants' experts, world-renowned biologists Donald Kennedy and Francisco Ayala (SER0972-73, SER1183-84) agree that use of a BJU or Beka biology book as the primary text would be inappropriate in a college preparatory course. Professor Ayala testified that the texts "present information contrary to knowledge generally accepted by the scientific community" and "reject the methodology generally accepted in science, which relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." SER1183. Professor Kennedy testified that, "[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible . . . both texts fail to encourage critical thinking and the skills required for careful scientific analysis." SER0955. Both Ayala and Kennedy testified that the books fail adequately to teach evolution, which "is the central organizing principle that biologists use to understand the living world" (SER1185), and "critical to understanding biology as a whole." SER0955; *see also* SER1193-99; SER0977A-SER1178A.[11]

Kennedy's and Ayala's opinions are uncontroverted. Plaintiffs'

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violations. *See Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) ("[N]umerous individual mistakes are inevitable in the day-to-day administration of our affairs. The . . . Constitution cannot feasibly be construed to require federal judicial review for every such error."), *overruled on other grounds*.

[11] Plaintiffs mischaracterize Professor Ayala's testimony. POB 20. Ayala, who does not make course approval decisions at UC, was explicitly discussing only how he personally would respond to hypothetical courses, not whether UC would approve those courses. ER784-801. That UC *approves* courses with more religious content than Ayala would allow further demonstrates how accommodating and reasonable UC's policies are.

biology expert, Michael Behe, opined only that the BJU/Beka biology texts "mentioned" most topics on a California State Board of Education (CSBE) checklist, but not "how much detail or depth" the texts contained. ER972-73 ¶ 4. Behe's testimony does not create any material issue. As Professor Kennedy testified, Behe's "checklist-based methodology . . . totally fails to discern whether the texts teach core concepts such as evolution accurately or in enough detail that students can understand them, or whether the texts help students develop scientific reasoning skills." SER0968-69. Behe's approach is insufficient to determine whether the CSBE standards themselves are met, let alone whether the more rigorous a-g guidelines are satisfied—indeed, the CSBE standards emphasize that students must understand evolution, which is not "refute[d]" with "credible evidence." SER0969, n.1.

Behe's testimony itself demonstrates that UC's decisions about these biology texts were not just reasonable but the *only* reasonable educational decisions. These "science" texts unqualifiedly state (for example): "[i]f the conclusions contradict the Word of God, the conclusions are wrong, no matter how many scientific facts may appear to back them" (SER0567A); and "[s]ince the Christian worldview comes from God, it is the only correct view of reality; anyone who rejects it will not only fail to reach heaven but also fail to see the world as it truly is." SER0574A. Behe admitted "it is personally abusive and *pedagogically damaging* to de facto require students to subscribe to an idea" (ER70), as these texts do. *See* SER0567A; SER0573A-574A; SER0579A; SER0627A; SER0630A; SER0640A; SER0701A; SER0707A; SER0751A-752A; SER0771A; SER0785A-786A; SER0792A; SER0796A; SER0804A-805A. Behe continued: "Requiring a

student to, effectively, consent to an idea violates [her] personal integrity. Such a wrenching violation [may cause] . . . a *terrible educational outcome*."[12] ER70; *see also* SER0927.

Long after discovery's end and the district court's initial summary judgment rulings, Plaintiffs attempted to submit an affidavit from Behe with new opinions. ER222-424; ER2468 (C.R. 191). The district court excluded that affidavit (and new materials from Plaintiffs' other experts) as untimely. ER8-9; *see also* SER0001-14. While Plaintiffs do not challenge that ruling, they repeatedly and improperly rely on the excluded affidavits. *See, e.g.*, POB 39, 40, 41, 43, 44, 49, 59; *see Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) ("Papers not . . . admitted into evidence by [the district court] . . . cannot be part of the record on appeal.").[13]

B. U.S. History/Government

The disputed Calvary history and government courses use a primary text from BJU. UC history Professor and BOARS member James Given and Defendants' expert, UC Professor Gary Nash (SER0479-92), agree that the BJU history text fails to teach critical thinking or modern historical analytic methods adequately because it: (1) instructs that the Bible is the unerring source for analysis of historical events; (2) attributes events to divine

[12] Throughout, all emphases are added and internal quotation marks and citations omitted unless otherwise specified.

[13] Were the belated affidavits admissible, they would show at most that there are multiple reasonable academic perspectives on the courses and texts at issue—not that UC's decisions, which are supported by competent and reliable expert testimony, were *unreasonable*. *See Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996) ("The fact that an expert disagrees with an officer's actions does not render the officer's actions unreasonable."), *overruled on other grounds.*

providence rather than human action; (3) evaluates historical figures and their contributions based on their religious motivations or lack thereof; and (4) contains inadequate treatment of several major ethnic groups, women, and non-Christian religious groups. SER0415-17 ¶¶ 3-8; SER0454-70; *see also* SER0715A-788A. These professors concluded that courses relying primarily on the BJU text would not adequately prepare students. *See* SER0415-17 ¶ 3-8; SER0454-70; *see also* SER0312; SER0313-14.[14]

Similarly, both UC reviewers and Defendants' expert, UC Professor Mark Petracca (SER0366-81), concluded that the BJU textbook relied upon by Calvary's American Government course presents a "doctrinaire approach" with a "single, unassailable standard for evaluating government, truth, civic and political leaders, culture and justice—the Bible." SER0343. This is "inconsistent with the pluralistic and inquisitive approach used by professors and expected of students at UC." *Id*. The book does not acknowledge the commonly accepted framework for scholarly analysis and provides little opportunity for critical thinking. SER0343-44. The text contains "many factual and empirical assertions that are not generally accepted among political scientists and/or historians and that are nevertheless not substantiated within the text by evidence." SER0344*; see also* SER0789A-809A.

The conclusions of Professors Given, Nash and Petracca are uncontroverted. Professor Vitz, a psychology professor that Plaintiffs offered as their history and government expert, merely compared the *indices* of the BJU history and government texts to *indices* of other texts in an

[14] Professor Given is the "BOARS member" to whom Plaintiffs refer, POB 14-15, but Plaintiffs have mischaracterized the testimony they cite.

irrelevant attempt to show "bias" in all texts. ER1118-33. Vitz's report offered no opinion whether the Calvary courses or their textbooks teach the methods of historical analysis and critical thinking skills expected by UC.

C. American Literature

The disputed Calvary English course has an anthology as its primary text. UC does not approve courses for "b" credit if they primarily use an anthology; college-preparatory courses are expected to require reading full novels or plays. SER1471. Plaintiffs' purported English expert found this requirement to be reasonable. SER0899-901.

Both UC's reviewers and Defendants' expert, UC Professor Samuel Otter (SER0439-46), concluded that the course and text were inconsistent with UC's expectations for teaching critical thinking skills and exposing students to writers' key works. SER0179 ¶ 5; SER0902-04; SER0425-37; *see also* SER0810A-860A. The anthology, published by Beka, is inadequate "not because it offers a 'Christian and civic' perspective on its materials but because it fails to provide substantial readings and because it insists on specific interpretations." SER0427. The text unduly restricts analysis of the limited excerpts, because it does not provide "the literary evidence or background information to judge the editors' polemics in their framing material, to either affirm or reject those polemics in discussion or in writing." SER0430-31.

This is again uncontroverted. Plaintiffs' Dr. Stotsky, whose advanced degree is in education, not literature, limited her opinion to the irrelevant issue whether vaguely defined "viewpoints" appear in various texts. ER1062-ER1115. Stotsky did not opine whether the Beka text is adequate for a college-preparatory course. *See* ER1062-ER1115. Stotsky noted that

"almost the same list of authors" appears on both Calvary's syllabus and those of three approved courses at other Christian schools (where full-length works, rather than short excerpts of works, of these authors are read)—a fact that, if relevant, shows UC's decisions were *not* based on religion. SER0074. Stotsky acknowledged that she merely "assumed" that a teacher who used the Beka anthology would teach critical thinking skills, notwithstanding that the book admittedly contains "very little" in that regard. SER0892-95.[15]

D. Religion

For most disputed religion courses, disapproval was based upon UC's long-standing Policy on Religion and Ethics Courses,[16] which provides that approved religion courses 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" and should not have as a primary goal promoting the students' "personal religious growth." SER2912.[17] Defendants' expert, Professor Robert Sharf, explains that this reflects the scholarly approach taken in the discipline of religious studies, for which these courses are expected to prepare students. SER0387-93. "Privileging one tradition or point of view is considered unacceptable and counter-

[15] Not only do the cited English course rejections not mention their alleged "basis," (POB18), but Plaintiffs' cited exhibits also misrepresent the facts. As UC pointed out below, Plaintiffs repeatedly paired applications from one course with rejections from another. SER0042-51.

[16] Religion and ethics courses typically fall into the "g" elective category. *See also infra* at 23-24.

[17] The policy nowhere refers to "added material" (*see* POB 13), but addresses the teaching of core course material.

productive in the scholarly study of religion at UC and similar universities," because "[o]ne of the methodological foundations of the discipline of religious studies is the ability to step back and gain intellectual and emotional distance from the subject matter." SER0388. Professor Scharf contrasted the discipline of religious studies taught at UC, which is neutral among religions, with the study of theology at seminaries and religious colleges, which may promote particular religious beliefs. ER2214. Because "scholarly detachment is requisite for unbiased analysis into the nature of religious phenomena," UC properly disapproves courses that would not "impart the basic conceptual skills required for college-level work" in religious studies. SER0388, SER0396; *see also* SER0905-11.[18]

Professor Sharf's opinions are uncontroverted. Plaintiffs' purported religion expert, Daniel Guevara, is a professor of philosophy, not religious studies, and testified that a religion professor would have more expertise in the latter discipline. SER0913. He testified that the opinions in his Rule 26 report (never filed) were solely about whether, in his view, "UC's policies are ethical or moral" (SER0914-17), while admitting that he is not "in a better position to say what in particular is more ethical" or moral than anyone else. SER0914-16. Guevara's opinions are unreliable, irrelevant,

[18] AACLJ is thus wrong that, for example, disapproval of a Jewish Philosophy course that had the explicit objective of relating the concepts covered "to [students'] own religious views" (a denial not challenged by the school) (ER2428; SER1218 ¶ 8), is analogous to disapproval of a course focused on African-American philosophers. The methodological concerns that underlie the Religion and Ethics Policy are implicated in the former but not the latter.

and inadmissible. SER0286-88 (#46, 48).[19]

UC's disapproval of Plaintiff Calvary's World Religions course was reasonable based on UC's Religion and Ethics Policy alone. *See* ER2193-203. But UC also disapproved the course because the syllabus failed to provide sufficient information about assignments and listed a textbook that did not appear to exist. ER2193.[20]

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[19] Contrary to AACLJ's unsupported assumption, *see* Amici Br. 20, 25-26, UC's judgment that some religion courses taught from a religious perspective would not prepare students to study religion at UC does not suggest a belief that strong religious beliefs are incompatible with college success. UC admits students without regard to religious faith, and there is no evidence that religious belief has ever disadvantaged any student in admissions. SER0296 ¶ 9; SER0169 ¶ 9.

[20] AACLJ selectively quotes from documents related to several other courses reasonably denied "g" approval. For example, the History of Christianity course from San Domenico School was disapproved pursuant to the Religion and Ethics Policy because it studied Christian doctrine solely from a Christian perspective (ER2384) (course description including study of "the Gospels . . .the Acts of the Apostles . . . . the Nicene Crede . . . prayer and mediation . . . and the practice of Christianity"), it lacked an appropriate prerequisite, and the description had insufficient information about student assignments. ER2381. AACLJ has no basis for characterizing Damian High School's Social Justice course as "emphasiz[ing] the school's religious viewpoint while discussing other religious and non-religious viewpoints," AACLJ Br.19 n.17; the syllabus for that course is not part of Plaintiffs' Excerpts of Record. Nor are those for Servite High School's Moral Philosophy Ethics and Notre Dame High School's Moral Decision Making courses, about which AACLJ complains. Similarly, neither the syllabi nor the rejection forms for the religion courses Plaintiffs mention at POB42 are in Plaintiffs' Excerpts of Record. Nothing in the record shows that UC's decisions on those courses or any others discussed by Plaintiffs or AACLJ were unreasonable.

E. Other Electives

UC guidelines provide that a "g" elective must "strengthen . . . analytical reading, expository writing, and oral communication[] skills" and "provide an opportunity to begin work . . . that could lead directly into a major program of study" at the university level. SER1460. Such courses must "be advanced level courses designed for the 11th or 12th grade and/or have appropriate prerequisites." *Id.*

Plaintiffs did not contest below the denial of elective credit for any Holocaust-focused course. Plaintiffs and AACLJ now devote much attention to two such courses from non-plaintiff schools.[21] *See* POB 11, Amici Br. 12-15. The "Holocaust and Human Behavior" course did not have a prerequisite or co-requisite (ER2402); UC accordingly denied "g" approval, explaining, the "[c]ourse must be an advanced level course." ER2400. UC said the school should "expand the perspectives" of the course. *Id.* The latter comment did not mean that the course needed to present claims by Holocaust deniers (Amici Br. 13-14), but that other genocides should be included. The school resubmitted the course with a prerequisite and syllabus that included other genocides, and UC approved it. SER0180 ¶ 12; SER0271-73. Similarly, for the "Shoah-Holocaust Studies" course, UC explained that it needed "a correlation between the Holocaust

[21] Most courses discussed by AACLJ were never raised with the district court. AACLJ repeatedly mischaracterizes those courses, UC's responses to them, and the record. Defendants lack space to respond to all such mischaracterizations. Defendants have responded, however, to all courses discussed in the text of Plaintiffs' brief.

Plaintiffs improperly included in their Excerpts of Record the entirety of their statements of facts and genuine issues. ER136-203, ER1183-1266. UC's responses to those documents are in the record at CR. 126, 140, 206.

and similar events worldwide." ER2238. There is no evidence that the school resubmitted that course, or that either school objected to the initial disapproval.

Amici pluck the words "viewpoint" and "perspective" from the minutes of UC reviewers' discussions of these courses to suggest viewpoint discrimination. Amici Br. 12-15. In context, however, the words express the expectation that other genocides be presented. No evidence shows this to be academically unreasonable.

IV. UC IS NOT HOSTILE TOWARD RELIGION.

A. UC Does Not Discriminate Against Religious "Viewpoints" or Reject Acceptable Courses Because of "Added" Religious Viewpoints.

Plaintiffs assert that courses that include "religious viewpoints" have been disapproved, while courses that include "secular viewpoints" (such as "materialism") have been approved. Plaintiffs conclude from this that UC is "hostile toward religion." POB 22. Plaintiffs' necessary but unsupported premise is that the courses containing "religious viewpoints" would have taught the knowledge and skills UC expects and were rejected only because of "added" religious viewpoints that would not interfere with such teaching.

Plaintiffs repeatedly characterize courses as containing "standard content," *see, e.g*, POB 13, 15, 21, but Plaintiffs cite no evidence (and there is none) that the content of any disapproved courses was "standard" for college preparatory courses in the relevant subjects—the only meaning of "standard" relevant here.[22] Although Plaintiffs claim "UC's rejections . . .

[22] Plaintiffs assert that "ACSI schools in California teach standard content," but cite testimony about only a single ACSI school, which testimony is itself ambiguous about whether that school even satisfies the CSBE Standards.

were not for lack of standard content, because UC did not give that as the basis," POB 7, the documents Plaintiffs cite explicitly say that the "content" of the courses in question would not "prepare[] [students] for success if/when they enter . . . courses/programs at UC." ER1981, 1983, 2000, 2009, 2010, 2016, 2018, 2019, 2023, 2024, 2049, 2061, 2077, 2111.[23] Similarly, uncontroverted testimony from UC's experts establishes the inadequacy of the courses and textbooks.

Plaintiffs' misuse of snippets from written course rejections provides no evidence that UC disapproves acceptable courses that include a "religious viewpoint." *See, e.g.*, POB 11, 13. That a course was disapproved because it was "too narrow," "slanted," or "biased" or had a single "perspective" or "viewpoint" hardly shows that the course was satisfactory but was nonetheless rejected because it added a religious viewpoint. To the contrary,

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POB 8. Even if there were evidence that *all* ACSI schools' courses satisfied the CSBE Standards—which there is not—that would not mean that the courses satisfied the a-g guidelines. The CSBE Standards are minimum standards for *all* high school courses, not courses designed to prepare students for UC. SER0294-95 ¶ 4; SER3695.

[23] Plaintiffs elsewhere again mischaracterize UC's explanations, claiming that UC had criticized the courses' "added 'content.'" POB 12. UC expressed concern about the content of the courses as a whole, never referring to anything being "added." *E.g.*, ER1489, ER1493, ER1981, ER2061. Plaintiffs also wrongly claim, (POB 12), that UC used the referenced language only when it rejected religious school courses. *See* SER0172-76. Plaintiffs likewise falsely claim that "UC approves the rejected course descriptions only when one change is made: the references to added religious viewpoints are removed." POB 8. None of the cited documents indicates that the referenced courses were approved after re-submissions, let alone that approvals resulted from removal of religious viewpoints. *See* SER0127-28 ¶¶ 21-22.

a course may be unsatisfactory precisely *because* it is too narrow or includes only one viewpoint (religious or otherwise), which could mean the course omits required material or fails to promote critical thinking. *See* SER0179-80 ¶ 9; SER0301-04 ¶ 30, 33, 43. UC has disapproved many courses without religious content (from secular and religious schools) because they were too narrow or insufficiently academic. SER0185-243; SER0281-83; SER0421 ¶ 6.

The a-g disciplines are defined not only by their substantive material, but also by their methodologies and the types of evidence they accept. Science explores natural causes based on material evidence; the discipline does not include supernatural or religious explanations. SER1183, SER0967. History, government and other academic disciplines are similar. SER0457, SER0343, SER0431-33. If supernatural or religious explanations are used as overriding explanations or frameworks for analysis, they may interfere with teaching the subject in a manner that prepares students for UC.[24] It is for this reason that UC's Admissions Director testified that a course taught *solely* from such a perspective—expressly defined by Plaintiffs' counsel to include "a claim that [the Christian perspective] is the *correct* position"—would probably not be approved. SER3692-93; SER0300-01 ¶¶ 29-31. Plaintiffs repeatedly misuse this testimony. *See, e.g.*, POB 10-11; 14; 18.

Plaintiffs' authorities themselves recognize boundaries between

[24] In each instance, UC considers whether a viewpoint or perspective (religious or not) promotes or detracts from a course's ability to meet faculty's expectations for college preparation. SER0301-02 ¶¶ 31-33, SER0303-04 ¶¶ 42-43; SER0168-69 ¶ 7; SER0416-17 ¶ 5; SER0919-24; SER0278.

science and religion. *See, e.g.*, ER1780, ER1782. As the Complaint alleges, the CSBE Science Framework says: "nothing in science or in any other field of knowledge shall be taught dogmatically. *Dogma is a system of beliefs that is not subject to scientific test and refutation*." ER1320. This, like the Behe affidavit, supports disapproval of courses that insist upon religious explanations, which are not "subject to scientific test and refutation."

Contrary to Plaintiffs' assertions that UC rejects courses that "add" a single religious "viewpoint" (*e.g.*, POB 4, 10, 13), UC approves both courses that use the BJU and Beka biology, history and government books as supplemental texts and courses that use the BJU physics and chemistry books as primary texts, if the courses otherwise meet UC's expectations. SER0295 ¶ 7; SER0168-69 ¶¶ 7, 8; *see also* SER0244-70; SER2829-31 ¶¶ 4, 6-8. This refutes the notion that UC disapproves courses merely because they add a religious viewpoint. *See* SER0543A-860A.

Plaintiffs' claim that approved courses and texts contain "secular viewpoints" is irrelevant. *See* POB 23; ER1127-ER1130; ER1066-ER1094.[25] The issue is whether a course adequately teaches the substantive material and necessary skills. The inclusion of a "viewpoint" is relevant only to the extent it assists or detracts from such teaching—a subject that Plaintiffs' experts ignore.

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[25] Even were secular viewpoints in approved courses relevant, the mere course titles Plaintiffs provide (*see* POB 14, 18) do not show the content each course includes or whether or how any "viewpoint" affects it. There is no evidence whatsoever that the approved courses that Plaintiffs list were comparable to religious schools' disapproved courses. Nor is there any evidence to support Plaintiff's characterizations based solely on the titles, such as that a course entitled "Multicultural Perspectives" was "taught from a single secular viewpoint." POB 13-14.

B. No Animus Is Alleged.

Aside from their baseless assertions regarding UC's purported rejection of courses based on "added religious viewpoints," Plaintiffs do not and could not allege animus. The evidence is uncontroverted that faculty and staff reviewers apply the same standards regardless of whether courses are from religious or non-religious schools. *See, e.g.*, SER0929-35; SER0124-25 ¶¶ 10, 11, SER0131 ¶ 24; SER0078 ¶¶ 10, 11; SER0089 ¶¶ 10, 11; SER0095 ¶¶ 10, 11; SER0101 ¶¶ 10, 11; SER0107 ¶¶ 10, 11; SER0113 ¶¶ 10, 11; SER0119 ¶¶ 10, 11; SER0500-01 ¶ 11; SER0418 ¶ 11; SER0275. Consistent with this, course approval rates for ACSI schools are similar to those for other schools and higher than for some categories of public schools. SER0297-98 ¶¶ 14-19; SER0309. No student has ever been denied admission, or otherwise discriminated against, based on religion.

SUMMARY OF ARGUMENT

UC's guidelines and course decisions are constitutional under the Free Speech Clause. Where, as here, the government's mission by its nature requires evaluations of the content of speech, those evaluations are constitutional if they are reasonably related to that mission—here, education. The uncontroverted evidence shows that UC's guidelines and course decisions are reasonably related to its goal of admitting qualified students. There is no "unchecked discretion," because UC provides sufficient guidance and oversight for course reviewers' decisions.

UC's Guidelines and course decisions are constitutional under the Free Exercise Clause, because the uncontroverted evidence shows that they do not substantially burden plaintiffs' exercise of their religion. UC has not

deprived Plaintiffs of equal protection, because a-g course approval is based not on religion or religious beliefs, but solely on whether a course is determined to be college preparatory under faculty guidelines. UC has not offended the Establishment Clause, because there is no evidence of hostility toward religion.

Finally, Plaintiffs' as-applied claims fail. UC's decisions with respect to all courses at issue were reasonable. Moreover, Plaintiffs lack standing to assert and have waived any challenge to nearly all of the courses they reference.

ARGUMENT

I. UC'S A-G GUIDELINES AND COURSE DECISIONS ARE CONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE.

A. Strict Scrutiny Is Inapplicable.

1. UC's guidelines and course decisions must be upheld if they are reasonably related to its educational mission.

The Supreme Court has repeatedly rejected heightened First Amendment scrutiny—including any blanket prohibition of "viewpoint" or "content-based" regulation—where, as here, the government is providing a public service that by its nature requires evaluations of and distinctions based on the content of speech. Instead, such evaluations and distinctions are constitutional if they are reasonably related to the goal of providing the service in question and therefore do not constitute "invidious" viewpoint discrimination. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204-05 (2003) ("*ALA*"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998).

In each case, the Supreme Court rejected an effort to invalidate government decisions based on the labels "viewpoint discrimination" or "content regulation." In *ALA*, the Court reversed a decision that the Children's Internet Protection Act (CIPA), which required libraries to block "obscenity" and "child pornography" in order to obtain federal assistance, was an impermissible "content-based restriction." *Id.* at 199, 202-03. The Court held that "forum analysis [such as it had applied in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829-31 (1995)]

and heightened judicial scrutiny . . . are [] incompatible with the discretion that public libraries must have to fulfill their traditional missions." *Id.* at 205. The Court upheld CIPA because the avowedly "content-based" judgments that libraries would be required to make were "reasonable." *Id*. at 208.

In *Finley*, the Court reversed invalidation, as a "viewpoint-based restriction[]," of a requirement that the NEA ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 524 U.S. at 572-73, 579-80. Although as "a consequence of the nature of arts funding," decisions regarding such funding are "content" and "viewpoint" based, the Court declined to apply heightened scrutiny and held that its decisions in *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 387 (1993)—upon which Plaintiffs principally rely—were inapplicable. *Id*. at 585-86. The Court "expressly declined to apply forum analysis, reasoning that it would conflict with 'NEA's mandate . . . to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support.'" *See ALA*, 539 U.S. at 205 (quoting *Finley*, 524 U.S. at 586). The Court indicated that only "*invidious* viewpoint discrimination"—decisions based on viewpoint that penalize "disfavored viewpoints" rather than reasonably furthering the NEA's mission—would violate the First Amendment. *Finley*, 524 U.S. at 587.[26]

[26] *See also Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 829-30 (9th Cir. 1991) (no viewpoint discrimination because exclusion of viewpoints from newspaper was reasonable); *Head v. Bd. of Trs. of the Cal. State Univ.*, No. C 05-05328 (WHA), 2006 WL 2355209, at

Likewise, in *Hazelwood*, the Court found a principal's deletion of school newspaper articles was not impermissible content or viewpoint regulation. 484 U.S. at 265-66. Because it is necessary for educators to make content- and viewpoint-based judgments about speech, *id*. at 271-72, the Court declined to apply heightened scrutiny or its public forum decisions, *id*. at 267-72. Instead, the Court held that the First Amendment was not offended "so long as [the educators' decisions] are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Similarly, in *Forbes*, the Court recognized that "[p]ublic . . . broadcasters . . . are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming" and so "must often choose among speakers expressing different viewpoints." 523 U.S. at 673.

Plaintiffs' burden under these decisions is particularly heavy here, because the a-g guidelines are promulgated in the exercise of UC's First Amendment "freedom . . . to make its own judgments [about] . . . the selection of its student body." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J. concurring); *see also Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (same). As Justice Frankfurter said in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), "the four essential freedoms of a university" include the freedoms "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *See also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Discretion to determine, on

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*6 (N.D. Cal. Aug. 14, 2006) (upholding requirement related to "feminist" and "diversity" viewpoints because it was reasonably related to educational purpose).

academic grounds, who may be admitted to study, has been described as one of the four essential freedoms of a university.").

If educators are to make the academic judgments that their educational missions require and the First Amendment protects, they must have the discretion to evaluate and approve or disapprove the means, content, and viewpoints of academic expression. This discretion includes "a public school prescribing its curriculum," despite the fact that this necessity "will facilitate the expression of some viewpoints instead of others." *Forbes*, 523 U.S. at 674. For example, educators cannot grade academic work without evaluating the soundness of the ideas their students have expressed. *See, e.g.*, *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) ("[T]eachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad."). Although such evaluations are based on the content of speech, they do not trigger heightened scrutiny. Otherwise, every time a University rejected a student based on her admission essay, a University press turned down a book for publication, or a professor gave an essay a low grade, there would be a potential First Amendment lawsuit subjecting the decision to judicial "strict scrutiny." The Supreme Court has repeatedly rejected such micro-management of academic decision-making. *See, e.g.*, *Ewing*, 474 U.S. at 225 ("[J]udges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment"); *see also ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, No. 06-14633, 2009 WL 263122, at *48 (11th Cir. Feb. 5, 2009) ("Federal courts should not arrogate to themselves power over educational suitability questions.").

Here, to fulfill its mandate as an elite public university, UC must make admissions judgments. Such judgments necessarily include judgments about speech—including whether particular high school courses will adequately prepare students. They must be upheld if they are reasonably related to UC's educational mission.

Plaintiffs' contrary argument for "strict scrutiny" is based on the simplistic use of the labels "viewpoint discrimination" and "content-based regulation." *See, e.g.*, POB 2, 44-49. But the cases on which Plaintiffs rely are inapposite. They involved either (1) exclusion of speech from government property that is used as a forum for speech,[27] (2) mandatory fees

[27] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-09 (2001) (exclusion of religious club from a "limited public forum"); *Rosenberger*, 515 U.S. at 829-31 (exclusion of religious publications from a "limited public forum"); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (exclusion of religious worship and discussion from a "[University] forum generally open for use by student groups"); *Lamb's Chapel*, 508 U.S. at 387 (denial of permission to show religious films on public school property); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (ordinance requiring permit and fee to speak in "the archetype of a traditional public forum"); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 790-91 (1985) (exclusion of advocacy organizations from annual charitable fundraising drive conducted in the federal workplace); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (exclusion of some unions from using public school mailboxes); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (ban on black armbands in public school); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 902, 910 (9th Cir. 2007) (denial of access to public library meeting room), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1051 (9th Cir. 2003) (exclusion of religious group from "limited public forum"); *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1220 (9th Cir. 2003) (ban on expressive banners, other than United States flags, on highway overpasses); *Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002)

to support others' speech;[28] (3) outright prohibitions on certain speech,[29] (4) a financial penalty based on the content of speech,[30] (5) compelled speech,[31]

(public school's denial to Bible Club of equal access to school facilities); *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 962 (9th Cir. 2002) (denial of entrance to government building for refusing to remove symbols of motorcycle organizations); *Gentala v. City of Tucson*, 213 F.3d 1055, 1059, 1062 (9th Cir. 2000) (denial of funding from "limited public forum" created by City).

Because the claim in *Healy v. James*, 408 U.S. 169 (1972), was freedom of association rather than speech, the Court did not explicitly apply forum analysis. But the facts in *Healy* are analogous to those in *Good News Club*, because the college there refused recognition and meeting space to one student political group while granting it to others.

[28] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 220-21 (2000) (mandatory student activity fee to support organizations engaging in political or ideological speech held closely analogous to public forum).

[29] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (ban on "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'"); *Police Dep't v. Mosley*, 408 U.S. 92, 92-93 (1972) (ban on all picketing other than peaceful labor picketing); *Regan v. Time, Inc.*, 468 U.S. 641, 644-46 (1984) (ban on certain photographic reproductions of currency); *Boos v. Barry*, 485 U.S. 312, 315 (1988) (prohibition on signs critical of foreign government near its embassy); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1987) (ban on "all 'First Amendment activities'" at airport); *Sable Commc'ns v. FCC*, 492 U.S. 115, 117 (1989) ("outright ban on indecent . . . interstate commercial telephone messages"); *Broadrick v. Okla.*, 413 U.S. 601, 602-06 (1973) (prohibition on "a broad range of political activities" by civil servants); *Chaker v. Crogan*, 428 F.3d 1215, 1217 (9th Cir. 2005) (criminal statute prohibiting knowingly false speech critical of peace officer conduct).

[30] *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-18 (1991) (statute that took convicted criminals' earnings from works describing their crime for a victim compensation fund).

[31] *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795-800 (1988) (requirement that all fundraisers make certain disclosures).

(6) time, place and manner regulations;[32] or (7) compulsory acceptance of members into a private organization.[33] This case involves none of those circumstances. Plaintiffs' cases are, simply, the wrong cases here. It is irrelevant that some of the cases also involved state universities.

2. Plaintiffs' efforts to distinguish the controlling Supreme Court precedents are meritless.

Plaintiffs' arguments that *Finley*, *ALA*, and *Forbes* are "not the relevant precedents" (Plaintiffs ignore *Hazelwood*) are spurious. POB 32-33. First, they say the decisions do not involve a "university's action and students' rights." POB 32; *see also* POB 33. That may be, but in *Forbes* the Court expressly indicates that its analysis should apply to "a public school prescribing its curriculum," and in *Hazelwood* the Court applied similar reasoning to reject strict scrutiny in the public school context. The reasoning of *Finley*, *ALA* and *Forbes* applies equally to a public university setting admission standards as to arts funding, public libraries and public broadcasting (Plaintiffs never explain why it should not), while the "forum" analysis of Plaintiffs' cases has no application here.

Second, Plaintiffs say *ALA*, *Finley* and *Forbes* do not involve "viewpoint-based" or "content-based" selection. POB 33. That is false. *See ALA*, 539 U.S. at 205 ("Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."); *Finley*, 524 U.S. at 572 (statute required consideration of "general standards

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[32] *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 642 (1981) (regulation of location of solicitation at State Fair).

[33] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) (attempt to compel organization to accept members where such acceptance would impair group's expression).

of decency"); *id*. at 585 ("Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding."); *Forbes*, 523 U.S. at 673 ("the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination"); *id*. ("broadcasters must often choose among speakers expressing different viewpoints").

Third, Plaintiffs say the cases do not involve "regulation of private schools or other private institutions" and suggest that there is "direct regulation of speech" here. POB 32. Relatedly, they assert that the Supreme Court cases did not involve "involuntary applicants" or "involuntary regulation." POB 33. But UC engages in no "direct [voluntary *or* involuntary] regulation" of schools' speech—private schools may teach any courses in any manner they choose, just as the artists in *Finley* were free to create whatever art they chose. And there are no "involuntary applicants" for UC course approval or admission to UC. The guidelines apply only to courses for which schools *choose to request approval* so that their students *who choose to apply to UC* can use those courses to qualify for UC eligibility—just as the NEA's standards applied only to art for which artists chose to request funding. *Finley*, 524 U.S. at 573-77.

Fourth, Plaintiffs say *Finley*, *ALA* and *Forbes* involve only "a benefit that few members of the public use or need." POB 33. This characterization is neither supported by the decisions nor relevant to whether these cases' rationale applies to public education. Indeed, to the extent that public education benefits most, if not all, of the public, it is even *more*, not less, important that public educators have the discretion to make legitimate educational judgments.

Lastly, Plaintiffs claim that the Supreme Court decisions involved "the government as speaker, not private parties as speaker." POB 33-34. But *Finley* involved private speech, not government speech, in exactly the same way this case does. *Finley* involved the NEA's standards for granting the benefit of arts funding to private speech (the speech of artists). This case involves UC's standards for granting the benefit of university admission to high school students. Nowhere in *Finley* does the Supreme Court suggest that the NEA's policies or decisions were "government speech," and *Finley* does not turn on any such characterization. *See also ALA*, 539 U.S. at 204 (In *Finley* and *Forbes*, "[w]e . . . held . . . that the government has broad discretion to make content-based judgments in deciding what *private speech* to make available to the public.").

B. UC's Guidelines and Course Review Are Reasonably Related to Its Educational Mission.

"Facial invalidation is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort." *Finley*, 524 U.S. at 580. Although Plaintiffs purport to mount a facial challenge to UC's guidelines, they have no evidence of unreasonableness. As shown above, *see supra* pp. 8-11, there is no material issue whether the Guidelines are reasonable on their face.

There is also no evidence that UC's course approvals are viewpoint discriminatory. POB 39-44. Plaintiffs argue that UC "reject[s] private school courses for adding a single religious viewpoint [but not] courses that add a single secular viewpoint" (POB 39), but the evidence is to the

contrary.[34] *See supra* pp. 11-28. As to the six particular courses Plaintiffs mention (POB 41-42), the reasonable, non-discriminatory grounds for disapproval are explained above. *See supra* pp. 12-23. Moreover, Plaintiffs have no basis for claiming that the district court relied on "post hoc reasons" in upholding those decisions. *See infra* at 49-51.

UC's Religion and Ethics Policy is not "viewpoint disciminatory" either. POB 39. The policy provides that, for religion courses to be approved, they should be taught from a "scholarly perspective" and not have as a principal goal promoting the "personal religious growth" of students. SER2912. The policy does *not* differentiate among religions (or atheism). The policy furthers UC's educational mission by providing credit for only those religion courses that teach the subject in a scholarly, neutral manner and prepare students for UC, where religion is taught in that manner.

All schools remain free to promote their students' religious growth in other courses and through worship. The policy on religion courses is no different, for this purpose, from a hypothetical policy that, to receive a-g credit, high school government courses should not have as a principal goal promoting "personal partisan affiliation" among students, because, in UC's judgment, such prominent partisan indoctrination interferes with scholarly teaching of government. Both policies would reasonably relate to UC's educational mission, and neither would involve "invidious viewpoint

[34] UC's Position Statements reasonably included the word "secular" as a short-hand for an approach different from the avowedly sectarian BJU and Beka textbooks. Contrary to Plaintiffs' inaccurate quotations, (POB 40), Dr.Wilbur did not say that it is a "requirement" that courses be "secular" (ER1528), and no course rejection form at issue referred to a lack of "secular . . . curriculum."

discrimination" intended to penalize "disfavored viewpoints." *See Finley*, 524 U.S. at 587.

As this Court explained in *Faith Center*, 480 F.3d at 913-14, courts do not, even in the context of a limited public forum, treat all religious speech as reflecting a "viewpoint" for First Amendment purposes. Rather, courts focus on the governmental mission in a particular context to determine whether exclusion of particular religious speech is viewpoint discrimination or permissible regulation. *Id.* at 915. This Court explained that previous Supreme Court decisions had found viewpoint discrimination where the purpose of a limited public forum was to encourage discussion of certain issues, but speech on those subjects from a particular religious viewpoint—speech which was entirely consistent with the purpose of the forum—was excluded. *Id.* at 912-13. By contrast, where the type of religious speech involved—in *Faith Center*, "religious worship"—would *not* further the purpose of the forum, the government could exclude it. *Id*.

Although no type of public forum is involved here and the standard of review allows UC even more discretion, *Faith Center* makes clear that UC's policy regarding religion and ethics courses is not impermissible "viewpoint" discrimination. The purpose of the a-g guidelines is to ensure that students learn the academic content and skills needed to study various disciplines, including religious studies, in a scholarly manner at UC. The inculcation in high school students of personal religious beliefs grounded in faith, rather than scholarship, is not any part of this purpose and is not part of preparation for study at UC (any more than indoctrination in a particular political ideology would be). SER0387-97. Under *Faith Center*, UC's policy regarding religion and ethics courses is based on content, not

viewpoint, and is permissible.

In any event, when the government's mission by its nature requires evaluations of speech, it may make reasonable viewpoint distinctions in furtherance of that mission. In *ALA*, the Court explained that, because libraries need to select the materials they offer to the public, the library context is different from those in which all viewpoint-based restrictions or discrimination are impermissible. 539 U.S. at 206 & n.7. In *Hazelwood*, the Court explained that a school "retain[s] the authority" to restrict student speech expressing certain viewpoints, including "speech . . . advocat[ing] drug or alcohol use." 484 U.S. at 272. Finally, *Finley* says only "*invidious* viewpoint discrimination" that was intended to penalize "disfavored viewpoints," rather than reasonably furthering the NEA's mission, would violate the First Amendment. 524 U.S. at 587; *see also Planned Parenthood of S. Nev.*, 941 F.2d at 829-30 (no viewpoint discrimination because school's exclusion of advertisements from newspaper was reasonable); *ACLU of Fla.*, 2009 WL 263122, at *45 (school district's "preference in favor of factual accuracy is not unconstitutional viewpoint discrimination"); *Head v. Bd. of Trs. of the Cal. State Univ.*, No. C 05-05328 (WHA), 2006 WL 2355209, at *6 (N.D. Cal. Aug. 14, 2006) (upholding university requirements for education students to "articulate rationales" for integrating "feminist" and "diversity" education in curricula because requirement reasonably related to a legitimate pedagogical purpose: "For example, if a student takes an algebra course, the student cannot ace a quiz by offering biblical quotes."). *Id.* Because UC's guidelines and course review further UC's educational mission, any reasonable distinctions among "viewpoints" are consistent with the First Amendment.

C. UC's Guidelines Do Not Allow "Unbridled Discretion."

1. Unchecked discretion case law does not apply.

The First Amendment doctrine of "unchecked discretion" has no application here, where there is neither any prior restraint (such as a license or permit requirement) nor any criminal or civil penalty for protected speech. Plaintiffs' cases all reflect the doctrine's limited scope. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988), the Court held that "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." In *Healy*, the Court held there was a "prior restraint" because a student organization needed advance permission from the college in order to speak. 408 U.S. at 181-84. In *Jews for Jesus*, the Court rejected a proposed limiting construction of an overbroad airport resolution because the narrowed version would "confer[] on police a virtually unrestrained power to arrest and charge persons with a violation." 482 U.S. at 576. In *Forsyth County*, the Court, discussing application of the overbreadth doctrine to "an ordinance that delegates overly broad discretion to the decisionmaker," cited to three pages from its prior decisions. 505 U.S. at 129. Each discusses application of the unchecked discretion doctrine to advance license or permit requirements. *See Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 n.15 (1984) (citing three decisions involving permit or license requirements); *Freedman v. Md.*, 380 U.S. 51, 56 (1965) ("one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion"); *Thornhill v. Ala.*, 310 U.S. 88, 97 (1940) (discussing test for "constitutionality of a statute purporting to license the dissemination of ideas"). Finally, in *Arizona Life*

Coalition, Inc. v. Stanton, while this Court did not invoke the "unchecked discretion" doctrine, it addressed denial of advance permission to place a message on a license plate. 515 F.3d 956, 972-73 (9th Cir. 2008). Consistent with this, in *Finley*, where there was no prior restraint or penalty, the Court expressed no concern about the "NEA['s] . . . substantial discretion to award grants." 524 U.S. at 573.

Here, there is no prior restraint and no potential penalty. Plaintiffs are not required to obtain UC approval before teaching a course, and schools do teach courses that have not been approved by UC without penalty. *See supra* at pp. 7-8.

2. Sufficient standards exist.

Even if the "unchecked discretion" doctrine were applicable, UC provides sufficient guidance for course review. The guidelines under which reviewers operate include the BOARS-approved subject matter descriptions and interpretive notes, exemplars of approved courses, competency standards, and more. SER1226-369. Reviewers obtain additional guidance, when needed, by consulting with faculty with specialized knowledge or BOARS as a whole. SER3676-77 ¶ 6; SER0178-79 ¶ 3, 6; SER0876-83.[35]

In contrast, the Supreme Court in *Lakewood* found unconstitutional an ordinance that gave "the mayor *unbounded* discretion to grant or deny a permit application and to place unlimited additional . . . conditions on any permit." 486 U.S. at 755. Likewise, in *Saia v. New York*, "[t]here [were] *no*

[35] There is no evidentiary support for Plaintiffs' claim that "[t]he reviewers testified that nothing limited their discretion . . . and that they had no checklists or content standards." POB at 53; ER843-ER844; *see also* SER0291-92.

standards prescribed for the exercise of [the Police Chief's] discretion." 334 U.S. 558, 560 (1948). Here, UC provides very substantial guidance.

II. UC'S GUIDELINES AND COURSE DECISIONS ARE CONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE.

A. This Court Has Not Adopted the "Hybrid Rights" Doctrine.

Plaintiffs assert that the district court erred by not adopting the much-criticized "hybrid rights" doctrine, under which a free exercise claim made in conjunction with another constitutional claim would receive strict scrutiny. POB 54-55. Last year, in *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), this Court declined to be "the first" to "bootstrap a free exercise claim in this manner." *Id*. at 440 n.45. As this Court noted, "the 'hybrid rights' doctrine has been widely criticized." *Id*. (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., dissenting) (doctrine is "ultimately untenable"); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (calling doctrine 'completely illogical' and declining to recognize it)). Plaintiffs offer no reason for this Court to depart from *Jacobs*.

B. There Is No Substantial Burden on the Exercise of Religion.

Regardless of the legal standard that would govern a proper free exercise claim, Plaintiffs' claim fails because they have not met the threshold requirement of proving a substantial burden on their exercise of religion. *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997) ("interference with one's practice of religion must be more than an inconvenience; the burden must be substantial"), *abrogated on other grounds by Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008).

"Substantial burden" requires that the government either (1) "conditions receipt of an important benefit upon conduct proscribed by a religious faith," or (2) "denies such a benefit because of conduct mandated by religious belief." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987).[36]

Neither situation exists here. As discussed above, *supra* at 6-8, UC neither conditions admission on Plaintiffs' engaging in conduct prohibited by their religion nor denies admission because Plaintiffs engage in conduct mandated by their religion. Plaintiffs' religion does not prohibit teaching any material that is required to satisfy UC's a-g guidelines, and it does not mandate teaching any material that would interfere with a school's offering a full a-g curriculum. ACSI schools can and do offer non-a-g courses (including Bible courses at each grade level), and those courses may contain any material that Plaintiffs wish without consequence. *See Windsor Park Baptist Church, Inc. v. Ark. Activities Ass'n*, 658 F.2d 618, 622 (8th Cir. 1981) (rejecting free exercise challenge and explaining that "[i]t is not argued . . . that having to teach a given number of units of Mathematics prevents the school from teaching all the Bible classes it wishes, in any way it wishes, with any teachers it wishes"); SER3455-59; SER3462.

Further, a student can receive a-g area credit without taking UC-

[36] Many cases require that a free exercise plaintiff show that the belief or practice at issue is *central* to the plaintiff's religious faith. *See, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("substantial burden on the observation of a *central* religious belief"); *United States v. Turnbull*, 888 F.2d 636, 638-39 (9th Cir. 1989) ("interference with a tenet or belief that is *central* to religious doctrine"). Plaintiffs have conceded that this litigation does not involve a belief or practice that is central to their religion. ER92:1-2.

approved courses. Most significantly, any student can receive subject area credit with a relatively modest score on the relevant SAT II test.[37] Numerous courts have held that requiring students to take extra exams is not an unconstitutional burden on religion. *See, e.g.*, *Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998) (rejecting free exercise challenge to policy requiring home-schooled students transferring to public school to pass proficiency exams at their own expense in order to receive graduation credit for prior courses); *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 933 (6th Cir. 1991) (rejecting free exercise challenge to requirement that home schooled students pass exams to get high school course credit).

Given that there is no constitutionally cognizable conflict between Plaintiffs' religion and either a-g courses or the SAT II testing alternative, there is no genuine issue whether the guidelines substantially burden Plaintiffs' religion. Plaintiffs' free exercise claim therefore fails. *See Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (plaintiff's free exercise claim failed because "[the state scholarship program] does not require students to choose between their religious beliefs and receiving a government benefit"); *Canell v. Lightner*, 143 F.3d 1210, 1215 (9th Cir. 1998) (affirming summary

[37] Plaintiffs' free exercise claim fails as a matter of law based solely on the existence of the SAT II option. Students can, however, also fulfill an a-g subject area requirement by taking a transferable community college course. Further, if a student objects specifically to learning about evolution or some other aspect of biology, the "d" laboratory science guideline requires only two courses and can be satisfied by courses (or SAT II exams) in chemistry and physics. SER1226-2827.

judgment for lack of substantial burden).

III. UC HAS NOT DEPRIVED PLAINTIFFS OF EQUAL PROTECTION.

A. The Applicable Standard Is Reasonableness.

"In applying the Equal Protection Clause to most forms of state action, [courts] seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *accord City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The "general rule gives way" and courts apply "strict scrutiny" only when distinctions are made on the basis of suspect classifications such as "race, alienage, or national origin." *Cleburne*, 473 U.S. at 440. Though religion is a suspect classification, *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001), no classification based on religion is made here. The paths to UC eligibility (including the a-g guidelines) are the same for all in-state freshman applicants, regardless of religion. SER0296 ¶ 10, SER0304 ¶ 45.

Distinctions are made based on the content of speech (religious or otherwise), but those must be analyzed under the First Amendment, not the Equal Protection Clause. A-g course approval is based solely on whether the course is determined to be college preparatory under the faculty's guidelines. SER0296 ¶ 10; SER0937. Whether a course is college preparatory is not a suspect classification, so the Equal Protection Clause requires only that distinctions be rational. *See Cleburne*, 473 U.S. at 440. As discussed above, the a-g guidelines and UC's course decisions are reasonably related to UC's legitimate interest in ensuring that the students it admits are adequately prepared.

B. UC Does Not Discriminate.

To the extent Plaintiffs argue that UC has discriminated on the basis of religion, the alleged "facts" on which they rely are false. In particular, Plaintiffs say, "this case involves exclusion of religious high school students from the 85% of regular admission seats." POB 56. No evidence supports this. No one is excluded from *any* path to UC eligibility because of religious affiliation. SER0304 ¶ 45. A student who has not taken a full a-g curriculum can take SAT II tests to fulfill the a-g requirements and use the most common eligibility path. *See supra* at pp. 3, 5-6. Plaintiffs have not identified a single student denied admission because of purported discrimination by UC, and ACSI schools testified that they knew of none. *See* SER0862-70. It is uncontroverted that UC accepts students regardless of their faiths. SER0169 ¶ 9 ("Students' religious or other beliefs have no bearing on their admission to UC.").[38]

IV. UC HAS NOT OFFENDED THE ESTABLISHMENT CLAUSE.

The district court correctly held that UC's policies and decisions have a secular purpose and effect, do not excessively entangle UC with religion, and thus do not violate the Establishment Clause. ER63-64. The court did not, as Plaintiffs claim, invent the "primary effect" standard, which is from *Lemon v. Kurtzman*. 403 U.S. 602, 612 (1971). Nor did the court "require[] animus." POB 54. In any event, Plaintiffs' Establishment Clause claim is predicated on the allegation that UC is hostile toward religion. *Id.* There is

[38] AACLJ repeatedly says, without citation, that UC "reject[s] . . . students who hold disfavored religious views or belief systems." Amici Br. 27, *see also id.* at 20, 25-26. There is no evidence for this; all evidence is to the contrary. SER0304 ¶ 45; SER0169 ¶ 9. Students are evaluated based on their *preparation*, not their beliefs.

no evidence of that, so the claim fails.

V. PLAINTIFFS' AS-APPLIED CLAIMS FAIL.

A. UC's Decisions About Calvary's Courses Were Reasonable and Do Not Depend on "Post Hoc" Justifications.

As explained above, and as the district court correctly held, UC's decision on each of Plaintiff Calvary's courses was reasonable. *See supra* at 17-22.[39] Plaintiffs argue that the district court erroneously upheld UC's decisions based solely on "post hoc rationalizations" rather than UC's "actual stated reasons." *See* Appellants' Brief at 42-43. The evidence is to the contrary.

Virtually all of the reasons for course decisions proffered by UC—and relied upon by the district court—were articulated in some manner when the course decisions were made. *See, e.g.*, ER12-17, ER1981, ER1994, ER1996, ER2000, ER2007, ER2051, ER2059, ER2077, ER2084, ER2193. In many instances, the district court cited to feedback that UC expressly communicated to schools. *Compare* ER16 ("[T]he feedback provided to Calvary regarding this course is telling") *with* ER2193; *compare* ER15 ("The UC reviewer found that 'the content of the course outline[] . . . is not consistent with the empirical historical knowledge generally accepted in the

[39] Plaintiffs' list of citations, (POB 44), many to the excluded expert affidavits, does not create a genuine issue as to the reasonableness of UC's decisions. *Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) ("laundry list" was insufficient to preserve claims because "issues [must be] argued specifically and distinctly in a party's opening brief"). Plaintiffs quote out of context the order denying *Plaintiffs*' motion for summary judgment to suggest that the district court ruled that summary judgment for *Defendants* on the as-applied claims would be inappropriate. Defendants had not yet even moved for summary judgment on those claims.

collegiate community") *with* ER2000; *compare* ER17 (UC "reviewed [the] text and concluded that it was inappropriate for use as the primary text in college-preparatory science classes") *with* ER2084. In other instances, the district court relied on what reviewers and professors communicated internally during course review. *Compare* ER12 ("Hargrove, a UC course reviewer, found this text inappropriate as a primary text in English") *with* ER2059 (reviewer meeting notes).

In short, the district court relied on evidence of UC's considered judgment at the time of its course decisions, not on post hoc rationalizations. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) (courts are not to consider an agency's litigating position where it "*merely*" reflects "post hoc rationalizations . . . *advanced for the first time* in the reviewing court"). The court's additional reliance on declarations from reviewers and professors further explaining their contemporaneous reasons for disapproving these courses, and on expert testimony explaining the reasonableness of UC's decisions, does not transform UC's reasons into post hoc rationalizations. *See In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 634 (8th Cir. 2005) ("*[T]here is no requirement that every detail of the agency's decision be stated expressly [at the time]*. The *rationale* is present in the administrative record . . . and this is all that is required.").

B. Plaintiffs Lack Standing to Challenge non-Calvary Course Decisions.

Plaintiffs recognize that they lack standing to bring as-applied challenges to UC's disapproval of courses from non-ACSI schools (most of the courses their brief mentions). But Plaintiffs contend that ACSI has

associational standing to raise as-applied challenges to disapproval of courses from ACSI schools other than Plaintiff Calvary.

Plaintiffs are wrong because those as-applied challenges require individualized proof concerning each school and course. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (for associational standing, organization must show that "*neither* the claim asserted *nor* the relief requested requires the participation of individual members in the lawsuit"); *Associated Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1408 (9th Cir. 1991) (associational standing exists only if *both* "the claims proffered *and* relief requested do not demand individualized proof"). That Plaintiffs seek only equitable relief does not obviate the need for individualized proof. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (association did not "automatically satisf[y] the third prong of the *Hunt* test simply by requesting equitable relief rather than damages"). While some decisions have stated that requests for equitable relief do not ordinarily require individual proof from group members, *see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 515 (1975), those cases have typically involved facial claims where generalized relief would benefit all members of the organization, *see, e.g., Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 796 (9th Cir. 2001).

Here, determining both liability and the appropriate remedy would require individualized proof, and any equitable relief would be specific to each school and course. First, ACSI's free speech and equal protection claims require individualized inquiries to determine whether it was reasonable for UC to conclude that each course at each school would not teach the expected knowledge and skills. *See, e.g., Kan. Health Care Ass'n,*

Inc. v. Kan. Dep't of Soc. and Rehab. Servs., 958 F.2d 1018, 1022-23 (10th Cir. 1992) (no associational standing where court "will be required to examine evidence particular to individual providers").

Second, ACSI's free exercise claims would require individualized proof to determine whether UC's actions substantially burdened each school's ability to practice its religion. *See, e.g., Harris v. McRae*, 448 U.S. 297, 320-21 (1980) (free exercise claim requires showing substantial burden on particular plaintiff so it "ordinarily requires individual participation").

Third, the equitable relief ACSI seeks would require individualized proof specific to each school and each course, including the course details, the reasons for UC's decision, and whether the school still offers or intends to offer the course. Moreover, relief on any particular course would benefit only a single school. This sharply contrasts with cases finding associational standing on the basis that the plaintiff organization sought generalized equitable relief that would benefit all members equally. *See, e.g., Alaska Fish & Wildlife Fed. & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 934-35, 938 (9th Cir. 1987) (all members would benefit from agreements permitting subsistence hunting by Alaskan Natives).

C. Plaintiffs Waived As-Applied Challenges for non-Calvary Courses.

The district court correctly ruled that ACSI waived as-applied challenges with respect to courses from schools other than Plaintiff Calvary by not specifically identifying them in its Complaint, interrogatory responses, or expert reports. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-94 (9th Cir. 2000) (the district court did not err in precluding

plaintiff from introducing new theory of recovery after discovery); *Whittaker v. T.J. Snow Co.*, 151 F.3d 661, 664 (7th Cir. 1998) (same).

Plaintiffs concede they failed to identify their as-applied challenges. They argue against waiver because the *existence* of some of the course decisions was "disclosed" during discovery. Both sides have of course long known which ACSI courses were disapproved, but it was not until almost a year after discovery closed that Plaintiffs disclosed *which* course decisions they contend violated the Constitution. Each of Plaintiffs' supposed prior "disclosures" included many additional courses. *See, e.g.*, SER0053-54 ¶¶ 3-8 (at least 175 ACSI courses were denied a-g approval from 2003-2005; only 25 of those are on Plaintiffs' belated list of as-applied challenges). UC could not independently have identified Plaintiffs' as-applied challenges; UC was certainly not required—in order to avoid surprise and prejudice to itself—to take discovery of every ACSI member school that had any course rejected since 2003.

CONCLUSION

The judgment of the district court should be affirmed.

DATED: April 10, 2009

MUNGER, TOLLES & OLSON LLP

By: /s/
Bradley S. Phillips
Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases that are currently pending in this Court.

DATED: April 10, 2009

MUNGER, TOLLES & OLSON LLP

By: /s/
Bradley S. Phillips
Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,924 words.

DATED: April 10, 2009

MUNGER, TOLLES & OLSON LLP

By: /s/
Bradley S. Phillips
Attorneys for Defendants-Appellees

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Service List

Case Number: 08-56320
Christopher M. Patti UNIVERSITY OF CALIFORNIA Office of the General Counsel 8th Floor 1111 Franklin St. Oakland, CA 94607-5200
Wendell R. Bird BIRD, LOECHL, BRITTAIN & McCANTS, LLC 1150 Monarch Plaza 3414 Peachtree Road, NE Atlanta, GA 30326