No. 09-1461

IN THE

Supreme Court of the United States

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

v.

ROMAN STEARNS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the evidence shows that the course review policy of the University of California ("UC") both (a) provides for approval (for credit toward guaranteed admission to UC) of high school courses that are sufficiently rigorous regardless of whether the courses "add a religious viewpoint" and (b) is academically reasonable on its face and as applied, did the courts below err in rejecting Petitioners' constitutional challenges to that policy?

2. When the government provides a public service that by its nature requires evaluations and distinctions based on the content of speech, does heightened First Amendment scrutiny apply absent evidence of invidious viewpoint discrimination?

3. Where Petitioners waived as-applied challenges that were dependent on their assertion of associational standing, and Petitioners' as-applied challenges would in any event not implicate any purported circuit split regarding associational standing doctrine, is this case a good vehicle for resolving any minor circuit court disagreements about that doctrine?

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STATEMENT OF THE CASE

Petitioners challenge the University of California's ("UC") policy of reviewing California high school courses to determine whether performance in those courses may be used to gain guaranteed admission to UC, a policy whose purpose is to ensure that admitted students will be well prepared for study at the University.[1] Petitioners allege that UC denies approval to courses that teach "standard content" merely because those courses "add a religious viewpoint." But both the district court and the Ninth

[1] Respondents are or were individual UC employees, all of whom were sued in their official capacities.

Circuit held this allegation is unsupported. Both courts found the uncontroverted evidence to demonstrate that UC does not discriminate based on the presence of religious viewpoints and that UC's policy is academically reasonable on its face and as applied.

I. THE COURTS BELOW CORRECTLY FOUND THAT UC'S COURSE REVIEW POLICY IS ACADEMICALLY REASONABLE AND DOES NOT SUBSTANTIALLY BURDEN PETITIONERS

UC is one of the world's great universities. UC guarantees admission to all "eligible" California students. SER[2] 3653; Appendix to Petition for a Writ of Certiorari ("App.") 46a. Most students become eligible by achieving sufficiently high grades in courses in specified subject areas and scores on standardized tests. *Id.* UC's course review policy ensures that grades on which students rely have been earned in courses that are truly preparatory for study at the University. App. 48a. Nothing in Petitioners' religion is inconsistent with teaching such courses, and most members of Petitioner Association of Christian Schools International ("ACSI") do teach such courses.

A. There Are Multiple Paths to UC Eligibility

1. Eligibility in the Statewide Context

Under the most common path to eligibility, "Eligibility in the Statewide Context," students must demonstrate proficiency in the "a-g" subject areas.

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[2] "ER" and "SER" refer to the Ninth Circuit Excerpts of Record and Supplemental Excerpts of Record.

SER 3654. Students have several ways to demonstrate proficiency, including by earning good grades in approved courses (approximately 3.75 courses per high school year) and/or scoring in the top two thirds of test takers on SAT II subject tests. SER 3654-56, 3659-73.[3]

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.

SER 1453-61. Most students take additional courses not qualifying for a-g credit. SER 167-68.

To obtain approval of their courses for a-g credit, California high schools must submit course descriptions to UC.[4] UC then considers whether the courses "involve[] substantial reading and writing," show serious attention to "both analytical thinking and

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[3] This is the most common path to what Petitioners call "regular admission." *See* Petition at 4. Because of the SAT II option, among others, a student from a school without an approved a-g curriculum is *not*, as Petitioners claim (*id.* at 5), "ineligible for regular admission." App. 47a n.3.

[4] Contrary to Petitioners' claim that course descriptions are one to five pages long, Petition at 4, the district court found that submissions are typically three to five pages long. App. 48a.

factual content," are academically challenging, and will sufficiently prepare students for UC. App. 49a.

To assist schools and guide UC's course reviewers, UC maintains a dedicated website, containing extensive interpretive notes, "helpful hints," hundreds of pages of sample course descriptions, and two "Statements of Competencies." SER 178, 873, 1226-2827. Reviewers obtain additional guidance from faculty and the Academic Senate's Board of Admissions and Relations with Schools ("BOARS"). SER 3676-77, 179. Reviewers apply the same standards to courses from religious and non-religious schools. *See, e.g.*, SER 78, 124-25, 275, 929-35. Course approval rates for ACSI schools are similar to those for other schools and higher than for some categories of public schools. SER 297-98, 309.

If UC disapproves a course, it explains why. *E.g.*, SER 145-64, ER 2193-94. Schools may resubmit courses with either revisions or an explanation of why the disapproval was mistaken. SER 127-28, 139-40, 143.

b. SAT II tests

Students may also satisfy a-g subject areas (except the "f" Visual and Performing Arts area) by scoring in the top two thirds of test takers on the relevant SAT II tests. SER 3655-56, 3659-73.[5] Several ACSI schools, including Petitioner Calvary Chapel Christian School ("Calvary"), testified that they advise students of this alternative. SER 2944-68.

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[5] UC also allows students to satisfy a-g areas with International Baccalaureate or Advanced Placement exams or college courses. App. 47a.

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") (SER 3002, 3656-57);
- receiving sufficiently high standardized test scores (SER 3003, 3657); or
- demonstrating potential to succeed based on campus-specific criteria (SER 3004, 3657).

B. UC's Policy Is a Reasonable Exercise of Academic Judgment

UC's policy reflects a decades-long faculty consensus about the academic value of having standards for those high school courses in which a student's grades can be used to qualify for University admission. SER 325-26, 3677. The policy helps 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.

SER 1453. As the district court found, it is uncontroverted that the faculty's goals are legitimate and the policy is a reasonable means to meet them. App. 67a.

Dr. Michael Kirst, an expert on college-preparatory curricula and admission standards, testified that

course content is a "crucial variable in predicting whether students will succeed at very selective post-secondary institutions such as [UC]." *Id.* 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.;* SER 2840-45, 2847-49, 2853.

As the district court recognized, Petitioners' education experts agreed that content- and knowledge-based admission requirements are educationally reasonable. App. 67a-68a. Petitioners' experts testified that, the more information a university reviews about students' preparation, the better its admissions process. SER 3600-08. They also agreed that the course descriptions submitted to UC give guidance about the content actually taught. SER 3609-18.[6] One of Petitioner's experts specifically testified that UC's course review "would give a better indication of what was actually taught in the course than a course title." SER 3621. Further, Petitioners' 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. SER 3628-35. Petitioners' experts additionally believe it is educationally reasonable that students not be excused from these requirements on religious grounds. SER 3575-88.

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[6] ACSI itself similarly requires schools to prepare course descriptions for its review in assessing whether to grant accreditation. SER 3623-26.

C. A-g Courses Are Not Inconsistent with Petitioners' Religion

Petitioners' religion does not forbid ACSI schools from teaching any material required for a-g approval. Petitioners "hold a . . . religious faith that they *should* present and study . . . all standard subject matter in science." *Id.*; *see also* ER 1322-30 (same for other subjects); SER 3068.01-3068.03, 3070.

Petitioners' religion also does not require 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. SER 3072-381. ACSI's President and ACSI school representatives testified that they are unaware of any ACSI schools' a-g approved courses having content contrary to the ACSI Statement of Faith. SER 3382-84, 3405-34. Petitioner Calvary had a complete a-g curriculum during 2006-2007, and a Calvary representative testified that those courses were fully consistent with the school's Statement of Faith. SER 3126-29, 3405-08.

Virtually all schools offer additional courses not submitted for a-g credit. App. 3a; SER 3005-27. As one ACSI school testified, UC does not "regulate what [ACSI schools] may teach." SER 3402-04; *accord* SER 3028-68. For example, ACSI schools offer yearly Bible courses that most students take. SER 3514-26. If, in its Bible courses, a school wants to teach students to question scientific methodology or theories, that does not affect approval of the school's other courses or admission of its students. SER 167-68.

Petitioners have no religious objection to SAT II tests, and in fact tout standardized tests as the optimal means of determining college preparation. SER 2970-71, 3627-35. ACSI schools testified

uniformly that taking the SAT II does not interfere with students' exercise of religion. SER 2975-97. 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." SER 2998-3001.

II. AS THE COURTS BELOW FOUND, THE COURSES AND TEXTS AT ISSUE DID NOT MEET UC'S LEGITIMATE EXPECTATIONS

No admissible evidence supports Petitioners' claim that UC disapproved courses because the courses "added" a "religious viewpoint" to "standard content." *E.g.*, Petition at 5, 6, 13. A course or text is not acceptable for a-g credit if it, among other things, fails to teach (1) topics with sufficient accuracy and depth or (2) relevant analytic skills. As the courts below found, the undisputed evidence is that the courses and texts at issue were denied approval because they were unacceptable under one or both of these measures.[7]

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[7] Petitioners refer repeatedly to "150 courses" rejected (*e.g.*, Petition at 11, 23), a phrase taken from the district court's Partial Summary Judgment Order: "Plaintiffs do not provide an analysis as to why any of the more than 150 courses rejected by UC should have been approved." App. 103a. As the Ninth Circuit recognized, Petitioners have still not provided any such analysis. App. 9a-10a.

It is not even clear to which courses Petitioners refer with their "150 courses" mantra. Petitioners cite two attorney "compilations" of snippets from different sets of disapproved courses, neither of which numbers 150. Petition at 11 (citing ER 443-86, 750-77). Moreover, as Respondents pointed out in the district court, those "compilations" are inadmissible because they lack foundation, do not properly authenticate the underlying documents, assume facts not in evidence, improperly

A. Biology

Many of the UC decisions Petitioners cited below for their claim that UC disapproves courses for "add[ing]" a "religious viewpoint" to "standard content" related to biology courses that were not approved for science credit because they use Bob Jones University Press ("BJU") or A Beka Book ("Beka") biology books as their primary text.[8] UC Professor and BOARS Chair Barbara Sawrey reviewed these textbooks and concluded they were inappropriate 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. App. 104a. The BOARS High School Subcommittee agreed. App. 105a.

These texts teach, for example, that: (1) conclusions reached by the scientific method are false if they conflict with the "Word of God" (App. 107a); (2) the theory of evolution is false (SER 575A, 602A, 638A, 647A); (3) the human life span averaged 912 years before Noah's flood created the fossil record (SER 582A, 584A); and (4) HIV is the result of immorality against God (SER 629A). All of this is presented as literally true.

UC faculty summarized the rationale for disapproving such courses in a Position Statement: "[T]hese texts teach students that their conclusions

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excerpt portions of quotations out of context, and cite documents never submitted to the courts below. SER 15-17.

[8] These biology courses are also a focus of the "compilations" of snippets from course-related documents cited in the Petition. *See supra* note 6.

must conform to the Bible, and that scientific material and methods are secondary." App. 104a n.36. The Position Statement nevertheless left open that otherwise adequate courses may obtain "d" credit using these as supplemental texts (ER 1477-82), as has occurred several times. *E.g.*, ER 10-11; SER 295 ¶ 7; SER 264-70. Thus, the University does not exclude courses that expose students to these ideas; it only requires that these ideas not be the exclusive framework for teaching science.

UC's experts, world-renowned biologists and university professors Donald Kennedy and Francisco Ayala, agreed that use of a BJU or Beka biology book as the primary text would be inappropriate in a college preparatory course. Ayala testified that the texts "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." App. 105a-106a. 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." App. 105a. 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" and "is critical to understanding biology as a whole." SER 955, 1185. As the district court recognized, these opinions were uncontroverted by Petitioners' biology expert, Michael Behe, who opined only that the BJU biology text "mention[ed]" various topics, but not "how much detail or depth" the text contained. App. 39a. As the district court also noted, some ACSI schools "have

declined to use BJU and A Beka textbooks because of concerns about the texts' academic merit." App. 37a n.15.

Because Petitioners do not discuss biology courses in their Petition, it is unclear whether they still contend that courses relying on these texts should have been approved.

B. History

Petitioner Calvary's disputed history course uses a primary text from BJU. UC history Professor and BOARS member James Given and UC's expert, UC Professor Gary Nash, agreed 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 providence rather than human action; (3) evaluates historical figures and their contributions based on their religious motivations; and (4) contains inadequate treatment of several major ethnic groups, women, and non-Christian religious groups. App. 107a-108a. These professors concluded that courses relying primarily on the BJU text would not adequately prepare students. *Id.*[9]

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[9] 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. SER 967, 1183. History and other academic disciplines are similar. SER 343, 431-33, 457. 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. It is for this reason that UC's Admissions Director testified that a course taught *solely* from such a perspective—a

As the district court held, the conclusions of Professors Given and Nash were uncontroverted. Professor Vitz, a psychology professor that Petitioners offered as their history and government expert, merely compared the *indices* at the backs of the BJU history and government texts to *indices* at the backs of other texts in an irrelevant attempt to show "bias" in all texts. ER 1118-33. Vitz's report offered no opinion whether the Calvary history course or its textbook teaches the methods of historical analysis and critical thinking skills expected by UC. App. 33a.

Petitioners now also reference a history course titled "History of Christianity," from a Catholic (non-ACSI) school. Petition at 8. As the Petition itself makes clear, the reason UC gave for denying that course approval was: "We would expect a course in the History of Christianity to include *more than one Christian viewpoint*." *Id.* (emphasis added). The issue was not that the course included a religious viewpoint but that it did not include enough Christian viewpoints to satisfy UC's educational standards. Petitioners did not enter the syllabus for that course into the record, so Petitioners could have no basis to claim that, contrary to UC's assessment at the time, the course would have taught the content and critical thinking skills expected for preparing students for UC.

Despite Petitioners' unsupported assertions otherwise, the evidence demonstrates that UC *does* approve history courses that include a religious

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perspective expressly defined by Petitioners' counsel as "a claim that [the Christian perspective] is the *correct* position"—would probably not be approved. SER 300-01, 3692-93. Petitioners repeatedly misuse this testimony. *See, e.g.*, Petition at 12 & n.5.

perspective on the material. App. 55a (citing the approved history course "Western Civilization: The Jewish Experience"); *see also* SER 79 (course reviewer testimony that presence of religious content does not cause history courses to be disapproved); SER 90 (same).

C. English

Petitioner Calvary's contested English course used a Beka anthology as its primary text. App. 29a-30a. 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. *Id.* As the district court recognized, Petitioners' English expert, Dr. Stotsky, found this requirement to be reasonable. *Id.*

In addition, both UC's course reviewers and UC's expert, UC Professor Samuel Otter, concluded that Petitioner Calvary's course and its text were inconsistent with UC's expectations for teaching critical thinking skills and exposing students to writers' key works. *Id.* They agreed that the Beka anthology is inadequate not because it offers a Christian perspective but because it "fails to provide substantial readings and because it insists on specific interpretations." App. 30a.

As the district court recognized, this is again uncontroverted. Petitioners' expert limited her opinion to the irrelevant issue of whether vaguely defined "viewpoints" appear in various texts. App. 31a. She did not opine whether the Beka text is adequate for a college-preparatory course. *Id.* Stotsky did note, however, 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 at all, shows UC's decisions were *not* based on religion. SER 74.

Petitioners now mention two additional "English" courses—"Grammar and Composition" and "Introduction to the New Testament." Petition at 9. Petitioners did not raise either of these in their Ninth Circuit briefing. Indeed, the only document included in the record materials Petitioners presented to the Ninth Circuit about either course—UC's evaluation form for "Introduction to the New Testament," from a Catholic (non-ACSI) school—shows that the course was submitted as an elective, not as an English course, and that it was rejected because it lacked prerequisites. ER 2264.[10]

D. Religion

For most of the disputed religion courses, disapproval was based upon UC's long-standing Policy on Religion and Ethics Courses,[11] 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

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[10] Even if, among the many *thousands* of course decisions produced in this litigation, Petitioners could identify a few decisions that were arguably mistaken, mistakes are not constitutional 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.").

[11] Religion and ethics courses typically fall into the "g" elective category.

religious growth." App. 72a. UC's expert, Professor Robert Sharf, explained that this reflects the scholarly approach in religious studies, for which these courses are expected to prepare students. *Id.* "One 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." *Id.* Professor Sharf contrasted the discipline of religious studies at UC, which is neutral among religions, with the study of theology at seminaries and religious colleges, which may promote particular religious beliefs. ER 2214. 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. App. 72a.

As the district court held, Professor Sharf's opinions are uncontroverted. App. 73a. Petitioners' purported religion expert, Daniel Guevara, is a professor of philosophy, not religion, and testified that a religion professor would have more expertise in the latter discipline. SER 913. He testified that the opinions in his expert report were solely about whether "UC's policies are ethical or moral" (SER 914-17), while admitting that he is not "in a better position to say what in particular is more ethical [or moral]" than anyone else (SER 914-16).

The one specific religion course Petitioners focus on now—"Jewish Philosophy," from a Jewish (non-ACSI) school (Petition at 7)—was disapproved pursuant to

the longstanding and reasonable Policy on Religion and Ethics Courses.[12]

III. THIS LAWSUIT AND THE LOWER COURT DECISIONS

A. Complaint

Petitioners are the Association of Christian Schools International ("ACSI"); Calvary, an ACSI member school; and various Calvary students. Petitioners' Complaint challenged UC's course review policy on its face, including UC's denying science credit for biology courses using the BJU or Beka books as primary texts and the Policy on Religion and Ethics Courses. ER 1316-1322. The Complaint also included as-applied challenges to UC's denial of a-g approval for three courses submitted by Calvary—in American history, English, and government. ER 1367-1401. The Complaint did not mention specific course submissions from any other ACSI or non-ACSI school, and no non-ACSI school or organization joined in the Complaint. Petitioners sought only declaratory and injunctive relief.

B. Summary Judgment Rulings

After discovery, Petitioners moved for summary judgment. UC simultaneously moved for partial summary judgment on Petitioners' facial challenges.

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[12] The Women's Studies elective also discussed in the Petition (Petition at 7) was disapproved in part because the syllabus was missing information about "Unit 3"—it skipped "from Unit 2B directly to Unit four." ER 2368. UC invited the school to submit the missing information so it could "adequately evaluate the course." *Id.* Petitioners have never offered any evidence that this response was unreasonable or that the Women's Studies course taught content and skills that would prepare students for UC.

In March 2008, the district court denied Petitioners' motion and granted UC's. App. 42a-158a.

The district court found that the evidence established that UC does not have a policy of rejecting courses that contain standard content but add a religious viewpoint. App. 55a, 57a, 59a. The court further found that UC's course-review policy is constitutional if it is reasonably related to the goal of providing a public service that by its nature requires evaluations of, and distinctions based upon, the content of speech and is not the product of government animus. App. 63a-64a. The court found that, because the uncontroverted expert testimony demonstrated that UC's a-g guidelines, the Policy on Religion and Ethics Courses, and the Position Statement rejecting biology courses that rely primarily on the BJU and Beka textbooks were all academically reasonable, those policies are constitutional on their face. App. 71a-74a. The district court further held that it is reasonable for UC to limit its course review to courses from California high schools because "[g]raduates of California high schools make up more than ninety percent of UC applicants." App. 78a.[13]

The parties then jointly requested permission for UC to move for summary judgment on Petitioners' as-applied challenges. The court granted that request and ordered Petitioners to identify "the specific . . . courses they wish to include in their as-applied challenges." ER 1178. Petitioners initially listed 41 courses but later withdrew three. App. 14a n.2. All but 4 of the courses were from schools other than Petitioner Calvary. ER 1173-77.

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[13] In addition, out-of-state students are never guaranteed admission to UC based on coursework.

In opposition to UC's motion, Petitioners proffered previously undisclosed expert opinions regarding the 38 remaining courses. The district court ruled that Petitioners had waived any as-applied challenges to courses other than Calvary's courses identified in the Complaint and one biology course identified in an interrogatory response. App. 22a-23a; ER 1175. The court also excluded Petitioners' belated expert opinions because those opinions had not been disclosed during discovery. App. 23a-25a. The court found that, in any event, ACSI lacked associational standing to pursue as-applied challenges to individual course decisions because the relief sought—"an order that [UC] must reconsider (or perhaps approve) specific proposed courses"—"inhibits any resolution in a group context" and because the as-applied claims would "require an ad hoc factual inquiry" for each school at issue. App. 19a-20a (internal quotation marks omitted). Finally, the court found that the as-applied challenges to UC's rejections of the Calvary courses were meritless, because the uncontroverted evidence demonstrated that UC had reasonable academic bases for those decisions. App. 29a-36a.

C. Ninth Circuit Ruling

The Ninth Circuit affirmed. The court found that heightened First Amendment scrutiny is not appropriate "where, as here, the government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech." App. 2a. The Ninth Circuit emphasized that it is "undisputed that UC's policy does not prohibit or otherwise prevent high schools . . . from teaching whatever and however they choose or students from taking any course they wish." App. 3a. The court held that Petitioners' facial challenges

failed because the uncontroverted evidence shows that UC does not have a policy or practice of rejecting courses with standard content because they add a religious viewpoint. App. 4a. The court further held that Petitioners' "list of 150 rejected courses, without any supporting analysis, does not raise a genuine issue of material fact with respect to whether UC's policy . . . [violates] the overbreadth doctrine." App. 10a.

On the as-applied challenges, the Ninth Circuit agreed that ACSI lacks associational standing to "assert as-applied claims on behalf of its member schools that are not parties to this lawsuit." App. 5a. The court noted that "because [it] conclude[d] that ACSI lacks associational standing, [it] need not address the . . . decision that [Petitioners] waived as-applied challenges for non-Calvary courses that were not timely disclosed." App. 5a n.2. The Ninth Circuit also held that Petitioners had waived any challenge to the exclusion of their undisclosed expert evidence. App. 10a. Finally, the court held that UC's rejections of Calvary's courses were reasonable: "UC denied approval not because the courses added a religious viewpoint, but because they were either not college preparatory, lacked necessary course information or materials, or had other procedural defects which Calvary never bothered to cure." App. 6a.

SUMMARY OF THE ARGUMENT

This fact-bound case does not warrant review. Petitioners' claims are all premised on the allegation that UC denies a-g approval to courses that "teach standard content if they add a religious viewpoint." As the courts below both held, the uncontroverted evidence shows that allegation to be false. App. 4a, 55a-59a.

Petitioners also mischaracterize the Ninth Circuit's ruling in their attempt to show a conflict with the decisions of this Court and other Circuits. Petitioners repeatedly assert that the Ninth Circuit held broadly that rational basis scrutiny, not strict scrutiny, applies whenever "'government provides a public service.'" Petition at ii; *see also, e.g., id.* at 1, 24, 27, 29. But the Ninth Circuit held only that heightened scrutiny does not apply "where, as here, the government provides a public service *that, by its nature, requires evaluations of and distinctions based on the content of speech.*" App. 2a (emphasis added). That is entirely consistent with this Court's decisions. *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). Petitioners also assert that "[o]ther circuits conflict with the Ninth Circuit's refusal to find viewpoint discrimination *in UC's rejection of courses because of added religious viewpoints.*" Petition at 21 (emphasis added). But, again, the Ninth Circuit found that UC does *not* reject courses because of added religious viewpoints. App. 4a, 55a.

Finally, Petitioners argue that the Ninth Circuit's holding that Petitioner ACSI lacks associational standing to bring as-applied challenges to UC's individual course decisions is in conflict with decisions of other Circuits. Petition at 36. But none of the cited decisions involved an association's standing to assert as-applied claims where, as here, liability on each claim would depend upon the specific facts with respect to each member *and* any declaratory or injunctive relief for each claim would need to address

the specific circumstances of each member in order to provide meaningful relief. Even if there were some conflict between the Circuits—which there is not—this case would not be an appropriate vehicle for resolving it, because the courts below held that Petitioners waived the as-applied challenges that would have required associational standing. App. 6a, 21a-23a. The district court also excluded as untimely the only expert opinions that would purportedly have supported those as-applied challenges (App. 23a-25a), and the Ninth Circuit affirmed that evidentiary ruling. App. 10a-11a.

The Petition for a Writ of Certiorari should therefore be denied.

REASONS FOR DENYING THE WRIT

I. THE ENTIRE PETITION IS BASED ON THE FALSE PREMISE THAT UC REJECTS COURSES REGARDLESS OF WHETHER THEY ADEQUATELY TEACH CONTENT AND SKILLS, IF THEY ADD A RELIGIOUS VIEWPOINT

Petitioners' entire petition is based on the false premise that UC "reject[s] private schools' courses that adequately teach standard content if they add a religious viewpoint." Petition at 1; *see also, e.g., id.* at *i* ("question presented is: Whether the Ninth Circuit erred in [upholding UC's] rejection of courses in religious high schools . . . when they add to standard content a religious viewpoint . . . ."); 5 ("UC began to reject courses that contain adequate standard content but add a religious viewpoint"); 6 (policy or practice to reject "courses with standard content because they added a religious viewpoint"); 13 ("[T]he case involves UC's viewpoint discrimination against courses . . .

which teach standard content, *because* they add a religious viewpoint."). Both the Ninth Circuit and the district court found, consistent with uncontroverted evidence described above, that UC does no such thing.

The Ninth Circuit squarely held: "[T]he Plaintiffs contend that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint. . . . *The evidence, however, is to the contrary*. It is undisputed that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks as the primary and secondary course texts." App. 4a.

Similarly, the district court held: "Plaintiffs contend that Defendants have a policy of rejecting courses that contain standard content, but add a single religious viewpoint. . . . *Yet, the evidence establishes otherwise*." App. 55a; *see also, e.g.,* App. 56a ("Defendants are not withholding approval solely because the course includes a religious viewpoint."); App. 57a ("The evidence establishes that Defendants do not have a policy of rejecting courses solely because the courses add a religious viewpoint. Plaintiffs provide no evidence of such a policy.").

The sole "question presented" in the Petition—"[w]hether the Ninth Circuit erred in holding constitutional . . . [UC's] rejection of courses . . . when they add to standard content a religious viewpoint"—therefore does not arise from the decision of either the Ninth Circuit or the district court. The Petition should be denied on that basis alone.

II. THE NINTH CIRCUIT'S DECISION ON THE MERITS IS CONSISTENT WITH BOTH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS

A. The Ninth Circuit's Rejection of Strict Scrutiny Is Consistent with This Court's Decisions

Petitioners mischaracterize the Ninth Circuit's holding regarding the level of First Amendment scrutiny that applies to UC's policies and decisions. Petitioners repeatedly assert that the Ninth Circuit held broadly that rational basis scrutiny, not strict scrutiny, applies whenever "'government provides a public service'." Petition at ii; *see also*, *e.g.*, *id.* at 1, 24, 27, 29. But that was not the holding of either court below. The Ninth Circuit held only that heightened scrutiny does not apply "where, as here, the government provides a public service *that, by its nature, requires evaluations of and distinctions based on the content of speech*." App. 2a (emphasis added). In almost identical language, the district court held only that heightened scrutiny does not apply "where the government is providing a public service *that by its nature requires evaluations of, and distinctions based upon, the content of speech*." App. 63a-64a (emphasis added).

These narrow rulings are supported by this Court's decisions, which have repeatedly rejected heightened First Amendment scrutiny—including any blanket prohibition of "viewpoint" or "content-based" regulation—where the government provides a public service that by its nature requires evaluations and distinctions based on the content of speech. This Court has made clear that 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 ALA*, 539 U.S. at 204-05; *Finley*, 524 U.S. at 580-81; *Hazelwood*, 484 U.S. at 271-72; *Forbes*, 523 U.S. at 673.

In each instance, this Court rejected invalidation of government decisions based on the labels "viewpoint discrimination" or "content regulation." In *ALA*, this 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." 539 U.S. 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. This Court upheld CIPA because the avowedly "content-based" judgments that libraries would be required to make were "reasonable." *Id.* at 208.

In *Finley*, this Court reversed the court of appeals' 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. Even though as "a consequence of the nature of arts funding," decisions regarding such funding are "content" and "viewpoint" based, this 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 Petitioners here 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.

Likewise, in *Hazelwood*, this 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.

Petitioners' burden under these decisions is particularly heavy because UC promulgated the a-g guidelines as part of its 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*, "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." 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university.").

For educators to make academic judgments that their educational missions require and the First Amendment protects, they must have the discretion to evaluate the means, content, and viewpoints of academic expression. This Court has recognized that this discretion includes "a public school prescribing its curriculum," despite the fact that this necessarily "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 students' ideas. *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, that does not trigger heightened scrutiny. This Court has repeatedly rejected judicial micro-management of academic decisions. *See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, ___ U.S.

___, Slip Op. at 20 (June 28, 2010) ("[W]e have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities.") (internal quotation marks omitted); *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.").

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

Petitioners' argument for "strict scrutiny" is based on the simplistic use of the label "viewpoint discrimination." *See, e.g.*, Petition at ii, 1, 15-32. But this Court's decisions on which Petitioners rely are inapposite. They involved either (1) exclusion of speech from government property that is used as a forum for speech,[14] (2) mandatory fees to support others'

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[14] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-09 (2001) (exclusion of religious club from "limited public forum"); *Rosenberger*, 515 U.S. at 829-31 (exclusion of religious publications from "limited public forum"); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (exclusion of religious worship and discussion from "[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 "traditional public forum"); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 790-91 (1985) (exclusion of advocacy organizations from charitable fundraising drive in federal workplace); *Perry Educ. Ass'n v. Perry Local Educators'*

speech;[15] (3) outright prohibitions on certain speech,[16] (4) compelled speech,[17] or (5) compulsory acceptance of members into a private organization.[18] This case involves none of those circumstances. Petitioners' cases are, simply, inapplicable. It is irrelevant that, as Petitioners note (Petition at 27), some of those cases also happened to involve state universities.

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).

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.

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

[16] *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 of Chi. 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).

[17] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559, 581 (1995) (requirement that parade include a group imparting a message the organizers do not wish to convey); *see also Christian Legal Society v. Martinez*, ___ U.S. ___, Slip Op. at 16 n.14 ("*Hurley* involved the application of a statewide public-accommodations law to the most traditional of public forums: the street.").

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

Petitioners argue that the Ninth Circuit's reliance on *Finley*, *ALA*, and *Forbes* was misplaced because "those decisions prohibit viewpoint discrimination." Petition at 29. While those decisions undoubtedly prohibit "*invidious* viewpoint discrimination"—discrimination that is intended to penalize "disfavored viewpoints" *rather than* reasonably furthering the government's speech-related mission, *see Finley*, 524 U.S. at 587[19]—the decisions also make clear that, when the government's mission by its nature requires evaluations of speech, it *may* make viewpoint distinctions that *are* reasonably in furtherance of that mission. Thus, in *ALA*, the Court emphasized that "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them" and 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 distinctions are impermissible. 539 U.S. at 205, 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. In *Finley*, the Court *upheld* the NEA's discretion to make decisions based on "general standards of decency," which would necessarily involve some viewpoint-based distinctions. 524 U.S. at 572-73. In *Forbes*, the Court held that "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint

[19] Thus, for example, UC could not, based simply on hostility to the viewpoint rather than reasonable educational objectives, approve courses that advocate a Christian or Democratic perspective while disapproving courses that advocate a Jewish or Republican perspective. There is no evidence of such disparate treatment here.

discrimination" and "broadcasters must often choose among speakers expressing different viewpoints." 523 U.S. at 673.

Petitioners assert that *Finley*, *ALA*, and *Forbes* are "limited to government selection among speech to subsidize, and do not involve government regulation of private speech." Petition at 29; *see also id.* at 30-31. But UC does not engage in "*regulation* of private speech" any more than did the NEA in *Finley*. This case involves UC's internal standards for granting the benefit of university admission to high school students, while *Finley* involved the NEA's internal standards for granting the benefit of arts funding to private speech by artists. Here, private schools may teach (and students may take) any courses in any manner they choose, just as, in *Finley*, artists remained free to create whatever art they chose. The a-g guidelines apply only to courses for which schools *choose to request approval* so that their students *who choose to apply to UC* may use those courses to gain the benefit of UC eligibility—just as the NEA's standards applied only to art for which artists chose to request government funding. *Finley*, 524 U.S. at 573-577. In terms of Petitioners' dichotomy, UC's course review for purposes of its own internal admissions decisions—without any restriction on what courses schools may teach or students my take—is much more like a "subsid[y]" than it is like a "regulation of private speech."[20]

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[20] Contrary to Petitioners assertions (Petition at 32-35), the Ninth Circuit's analyses of Petitioners' free exercise, Establishment Clause, and equal protection claims were entirely consistent with this Court's prior opinions. In any event, each of those claims is premised on the notion that UC rejects courses "because of an added religious viewpoint" (*id.* at

B. The Ninth Circuit's Decision Does not Create a Circuit Split

Petitioners argue that "[o]ther circuits conflict with the Ninth Circuit's refusal to find viewpoint discrimination *in UC's rejection of courses because of added religious viewpoints*." Petition at 21 (emphasis added). But, again, the courts below found that UC does *not* reject courses because of added religious viewpoints. App. 4a, 55a.

The Ninth Circuit's decision does not remotely conflict with any of the other Circuit decisions discussed by Petitioners. Petition at 21-22, 28-29. In *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999), and *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), the courts of appeals addressed viewpoint- and content-based discrimination only in the context of public forums. *DeBoer*, 267 F.3d at 566-567 (village hall); *Mesa*, 197 F.3d at 1044 (county commission meeting); *Child Evangelism Fellowship*, 470 F.3d at 1064, 1069 (public school facilities). Here, there is no public forum, and there is therefore no inconsistency between the Ninth Circuit's decision and these public forum cases.

In *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004), the Eighth Circuit addressed only the defendant school district's argument that its decision prohibiting a teacher from participating in a Christian-based after-school program at district schools was justified by its desire to avoid a claim that it had violated the

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33), and so each necessarily fails due to the lack of evidence to support that premise.

Establishment Clause. *Id.* at 812-816. No similar issue exists here.

In *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), the Eighth Circuit held that messages on license plates are private speech and that the absence of any guidelines in Missouri's process for approving such messages rendered the approval process unconstitutional. *Id.* There was no suggestion that the issuance of specialty personal license plates is a government function that, like education, *requires* that the government make content- or viewpoint-based decisions.

Finally, in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the Seventh Circuit held it unconstitutional for Southern Illinois University's School of Law to revoke the official student organization status of the Christian Legal Society because it denied membership to those who engage in or affirm homosexual conduct. *Id.* at 857. The continued vitality of this decision is highly doubtful in light of this Court's recent contrary decision in *Christian Legal Society v. Martinez*, *supra*, Slip Op. at 31. In any event, no similar issue exists here.

In short, the Ninth Circuit's decision does not create any split of authority with these other Circuit decisions.

III. THIS CASE DOES NOT PRESENT ANY ISSUE OF ASSOCIATIONAL STANDING ON WHICH THERE IS A CIRCUIT SPLIT, AND, IN ANY EVENT, PETITIONERS WAIVED THE AS-APPLIED CHALLENGES THAT IMPLICATE ASSOCIATIONAL STANDING

Petitioner ACSI's associational standing to state a facial challenge to UC's a-g guidelines has never been

questioned. The issue of associational standing arose only after UC was granted summary judgment on ACSI's facial challenges and ACSI for the first time attempted to assert as-applied challenges concerning courses from non-plaintiff ACSI-member schools. UC argued that ACSI had waived any such as-applied challenges by not raising them previously, and, in any event, ACSI lacked associational standing both because resolution of those challenges would require the participation of each individual school whose course submissions were being implicated and because any relief obtained would be different for each school and course and would not apply to all ACSI members. The district court and the Ninth Circuit agreed. App. 5a, 18a-21a.

Petitioners now assert that the Ninth Circuit's rejection of associational standing for ACSI on the as-applied challenges to UC's individual course decisions conflicts with decisions of the First, Third, and Seventh Circuits. Petition at 36. None of those decisions, however, involved an association's standing to assert as-applied claims where, as here, liability on each claim would depend upon the specific facts with respect to each member *and* any declaratory or injunctive relief on each claim would need to address the specific circumstances of each member in order to provide meaningful relief. *See Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83 (3d Cir. 1991) (challenge to alleged governmental threats against tax-exempt hospitals to coerce payments in lieu of taxes); *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993) (challenge to settlement agreement between City of Chicago and pension funds); *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*, 906 F.2d 25 (1st Cir. 1990) (challenge to local obscenity statute and prosecutions thereunder based

on First Amendment and Cable Communications Policy Act).

In *Warth v. Seldin*, 422 U.S. 490 (1975), this Court held that, "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause," an association may be an appropriate representative of its members. *Id.* at 511. The Court further emphasized that, "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought" would "inure to the benefit of those members of the association actually injured." *Id.* at 515. In *Hospital Council* and *Retired Chicago Police Ass'n*, the Third and Seventh Circuits upheld associational standing because, given the nature of the claims and the relief sought, while some association members might need to participate, the participation of each allegedly injured member was not necessary. *Hosp. Council*, 949 F.2d at 89-90; *Retired Chi. Police Ass'n*, 7 F.3d at 601-603. In *Playboy Enterprises*, the First Circuit upheld associational standing because "[the requested] declaratory relief turns on a question of law which is not particular to each member," "the declaration applies equally to all members," and "no individual findings are necessary." 906 F.2d at 35.

Here, by contrast, determining both liability and the appropriate remedy on Petitioners' as-applied claims would require individualized proof from and findings with respect to each allegedly injured school, and any equitable relief would necessarily be specific to each school and course. First, ACSI's as-applied free speech and equal protection claims would require individualized evaluation of UC's disapproval of each course. Second, ACSI's as-applied claims would

require individualized proof to determine whether UC's actions substantially burdened each school's ability to practice its religion. *See Harris v. McRae*, 448 U.S. 297, 320-321 (1980) (free exercise claim requires showing substantial burden on particular petitioner 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 the cases relied upon by Petitioners where individualized findings were not necessary and the plaintiff organizations sought generalized equitable relief that would benefit all members equally.

Even if there were any Circuit conflict—which there is not—this case would be an inappropriate vehicle for resolving it. The Ninth Circuit held, in the alternative, that Petitioners had waived any appeal from summary judgment on their as-applied challenges because, "[i]nstead of identifying the factual issues and asserting arguments as to why they were material, the Plaintiffs merely provide[d] a table of citations to various declarations, affidavits, exhibits, and depositions relating to each rejected course, leaving [the Ninth Circuit] to 'piece together' their argument." App. 6a. Moreover, although the Ninth Circuit did not reach the issue (App. 5a n.2), the district held that Petitioners waived their as-applied challenges with respect to non-Calvary courses because Petitioners had not timely disclosed those challenges. App. 21a-23a. The district court also excluded as untimely the only expert opinions arguably relevant to the as-applied challenges (App.

23a-25a), and the Ninth Circuit affirmed that evidentiary ruling (App. 10a-11a). The Petition does not challenge any of these procedural or evidentiary rulings. Thus, Petitioners' non-Calvary as-applied claims are barred and unsupported regardless of whether ACSI would have associational standing.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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