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

REPLY BRIEF OF APPELLANTS

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REPLY TO UC'S INTRODUCTION

The issue in this case is not "educationally reasonable standards," but viewpoint discrimination, which was UC's stated reason for rejecting 150 courses, notwithstanding UC's endless repetition of post hoc rationales. Despite its best attempts to confuse the issue, UC admits that viewpoint discrimination is the issue, *and defends its right to practice content-based regulation and viewpoint discrimination*, in its brief at p.32:

> **"they [UC] must have the discretion to evaluate and approve or disapprove the means, *content*, and *viewpoints of academic expression*."**

The Supreme Court has held that viewpoint discrimination is flatly unconstitutional under the First Amendment. (POB27-30.) Yet UC argues that, in UC's self-appointed review of private school courses, "**any reasonable distinctions among 'viewpoints' are consistent with the First Amendment**." (UCB40.)

UC, unlike 49 other states' universities, has mistakenly defined its mission to "require[] evaluations of speech," claiming that "it may make reasonable viewpoint distinctions." (*Id.*) UC thereby tunnels around the First Amendment by saying that because UC is nonreligious:

- Preparation for UC consequently must be nonreligious (contrary to pre-2004 practice).
- It must exclude students from regular admission unless they have 15 UC-approved courses.
- It must review private schools for religious viewpoints added to standard content.
- An added religious viewpoint contaminates standard content, rendering it inadequate preparation (without evidence, ER1525).
- Courses with an added religious viewpoint must be rejected.

Each step is a giant and unconstitutional leap, violating the First Amendment.

UC does not "apply the same" standards to all schools or all viewpoints (UCB1); it regularly rejects courses adding a single religious viewpoint, generally without reference to an "educationally reasonable standard," while approving courses adding acceptable secular viewpoints or multiple religious viewpoints.

UC's claim that ACSI's brief is "based on three fundamental but false factual premises" (*id.*) misstates ACSI's claims and substitutes three nonsequiturs:

(1) UC denies that its "challenged standards prohibit or prevent schools, religious or otherwise, from teaching whatever and however they choose or students from taking any course they wish." The issue is not the *nonapproved* courses that schools may offer, which UC does not count toward regular admission requirements, but the *approved* courses that schools must have, which UC rejects if it notices an added religious viewpoint. "We have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison v. PSC,* 447 U.S. 530, 541 n.10 (1980).

(2) UC disavows that it "denied credit to courses that 'add' religious viewpoints to the teaching of 'standard content.'" Yet that is precisely the reason it gave in rejecting most of 150 courses. Failing to teach "knowledge and skills" was not the reason UC gave until concocted 3-4 years later. UC contradicts its disavowal later in its brief. *E.g.,* UCB32, 40.

(3) UC denies that it "discriminate[s] against religious schools or their students," because it "has approved full slates of preparatory courses." Most of the approvals were before UC's adoption of no-single-religious-viewpoint policies in 2004, and its "recent policy clarification" toward religion and ethics courses in 2004 (ER2413). Most rejections were expressly viewpoint discriminatory. UC acknowledges that regular admission is unavailable if a student chooses nonapproved courses and does not have 15 approved full-year courses, or if a school lacks the required number of ap-

proved courses in each subject area. UC claims it is nondiscriminatory to obligate students to take "SAT II subject exams" that other students are not required to take.

UC's "facts" are contradicted by its practices in innumerable examples.[1] Holocaust courses have been rejected for adding a Jewish viewpoint: UC's official reasons were "need to include a different ***perspective*** and a broader ***viewpoint***"[2] (ER2244), and "[n]eed to expand the ***perspectives*** for this course" (ER2400). UC's internal reasoning stated they were "too slanted towards Holocaust with no other ***perspective***." (ER2411.) Such rejections do not conform to UC's three nonsequiturs. (1) UC did "prohibit or prevent schools, religious or otherwise, from teaching whatever and however they choose" *in an approved course*. (2) UC did "den[y] credit to courses that 'add' religious viewpoints to the teaching of 'standard content'," and *did not do so because* they "fail to teach such knowledge and skills" as UC required. (3) UC did "discriminate against religious schools or their students," by rejecting courses for adding a single religious viewpoint *while not rejecting courses* that added a single secular viewpoint. The remaining 150 listed rejections were also for adding single religious viewpoints, and were equally viewpoint discriminatory.[3]

REPLY TO UC'S STATEMENT OF FACTS AND CONTENTIONS

I. UC's GUIDELINES, INTERPRETATIONS, AND PRACTICES, ARE VIEWPOINT DISCRIMINATORY, WHICH BURDENS FIRST AMENDMENT RIGHTS

A. Discrimination in Regular Admission

UC rejects religious courses adding a religious viewpoint to standard content (POB9-23), which is viewpoint discriminatory. Requiring additional "SAT II subject

[1] UC course rejections show its practices or policies, and constitute admissions.
[2] All emphasis is added unless otherwise indicated.
[3] These rejections were identified during discovery. (*See* Argument §V.C.)

tests" (UCB5-6; *contra* ER612-14, 738-739) or demanding "sufficiently high standardized test scores" (only 1% are admitted in this way without approved courses, ER1441, 1446) only multiplies the discriminatory impact.

It is a nonsequitur, and false, that "[n]othing in Plaintiffs' religion is inconsistent with courses that satisfy the a-g guidelines." (UCB3.) ACSI's primary claims are that viewpoint discrimination and content-based discrimination are inconsistent with Plaintiffs' freedom of speech. ACSI's free exercise claim is a hybrid-rights claim that UC discriminates against its religious speech and religious association. UC studiously ignores that ACSI's First Amendment rights require addition of a school's religious viewpoint to each class (POB8), and that UC's rejections are based on those added viewpoints. It is equally a nonsequitur that "Plaintiffs have no religious objection to SAT II tests" (UCB5) or to tests for non-regular admission, because those additional tests or higher scores are only required of students whose courses UC rejected for added religious viewpoints. (ER612-13, 738-39.)

UC's discrimination in regular admissions is shown in each example given in POB9-23 and in ER443-86.

B. Discrimination against Plaintiffs' Viewpoints

UC misstates ACSI's argument in saying "Plaintiffs' religion does not *forbid* ACSI schools from teaching any material required for a-g approval." (UCB6.) ACSI's beliefs require it to *add* a religious viewpoint to standard content. (POB8.) UC then rejects the course for that reason and not generally for lack of "knowledge and skills."

UC's contentions are misleading. (UCB6-8.) Many ACSI schools still have "a full set of a-g approved courses"—because UC has not re-reviewed already-approved courses (ER1521) to ferret out single religious viewpoints. ACSI schools do not feel impelled to use "textbooks from religiously affiliated publishers"—but their courses are automatically rejected if they use "banned" texts, and are rejected if they use ap-

proved secular texts and add a religious viewpoint. Many non-ACSI schools "offer additional courses not submitted" for UC approval—but the courses they submit are not rejected for added viewpoints—and UC grants a-g elective credit for religion courses without an ACSI-added viewpoint.

II. UC's VIEWPOINT DISCRIMINATION IS NOT REASONABLE, IS NOT THE SUPREME COURT'S TEST, AND IS SUPPORTED ONLY BY UC MISQUOTATIONS

The "reasonableness" of an abridgment of First Amendment rights is irrelevant and not the correct test. (POB44-45, 32-36.)

However, there is nothing "reasonable" in rejecting courses adding a religious viewpoint—while approving courses adding a secular viewpoint. (ER256, 279-80, 285-99, 305-06, 348-49, 381.) Statements that the "a-g guidelines constitute a reasonable exercise" (UCB8) are grossly overinclusive, because UC guidelines amount to 1600 pages (SER1227-2827), and are mostly not challenged. Statements by UC's experts that the "guidelines" are "reasonable" are equally irrelevant, and trick questions asked of ACSI's experts whether the 1600 pages are "reasonable" are equally irrelevant.

UC lists four points from one page within the 1600-page guidelines, about knowledge and skills. (UCB8.) Those were not the stated grounds for UC rejections of the disputed courses—added religious viewpoints were the stated ground at the time of denials. (ER443-86,750-77, POB9-23.)

UC misstates the facts. UC-proffered expert Kirst's claim that UC review is the "crucial variable in predicting whether students will succeed" (UCB9) misdescribed a statistical study that it causes only 15.4% of success at UC—leaving "84.6% explained by other factors" (ER620)—so that even UC's chair of the BOARS High School Subcommittee admitted the evidence (of a-g course grades signifying academic preparation) is "fairly weak" and fraught with "inaccuracy." (ER1614-15.) Hence, 49 states have never intruded into private or public schools via similar course reviews

(ER1048).

UC quotes ACSI's education experts[4] out of context (UCB9-10), making wild leaps from statements that it is reasonable to follow 49 states and require two years of history and four years of English, etc., to UC's extrapolation that it is reasonable to depart from 49 states and review each course's description and reject courses with added viewpoints.

It is discrimination, not reasonableness, "for UC to review only courses from California schools." (UCB10.) A-g review cannot be so vital as to justify trampling First Amendment rights of religious schools (3% of applicants), when it is not important enough to apply to the 15% of applicants who are out-of-state or foreign. (POB33.) (UC evaluates those students equivalently to in-state students, except for approving courses, with similar GPA and score requirements. (ER1711.)) UC thereby admits its lack of a compelling interest or the availability of less burdensome means.

III. UC's Rejection Of Courses And Texts Was Expressly Viewpoint Discriminatory, And Its Post Hoc Justifications Misstate The Facts And Are Inadmissible

There are no "faculty legitimate expectations." (UCB11.) A-g review is the creation of the 11-member BOARS committee (ER622-23), one of innumerable UC committees. Its policy or practice of rejecting courses for adding a religious viewpoint is not approved by UC's faculty. (*Id.*)

UC, when claiming "[u]ncontroverted evidence demonstrates that the courses and texts were disapproved because they did not satisfy UC's legitimate academic expectations" (UCB11), does not cite the course rejection checklists that stated the actual ground of rejection (quoted at POB40-44), though it assures the Court that "[i]f UC

[4] Dr. Erickson (Ph.D., Education, U. of Chicago) was a tenured professor at Chicago and at UCLA. (ER1056.) Dr. Keenan (Ed.D., Nova University) is Vice President of ACSI. (CR129.)

disapproves a course, it explains why" (UCB5). UC instead cites affidavits that construct new rationalizations years later, which Supreme Court decisions say should be ignored. (POB43.) Uncontroverted evidence (the UC rejection checklists) shows that the following courses were rejected for an added religious viewpoint (POB40-43), along with the remainder of the 38 ACSI school courses and the 58 Catholic and Jewish school courses.[5]

UC misdescribes the courses and its rejections:

A. Biology

UC's two stated reasons for rejecting Calvary's biology course were that its "content" "is not consistent with the knowledge generally accepted" (i.e., added a religious viewpoint), and that it was "[u]nclear how much of the course is devoted to labs." (ER2077, 326-27.) However, the course used a secular biology text (ER2083), which was used in many approved courses and has never been questioned, as well as the religiously-published text that UC wrongly treats as the only text. That secular biology

[5] UC's n.8 is mistaken, for reasons stated in Argument §V.C. The point that ACSI must demonstrate was that the "150 courses rejected by UC" were rejected as UC stated for added religious viewpoints, and *not* that each course could not have been also rejected for some reason that UC did not state. ACSI *did* show courses were rejected for added religious viewpoints, in UC rejections (ER1981-2454), in compilations (ER443-86, 750-77), and in expert witness affidavits (ER233-56, 285-99, 323-56, 360-85).

The compilations were proper under Fed. R. Evid. 1006, and the last contained all UC's stated reasons for rejection of each course (ER443-86).

The district judge did not rule that the compilations were inadmissible, and he did not rule that examples supporting prior opinions from exhibits were inadmissible. (ER750 (first compilation), ER443 (second compilation).)

UC is equally mistaken about preserving challenges and standing. (Argument §V.B-C, POB56-58.)

UC errs saying "Plaintiffs cannot use the '150 courses' to contest the district court's determination that there was no UC policy." The district judge did not rule Plaintiffs cannot use them as examples to show a pattern or practice (POB9-10, 59), or as UC admissions, when he ruled ACSI lacked standing to represent other course rejections. The first compilation (ER750-77), which the district judge said listed "150

text from oft-approved courses demonstrates that the course taught standard content and devoted adequate time to labs. UC's stated reason meant the other text added a religious viewpoint to standard content, which is what UC meant each time it used that form language ("not consistent with the viewpoints and knowledge generally accepted") (POB20-21).

The district court ignored UC's stated reasons and the secular biology text, instead relying on post hoc rationalizations of the BOARS chairman/faculty reviewer. (ER17, 69.) The district court also relied on the post hoc rationales of UC experts, disagreeing with the added religious viewpoint[6] (ER17-18, 69), and ignoring the contrary testimony of ACSI's expert witness, (ER978-79, 809-18).

B. U.S. History/Government

(i) For Calvary's history course, UC's stated reason for rejection (POB41) was the added religious viewpoint, not coverage of standard content. UC's rejection checklist said "Focus too narrow" (ER1981), UC's shorthand for a single religious viewpoint (ER370-71, 382-83, POB13), and "content...not consistent with the empirical historical knowledge generally accepted in the collegiate community," which was UC's form rejection language for "courses from non-secular schools" with an added religious viewpoint (ER1488-89). One of the course's two textbooks was a secular text by America's leading historian of religion. (ER1983, 1987, 2456.)

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courses" obviously was submitted before the "motion was considered."

[6] UC did not identify any alleged inaccuracies until three years after the Position Statement (ER1687), and UC's expert admitted the texts are "mostly accu-

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

The district court ignored UC's stated reasons and the secular textbook, instead relying on post hoc rationalizations developed 2½ years after the course rejection. The primary new rationalization was that one of the two texts "attributes historical events to divine providence." (ER13.) Professor Given had concocted that basis for rejecting religious school history courses ("it presupposes that a Christian god" [sic] has guided some historical events). (ER2036.) Professor Nash was quoted expressing his antipathy to that text's added religious viewpoints, without acknowledging that he believed the course should be approved. UC's expert was controverted by ACSI's expert.[7] (ER746-47, 1134-38, 233-37.)

UC's brief similarly dislikes the added religious viewpoint in the religiously-published text. (UCB16-17.)

(ii) UC's stated reason for rejecting Calvary's government course, rather than insufficient teaching (POB41-42), was the added religious viewpoint: "One sided presentation of history [*sic*] curriculum; needs balance." (ER2007.) UC sanitized that internal reason in what it sent to the school. (ER2000.)

The district court relied on the post hoc rationalization of Professor Petracca that the text "does not acknowledge the commonly-accepted framework for scholarly

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rate." (ER1776; ER898.)

[7] Dr. Vitz (Ph.D., Psychology, Stanford) is professor emeritus at NYU. (ER1140.)

analysis" and contains "assertions that are not generally accepted" (ER15, 71), *i.e.*, the text added a religious viewpoint (ER1135). Petracca's wrong standard meant that he would also reject government courses that UC describes as exemplary (ER1849-52), or whose content is the California Standards (ER1853-58, 921-22, 215-17.) In contrast, ACSI's expert (ER528, 1134-37, 237-38) compared the content of the religiously-published texts to UC-approved texts (ER224-33) and concluded Calvary's courses taught the "historical analysis and critical thinking skills expected by UC" (UCB18), (ER233-38).

C. English/American Literature

UC's three primary reasons for rejecting Calvary's English course were that the course outline and text were not adequate, "Substantial reading/writing" was not adequate because "[n]eed detail to determine which books on the reading list are read in their entirety," and the course "does not offer a non-biased approach." (ER2051, 285-88.) The final reason was viewpoint discrimination, and UC identifies the first reason as such, explaining the text "insists on specific interpretations" or "polemics." (SER0427, 0430, UCB18.)

The district court again relied on post hoc rationalizations that the "selection of works and pedagogical apparatus were inconsistent with . . . expectations regarding critical thinking and broad exposure to writers' key works," and that "the primary text is an 'anthology of excerpts,' which UC does not approve," because students must "read full-length works." (ER12.) The first rationale obviously differs from the stated

reasons, and ACSI's expert[8] countered it. (ER955-58, 285-88, 260-85.) The second rationale was not one of UC's actual reasons--UC regularly approves English courses using anthologies as primary texts (ER2267-2307), where no full-length works are read (ER2292, 2295). Calvary's course assigned the two full-length works that UC now says were required. (ER512-13.) As a third rationale, the court claimed Dr. Stotsky "does not refute Professor Otter's conclusions." (ER13.) Dr. Stotsky not only refuted them (ER955-58, 1106-07, 285-88, 299-306), but Otter admitted his criticism of "specific interpretations" was "an overstatement." (ER510.)

UC mistakenly asserts that "Stotsky did not opine whether the Beka text is adequate for a college-preparatory course" (UCB18), but she did (ER285-88). Approval of courses with "the same list of authors" (UCB19), only proves religious discrimination.[9]

D. Religion

(i) For Calvary's World Religions course, UC's primary reason for rejection was that the school must "demonstrate how the course treats the study of religion from the standpoint of scholarly inquiry" (ER2193)[10], which UC acknowledges meant that it must conform to "UC's Policy on Religion and Ethics Courses."[11] (ER1172.) That

[8] Dr. Stotsky (Ed.D., Harvard) was a research associate at Harvard and is a professor at the University of Arkansas. (ER1109.)

[9] UC's n.15 is mistaken: the other UC rejections also were based on an added religious viewpoint. (ER448-50, 465-67, 298.)

[10] Though UC listed two minor additional reasons for rejection, the prohibition on adding its religious viewpoint made addressing them futile.

[11] UC's n.17 is obviously mistaken; the Policy simply says that approved religion and ethics courses must not treat the subject "from the standpoint of...one denomina-

UC Policy expressly requires rejection of courses with standard content that add the perspective of "one denomination or viewpoint." (ER1485.)

The district court upheld that requirement as reasonable, ignoring ACSI's expert's[12] opinion that the course meets UC requirements except the viewpoints rule. (ER16. *Contra ER361*-62.) He testified that the Policy was "invalid and unreasonable." (ER362, 381-85, 687-88.)

(ii) For Cantwell/Sacred Heart's Old Testament course, rejection was based solely on adding a religious viewpoint, as UC's internal reasoning was that "additional text books needed (listed the use of the Catholic Bible only)" and "need other prospectives [*sic*]." (ER1664.)

UC claims that its Policy "reflects the scholarly approach." However, UC's own exhibits recognize that there are two scholarly approaches: one is secular universities' religious studies programs, and the other is religious universities' religion courses preferring the sponsoring religion (ER2214), *e.g.*, at Notre Dame and Catholic University (ER2205-13, CR220Ex.653-55). Sharf's opinions were controverted by ACSI's expert. (ER668-69, 384-85.)

E. Other Electives

UC misstates that "Plaintiffs did not contest below the denial of elective credit for any Holocaust-focused course." (UCB22.) ACSI did so in its exhibits 363, 470, 552-53, 302[at UC00123922-26], 469, 672, and 722; its deposition questions about them; its

tion or viewpoint."

[12] Dr. Guevara (Ph.D., Philosophy, UCLA) is a tenured professor of philosophy with a focus in moral philosophy at UC-Santa Cruz. (ER667, 387.)

first compilation (ER763-65); its first summary judgment brief (pp.A13 and A28); and its second compilation (ER461, 465, 477).

The holocaust courses were rejected for adding a single viewpoint, and *not* for failing to add "other genocides" (a newly-minted, post hoc rationalization not raised below). (UCB22-23.) For example, New Community Jewish High's "Holocaust and Human Behavior" course was rejected because, in the official internal reviewer notes, it was "too slanted towards Holocaust with no other perspective." (ER2400, 2411.)

Such rejections are typical of the 150 rejections for a single viewpoint. (ER443-86, 750-77, 1981-2454, 442-94; CR220Ex.606-669, CR224Ex.670-740, CR223Ex.748-755.) ACSI's experts testified that they were wrongfully rejected. (ER498-504, 524-28, 672-88, 957-58, 233-56, 285-99, 323-56, 360-85.)[13]

IV. UC REJECTS COURSES BECAUSE OF ADDED VIEWPOINTS, AND ANIMUS IS NOT THE SUPREME COURT'S TEST

A. UC's Practice and Policy Is to Reject Courses Because of Added Viewpoints (Viewpoint Discrimination)

ACSI's brief summarized what the district court called "150 courses" from religious schools that UC rejected because of added religious viewpoints, and cited the compilations listing them and quoting UC's reasons for rejection (ER750-77, 443-86) and the discovery exhibits of the course descriptions and rejection checklists (ER1981-2454, 442-94).

UC, faced with denying the undeniable, tries to change the rules. In addition to ACSI showing that a reason for rejection was an added religious viewpoint, UC proposes that ACSI *also* must show that each course "taught the knowledge and skills UC expects and w[as] rejected only because of 'added' religious viewpoints." (UCB23.)

[13] UC's n.22 is mistaken: ACSI's president and another officer testified that the ACSI schools in California teach standard content, and then add a viewpoint. (SER3715-17, ER643-44, 422.)

The Supreme Court does not require the plaintiff to show that viewpoint discrimination was the only reason for rejection. (POB42, 27-29.)

While that is the wrong burden of proof for trial, it is flagrantly wrong for summary judgment, where the facts are viewed in a light favorable to nonmovants.

UC misquotes its form language and some rejections to say they "would not" prepare students. (UCB24.)[14] That typical form language and rejection language (ER1488-89, 1493-94) was that a course "may" not prepare students for success at UC (ER1677, 1679-80, 1683-84; quoted POB41), stating a possibility and not a UC finding. The majority of rejections did not use the form language and did not refer to the adequacy of "viewpoint" or "content" at all. (POB9-23.) UC misdescribes as "Plaintiffs' misuse of snippets from written course rejections" (UCB24) what is in fact UC's actual language rejecting courses (POB9-23, ER750-77, 443-86).

At last, UC ***admits*** that it rejects courses that add "supernatural or religious explanations [that] are used as overriding explanations or frameworks." (UCB25.) (Its actual practice is far broader, rejecting courses that add a religious explanation regardless of its use as an "overriding explanation[] or framework[]"; and few rejected courses use the religious viewpoint in that way.) UC shows the antireligious nature of this standard, giving as its reason that added religious explanations "***may*** interfere with teaching the subject in a manner that prepares students for UC" (*id.*); UC's obvious

[14] UC's n.23 is mistaken. UC's form language did not refer to "content of the courses as a whole," and it is clear that the rejected portion "not consistent with the viewpoints and knowledge generally accepted in the scientific [or collegiate] community" was the religious portion. (*See, e.g.*, ER2025-45, 2061-76, 2131-72, 2177-92; POB14-15, 20-21.

UC is also mistaken that Plaintiffs "wrongly claim, (POB12), that UC used the referenced language only when it rejected religious school courses"—more than 25 times (ER442-58)—based on finding a single nonreligious school course where the rejection language was used (probably erroneously).

UC questions ACSI's "claim that 'UC approves the rejected course descriptions only when one change is made: the references to added religious viewpoints are removed.' POB8." Yet that is the difference between the rejected courses and the approved courses cited.

lack of evidence means it deems religion as harmful (like its form language).

It attempts to sanitize its Vice President for Admissions' testimony with this heavy post hoc gloss (UCB25), though there was no hint of "overriding explanations or frameworks [that] may interfere" in eight hours of actual testimony. UC misrepresents that "Plaintiffs repeatedly misuse this testimony" (*id.*), though it cannot identify any quotation in which Plaintiffs misquoted or misconstrued straightforward admissions by the officer in charge. (*E.g.,* POB10-11, citing ER963-64, 966-69; ER405-07, 412-13.)

UC claims that its reversals of position on religiously-published texts somehow show it does not practice viewpoint discrimination. (UCB26.) But UC's initial rejection of all courses using the physics and chemistry texts as primary texts (ER1667-75), and the biology texts as supplements (ER2077-2108), in the same Position Statement (ER1477-79), and then its decision during litigation to approve courses using the very same texts without change (ER1915-16), shows two things (POB19):

- First, UC admits that the texts sufficiently teach standard content and skills.
- Second, UC admits it rejected courses using those texts, from 2004-2007, not because of lack of standard content and skills but because of the added religious viewpoint expressly identified in UC's Position Statement as the reason).

B. Animus Is Not the Test, but Animus Is Established by Viewpoint Discrimination

While animus is not the Supreme Court's test (POB50-52), UC does not deny that animus is established by viewpoint discrimination (UCB27). All UC can argue is there is no animus "[a]side from their baseless assertions regarding...'added religious viewpoints'." (*Id.*). It claims that the "same standards" are applied for courses "from religious or non-religious schools" (*id.*), but of course the no-added-religious-viewpoint rule does cause rejection of courses from religious schools only. UC then contends

that "[n]o student has ever been denied admission, or otherwise discriminated against, based on religion." (*Id.*) The contention is too clever by half, because a student whose school does not have the 15 required approved courses, or who chooses unapproved courses for their enrichment through added viewpoint, is not "eligible" to apply for regular admission at all and so cannot be "denied admission" under regular admission. UC refuses to admit that rejecting courses for added religious viewpoints is "discrimination...based on religion."

SUMMARY OF ARGUMENT IN REPLY

The district court has made extraordinary and subconstitutional rulings that imperil First Amendment rights. It allows public institutions to practice viewpoint discrimination. It applies the rational basis test to abridgments of First Amendment rights. It gives tortured interpretations to narrow each First Amendment protection and the Equal Protection Clause. It similarly narrows the Supreme Court's rules on associational standing and overbreadth review.

UC's practice or policy is viewpoint discrimination, which has long been held unconstitutional under the Free Speech Clause. UC's mission does *not* "require evaluations of the content of speech," as 49 states recognize, and does *not* require rejection of courses with standard content that add a religious viewpoint. UC presupposes that religious perspectives are radioactive, though it does not presume that other viewpoints contaminate courses, and so UC singles religious viewpoints out for special disqualification. Singling out and discriminating against added religious viewpoints is as unconstitutional as singling out and discriminating against African-American or Latino viewpoints. UC's discrimination against added religious viewpoints is one example of its unchecked discretion.

The district court and UC also err on free exercise, equal protection, establishment, standing, and waiver issues.

ARGUMENT IN REPLY

I. UC's VIEWPOINT DISCRIMINATION, IN ITS NO SINGLE RELIGIOUS VIEWPOINT POLICY AND COURSE REJECTION PRACTICE, VIOLATES THE FREE SPEECH CLAUSE.

UC does not deny that the district court ruled that viewpoint discrimination was permissible, or that it applied rational basis review. UC instead defends both.

UC changes our sequence and main arguments. For the Court's convenience, this reply follows UC's outline.

A. Strict Scrutiny Is the General Test for First Amendment Rights, and the Narrow Exception UC Argues for Does Not Apply.

All Supreme Court decisions involving First Amendment rights employ strict scrutiny (POB45-46), except UC's duo (*Finley* does not use the rational basis test).

UC's argument is bootstrapped. It claims a state university "requires evaluations of and distinctions based on the content of speech" (UCB29), but only because UC appointed itself reviewer of private speech in private schools and the thought police against disfavored religious speech.

1. The Rational Basis Test Does Not Apply to First Amendment Rights, Outside the Very Narrow Exception of Government Speech Selection

UC claims that the "Supreme Court has repeatedly rejected heightened First Amendment scrutiny" where such a public service is provided.[15] (UCB29.) "Repeated[ly]" means simply three cases, none involving universities or student rights,[16] and one (*Finley*) not involving that test. UC acknowledges that those cases all state

[15] Intrusive review of private speech in private schools is not a "public service." Strict scrutiny applies to a university's violation of First Amendment rights generally, and applies to UC's unique review of private school speech.

[16] *Hazelwood* is inapplicable, involving a public school's speech, not private speech in private schools. *Hazelwood* does not apply the principle to all public school decisions, but to those in "school-sponsored expressive activities." 484 U.S. at 273.

they do not permit viewpoint discrimination (*id.*; POB34-35), though it tries to limit that to "invidious"[17] discrimination (UCB40), while the cases simply bar viewpoint discrimination (POB34-35). Those cases do not apply to private speech of private schools, and are limited to government selection among governmental speech. (POB34-35.) UC does not claim that there are more than three (actually two) Supreme Court cases along these lines, or deny that scores of the Court's decisions (POB45-46) instead apply strict scrutiny to First Amendment infringements involving an array of "public services."

The district court's ruling and UC, oddly, rely on *Bakke* and uphold UC's action under the freedoms of a university including "[d]iscretion to determine, on academic grounds, who may be admitted to study." (ER47,UCB31.) Neither acknowledges that there are constitutional limits, which were recognized and enforced in *Bakke,* which stated that "constitutional limitations protecting individual rights may not be disregarded" and held that UC's claim of that freedom did not justify its discrimination in admissions. *Regents v. Bakke,* 438 U.S. 265, 314 (1978).

2. Astoundingly, UC Claims "Discretion To Evaluate and Approve or Disapprove...Content, and Viewpoints," and Seeks to Compartmentalize the Supreme Court Decisions Directly on Point

At this point UC finally **admits** it is conducting viewpoint discrimination and content-based regulation:

> "must have the discretion to evaluate and approve or disapprove the means, ***content***, and ***viewpoints*** of academic expression."

(UCB32.) The Supreme Court has long stressed the danger of "discretion" (POB52-53), and the prohibition of "content"-based regulation (POB38) and "viewpoint" discrimination (POB27-29). UC's claim that it "must" "approve or disapprove" content

[17] The Supreme Court defines "invidious" viewpoint discrimination as penalizing "disfavored viewpoints." *Finley*, 524 U.S. at 587.

and viewpoints is barred by the First Amendment, and resembles claims of totalitarian regimes. No other state university has a need or a right to "approve or disapprove" content and viewpoints of applicants, their courses, or their schools, nor did even UC until its "policy change" in 2004.

In support, UC cites a portion of a sentence in *Forbes* about "a public school prescribing its curriculum." 523 U.S. at 674. This case involves neither a "public school" nor a public school "prescribing its [own] curriculum." This case involves a *private* school being told it may *not* prescribe its curriculum if its students are to be eligible for regular admission at UC, or conversely, the state prescribing a *private* school's curriculum. That is the best Supreme Court support UC can find for its astounding proposition, ignoring the express language of the numerous Supreme Court decisions forbidding university viewpoint discrimination (*Rosenberger, Widmar, Southworth, Bakke*) and other viewpoint discrimination (*Lamb's Chapel, Good News, Mergens, Boy Scouts*, etc.).

UC, instead of considering their holdings, compartmentalizes those decisions to (1) forums, (2) fees, (3) outright prohibitions, (4) financial penalties, (5) compelled speech, etc. Yet each of the Supreme Court decisions cited and found relevant language in decisions in other categories, because viewpoint discrimination is unconstitutional in any factual setting except when government does "itself speak or subsidize transmittal of a message it favors." *See ALA*, 539 U.S. at 213 n.7. For example, *Southworth* (UC's category 2) said "[o]ur public forum cases are instructive here by close analogy," "though the student activities fund is not a public forum." 529 U.S. at 229-30. *Rosenberger, Widmar,* and *Lamb's Chapel* (UC's category 1) relied on cases from all of UC's other categories, and were cited in the subsequent decisions in the other categories. UC, unable to distinguish relevant decisions, categorizes them and falsely claims the categories are totally insular.[18]

[18] UC's descriptions (33-35 nn.27-31) ignore the relevant language and obscure that the Supreme Court decisions involved viewpoint discrimination and content-

3. UC Misapplies the Narrow Exception for Government Speech Selection

UC ignores half of the nine distinctions ACSI points out (POB32-34), and fails to counter the others.

First, it admits that its only three Supreme Court decisions have nothing to do with a "university's action and students' rights." (UCB35: "That may be".) UC's only attempt to bridge that gulf is to note that public schools may prescribe their own curriculum, which is unquestioned and irrelevant.

Second, UC attempts to extrapolate *Finley, ALA,* and *Forbes* to viewpoint discrimination, conveniently ignoring the language of each case expressly forbidding viewpoint discrimination (quoted at POB34-35). It misdescribes references to content-based discrimination as references to viewpoint discrimination. (UCB35-36. *Contra*, *Rosenberger*, 515 U.S. at 831; POB30, 35.)

UC also ignores that the government speech selection in those three decisions was viewpoint-neutral. Thus, *Forbes* held that stations could exclude from televised debates candidates with thin voter support, but could not exclude candidates because of disfavored viewpoints. 523 U.S. at 673-75. *ALA* held that libraries could filter web pornography, but could not restrict private speech or disfavored viewpoints. 539 U.S. at 203 n.2. *Finley* held that the NEA could make grants under its statutory standard of excellence, but could not select based on viewpoint. 524 U.S. at 587.

Third, UC does directly regulate private schools. For example, it decrees "courses in religion or ethics taught in schools should have the following characteristics in order to satisfy the 'f' requirement: 1. The course should treat the study of religion or ethics from the standpoint...[not] limited to one denomination or viewpoint." (ER1485.) It is not a mere matter of private schools "choos[ing] to request approval" (UCB36), because UC has conditioned study at the dozen UC institutions and the two

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based regulation. It quotes not a single reference to either.

dozen CSU institutions on submission of courses to UC review.

Lastly, UC's cases involve government speech selection. (POB33-34.) While UC challenges whether *Finley* does so, *ALA* agreed that *Finley* and *Forbes* both involved "what private speech to make available to the public." 539 U.S. at 204. Instead, UC specifies what *private* speech may be added in *private* institutions.

B. The Reasonable Relation Test Does Not Apply to First Amendment Rights, Outside a Narrow Exception, and Is Not Met, as UC Admitted.

The district court and UC contradict Supreme Court precedent (POB45-46) by using the rational relation test for UC's viewpoint discrimination and other First Amendment abridgments.

However, even under that test, UC's treatment of courses as irreparably poisoned by added religious viewpoints is unreasonable (POB49), as shown by expert depositions (ER656-662, 392-93) and affidavits. (ER362, 236, 238, 288, 327.) UC's a-g course review, judging entire courses by several page descriptions, is also unreasonable, along with its policies. (ER1048, 408-410, 621, 607; POB40.)

UC selectively quotes its Religion and Ethics Policy, to make it sound reasonable and neutral. The policy is viewpoint discriminatory in the part UC does not quote: qualifying courses may not teach from the standpoint of "one denomination or viewpoint." (ER1485.) For example, a Jewish school's "rigorous" "excellent" courses (ER683-85, 373-77, 380-81) on philosophy or ethics will be rejected if taught with a Jewish viewpoint (ER2421-54), as will a Catholic schools' "outstanding" philosophy/ethics courses (ER685, 687-88, 365-79) if taught with a Catholic viewpoint (ER2368-75, 2381-91). That policy applies to courses in all areas, including "history, social science, and English." (ER1485.)

UC actually **admits** the repressive implications of its policy. It says that a "hypothetical policy that, to receive a-g credit, high school government courses should not

have as a principal goal promoting 'personal partisan affiliation'," would be "no different" and equally permissible. The only reason given is that, "in UC's judgment, such prominent partisan indoctrination interferes with scholarly teaching of government" (UCB38), though it offers no evidence for its opinion that a preferred viewpoint would somehow cancel the standard content taught. Under UC's test, even if standard content is sufficiently taught, and even if students learn as measured by standardized tests, UC's viewpoint police will not be satisfied:

- A conservative school's courses on government will be rejected if taught with a conservative viewpoint.
- A libertarian school's courses in economics will be rejected if taught with a free market viewpoint.
- An African-American school's courses will be rejected if taught with an African-American viewpoint.
- A Latino school's courses will be rejected if taught with a Latino viewpoint.
- A women's studies course will be rejected if taught with a feminist viewpoint.
- An environmental science course will be rejected if taught with an environmentalist viewpoint.

UC's viewpoint discrimination amounts to Orwellian totalitarianism, not American freedom of speech.

UC twists *Faith Center* to contradict the Supreme Court. Religious speech *is* a viewpoint. (POB28.) And "no type of public forum is involved here," as UC admits. (UCB39; POB29-30.)

C. UC's Policy or Practice against Single Religious Viewpoints, and Determinations Under That Policy, Involve Unbridled Discretion.

The district court and UC contradict Supreme Court cases (POB52-53) in attempting to limit the prohibition of unchecked discretion over speech to a "prior re-

straint (such as a license or permit requirement)." (UCB41, ER60 (district court did not include penalties). *Contra*, *Hills*, 329 F.3d at 1056.) Other types of unchecked discretion over speech are equally dangerous. However, UC's course rejection is a type of prior restraint or penalty (the course is denied approval and credit).

UC has no precise standards governing which viewpoints it will approve and which it will reject, as it routinely approves added secular viewpoints but rejects added religious ones. UC has demonstrated that, even in this brief, by arbitrarily saying it will reject courses for a new category of added viewpoint: "partisanship."

II. UC's Viewpoint Discrimination, In Its No Single Religious Viewpoint Policy And Course Rejection Practice, Violates The Hybrid Rights Of Religious Speech And Religious Association.

A. The Supreme Court Has Adopted the Hybrid Rights Doctrine, and UC Is Mistaken To Urge This Court To Reject It.

UC invites this Court to reject the hybrid-rights doctrine (UCB43), which the Supreme Court has recognized (POB55). The district court ignored that our free exercise claims were under it. (POB54.) Yet religious speech is speech (POB25n.10), and religious association is association; neither is constitutionally inferior to other speech or association.

B. UC's Viewpoint Discrimination Is a Substantial Burden on Religious Speech and Association.

Viewpoint discrimination *is* a substantial burden. *E.g.*, *Good News Club,* 533 U.S. at 111-12 & n.4; *Rosenberger,* 515 U.S. at 829, 832; *Boy Scouts*, 530 U.S. at 654, 661; ER611-14.

Prohibiting additional religious viewpoints in approved courses is another substantial burden on religious speech and religious association. A religious tenet of ACSI schools, like most religious schools, is that each subject should be taught with not

only standard content but an added religious viewpoint. (POB8.)[19] It is also a burden to discriminate against religious school students by requiring them to take and pass additional SAT II tests that other students do not have to take. (POB7, ER612-13.)

III. UC's VIEWPOINT DISCRIMINATION AGAINST RELIGIOUS SCHOOLS VIOLATES THE EQUAL PROTECTION CLAUSE.

A. Strict Scrutiny Applies to Equal Protection Claims Involving First Amendment Rights.

The district court and UC erroneously apply the rational basis test (UCB46) and not strict scrutiny for denial of equal protection for fundamental rights or suspect classifications such as First Amendment rights. (POB56.)

B. UC's Rejection of Courses Because of Added Religious Viewpoints, While Approving Courses with Other Viewpoints, Is Discrimination.

UC employs a straw man argument in claiming "[n]o one is excluded from any path to UC eligibility because of religious affiliation." (UCB47.) The issue is not affiliation but added religious viewpoints, and at least 150 courses have been rejected on that basis. If UC attacks already-approved courses in religious schools, many students will become ineligible for regular admission. (ER611, SER3719, POB8-9.) UC has proposed that sort of reconsideration of approved courses. (ER1521.)

IV. UC's POLICIES AND PRACTICES VIOLATE THE ESTABLISHMENT CLAUSE.

UC misstates our argument (UCB47), which was that the district court wrongly applied the tripart test to a hostility claim, and wrongly required animus for an establishment claim. (POB54, 50-51.)

V. UC's REJECTIONS OF CALVARY COURSES AND OTHER ACSI SCHOOL

[19] UC's attempt to restrict free exercise to central beliefs in n.36 is simply wrong. *Employment Div. v. Smith*, 494 U.S. at 886-87.

COURSES ARE UNCONSTITUTIONAL, AS APPLIED.

A. UC's Rejections of Calvary's Courses Were Viewpoint Discrimination, and Were Upheld Based on Post Hoc Justifications Rather than UC's Stated Reasons.

UC unconstitutionally rejected Calvary's courses because of added viewpoints POB40-43), and the district court wrongly upheld that based on post hoc rationalizations instead of actual stated reasons (POB43).[20]

B. ACSI Has Standing to Challenge UC Rejections of Its Member Schools' Courses.

UC's response is essentially that individualized proof is required. However, "just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties*." *Playboy Ent. v. PSC*, 906 F.2d 25, 35 (1st Cir.1990). *Accord Hospital Council v. City of Pittsburgh,* 949 F.2d 83, 89 (3d Cir. 1991)(testimony but not parties); *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1096 (9th Cir. 2008)(same).

The common *claims* do not require individualized proof. (POB58.) Those claims are that UC rejects courses in five subjects because they add a religious viewpoint, which UC admits. Individualized participation is not necessary, because the evidence is documentary (exhibits from UC files of course descriptions and rejections), which ACSI has assembled on behalf of its members. Even if there were differing individual facts, those do not require participation or prevent associational standing. *E.g., New York State Club Ass'n v. City of N.Y.,* 487 U.S. 1, 9 n.3 (1988)(though different club rules, similar constitutional arguments); *UAW v. Brock,* 477 U.S. 274, 282, 287 (1986) (though "UAW members were denied TRA benefits" of differing amounts by various state agencies); *Boston Stock Exchange v. STC,* 429 U.S. 318, 321 n.3 (1977) (though tax

[20] UC's n.39 is mistaken: the expert affidavits were not "excluded," but only the portion containing new opinions. (ER8-9.)

affected exchanges differently depending on percentage of out-of-state transactions).

The common *relief* does not require individualized remedies. (POB57-58.) That relief is simply a declaration that rejecting courses for added religious viewpoints is unconstitutional, or an injunction. ACSI has requested relief on behalf of its members. Declaratory and injunctive relief do not require participation and individualized proof. *E.g., Alaska Fish & Wildlife Fed'n v. Dunkle,* 829 F.2d 933, 938 (1987); *Olagues v. Russoniello,* 770 F.2d 791, 799 (9th Cir. 1985); *United Union v. Insurance Corp.*, 919 F.2d 1398, 1400 (9th Cir. 1990).

C. ACSI Properly Raised As-Applied Challenges Over Its Member Schools' Courses.

ACSI brought the complaint "representing more than 800 religious schools in California" (ER1296), and challenged UC course rejections in all those "Christian schools" (ER1333-34, 1339, 1350, 1356). The 38 as-applied challenges of ACSI course rejections were identified in exhibits during discovery and were used to question witnesses (ER118-24), which made them known so listing in interrogatory responses was unnecessary (Fed. R. Civ. P. 26(e)(1),(2)). They also were listed (ER1173-76, 203) on the date the district court specified (ER1178), and had been listed earlier in the Watters Declaration (ER750-77).

VI. UC CONCEDES THAT THE DISTRICT COURT "ERRED IN IGNORING THE UNDISPUTED FACTS OF 150 OTHER UC REJECTIONS OF COURSES THAT ADD A SINGLE RELIGIOUS VIEWPOINT," AND "REFUSING TO APPLY THE OVERBREADTH DOCTRINE."

UC concedes our Argument VI (quoted above), by not responding to it. (POB58-59.)

CONCLUSION

The summary judgment rulings should be reversed.

Dated May 8, 2009, and respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 6,995 words.

This 8th day of May, 2009.

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PROOF OF SERVICE

STATE OF GEORGIA, CITY OF ATLANTA:

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

On **May 8, 2009**, I electronically filed the documents below with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I served upon counsel for all parties in this action the following documents, by placing a true and correct copy addressed as stated on the attached service list to a third party commercial carrier for delivery within 3 calendar days, specifically by Federal Express, overnight delivery:

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