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.

Appeal from the United States District Court
for the Central District of California,
No. cv-05-6242-SJO (Hon. James Otero)

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* American Association of University Professors states that it is a not-for-profit organization, it has no parent companies, and it has not issued shares of stock.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of University Professors ("AAUP") is a non-profit organization of approximately 47,000 faculty, librarians, graduate students, and academic professionals. Its purpose is to advance academic freedom and shared university governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good.

The AAUP's participation will assist the Court and is relevant to the disposition of this case. This case directly implicates the academic freedom of public universities as that freedom is exercised through the professional academic judgment of faculty members. The academic freedom of universities is premised on the work carried out by their faculties, as the Supreme Court has recognized. Protection of that

freedom is therefore especially important where, as in this case, faculty members have had meaningful involvement in a university's academic decisions regarding admissions standards.

In the Supreme Court as well as the federal circuits (including this Court), the AAUP frequently submits *amicus* briefs in cases that raise important legal issues in higher education and implicate AAUP policies and the interests of faculty members. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004); *Hong v. Grant, appeal docketed,* No. 07-56705 (9th Cir. 2007); *Smith v. Univ. of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000). Several of these cases are relevant to this case and are discussed herein.

Further, the AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* is recognized as the nation's fundamental and most widely accepted description of the basic attributes of academic freedom and tenure, and has been cited by the Supreme Court. *See*, *e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972). The 1940 *Statement*, and the gloss of meaning

placed on it by the Association over the past sixty years, is generally accepted as normative in American higher education. *See* RICHARD HOFSTADTER & WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES Ch. X (1955); *Developments in the Law - Academic Freedom*, 81 HARV. L. REV. 1045, 1105-1112 (1968).

The AAUP has filed a motion in this Court seeking leave to file this brief.

INTRODUCTION

The Supreme Court has taught that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students," but also "on autonomous decisionmaking by the academy itself." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citations omitted). One of the "essential freedoms" of a university is its ability "to determine for itself *on academic grounds* ... who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment) (emphasis added); *accord*, *Ewing*, 474 U.S. at 226 n.12.

The academic freedom of universities is premised on the work carried out by their faculties, and protection of that freedom is therefore

especially important where faculty members have had meaningful involvement in a university's academic decisions. In this case, the plaintiffs' claims challenge the University of California's freedom to make basic educational judgments about the qualifications of potential students. Those educational judgments, which are the product of an academic decision-making process that is directed by faculty members applying their professional expertise, are entitled to deference by the courts.

Academic freedom is not, of course, absolute, and a public university has no right to act out of hostility to religion. But as the district court correctly found, plaintiffs' claims of religious discrimination have no basis and are belied by the record. Rather, under the guise of a claim of discrimination, plaintiffs seek to have the courts override the judgment of UC faculty about the academic coursework that would best qualify students for the rigors of college study. Regardless of what a high school may teach as a matter of religious doctrine, a university is under no obligation to accept courses that, in the judgment of its faculty, do not adequately prepare students for admission.

The issues in this case arise out of exactly the sorts of academic standards and faculty decision making that the Supreme Court and other courts have recognized are entitled to deference. "The freedom of a university to make its own judgments as to education includes the selection of its student body," *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.), and where such judgments are based on "accepted academic norms," a court "should not override" them, *Ewing*, 474 U.S. at 225. Accordingly, this Court should affirm the district court's rulings.

ARGUMENT

I. A University's Academic Freedom Is Intertwined With the Role of Its Faculty in Determining Academic Standards and Expectations.

In its foundational statement of principles on academic freedom almost a century ago, the AAUP recognized that every university, regardless of the source of its charter or funding, is a "public trust" – "a great and indispensable organ of the higher life of a civilized community." *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS 293, 295

(10th ed. 2006) (hereinafter, "AAUP POLICY DOCUMENTS"). At the same time, the AAUP explained that by virtue of their prolonged and specialized training, university faculty members are uniquely positioned to serve society by "impart[ing] the results of their own and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor." *Id*. at 294. Faculty do so not only through teaching and research, but by setting academic standards and participating in academic decision making.

The AAUP's *1915 Declaration* called upon universities to recognize that, within their systems of governance, trustees, administrators, and faculty all played unique and indispensable roles. But in order to safeguard the university's academic integrity and its ability to serve society, a proper division of authority required that on "purely scientific and educational questions," faculty be given "the primary responsibility" to set standards and exercise professional judgment. *Id*. at 295.

As they grew larger and more diverse during the 20th century, universities assumed a leading role in providing expertise to society through discoveries in the laboratory, the insights of the arts and

humanities, and the understanding of complex phenomena made possible by the social sciences. As universities became more engaged with the world on important and sometimes controversial questions, the academic freedom of the university itself came to be understood as intertwined with the academic freedom of individual scholars. As a former president of Harvard University has written,

> In addition to protecting individual professors, the concept [of academic freedom] gradually came to include a recognition of institutional autonomy in matters of educational policy. Specifically, universities insisted with ever greater success that curricula, admissions, and academic standards should be established by the faculty, rather than by outside groups, and should be fashioned for the sole purpose of carrying out the educational aims of the institution.

DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY 5 (1982).

A university's institutional autonomy on academic matters vis-à-vis outside interests was not based solely on principle or on an abstract claim for privilege, but also reflected practical considerations: the prolonged training, rigorous habits of mind, and continuous engagement with their specialties that its faculty members were

expected to bring to their work. As one longtime academic dean has written,

> Final judgments on educational questions are best left in the hands of those with professional qualifications: academics who have experienced a lengthy period of apprenticeship and have given evidence of performing high-quality work, in teaching and research, as judged by their peers on the basis of broad evidence.... Faculty members know the proper definition of subjects and standards, and are more likely to have a sense of intellectual frontiers.

HENRY ROSOVSKY, THE UNIVERSITY: AN OWNER'S MANUAL 270-71 (1990).

These principles have long been central to AAUP policy. As the AAUP explained in its 1966 *Statement on Government of Colleges and Universities* (a joint initiative with the American Council on Education and the Association of Governing Boards of Universities and Colleges), "When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction." AAUP POLICY DOCUMENTS 136. Moreover, "[w]ith regard to student admissions, the faculty should have a meaningful role in establishing institutional policies, including the setting of standards for admission, and should be afforded opportunity for oversight of the entire admissions process." *Id*.

at 140 n.4. A central tenet of the AAUP's work is that academic freedom and a commitment to shared decision making within a university "are most likely to thrive when they are understood to reinforce one another." *On the Relationship of Faculty Governance to Academic Freedom*, in AAUP POLICY DOCUMENTS 143. "Since such decisions as those involving choice of method of instruction, subject matter to be taught, policies for admitting students, standards of student competence in a discipline, the maintenance of a suitable environment for learning, and standards of faculty competence bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters." *Id*. at 141-42 (internal quotation marks omitted).

Indeed, this tradition of faculty members' exercising collective authority over academic matters actually has roots dating back to the earliest academic communities of the twelfth century, as a former chair of UCLA's Comparative Higher Education Research Group has explained. *See* Burton R. Clark, *Conclusions*, in BURTON R. CLARK, ED., THE ACADEMIC PROFESSION 384 (1987). Today, it is the faculty's application of "professional expertise" on educational matters that

provides the "cornerstone of autonomous academic authority" with which universities have been entrusted. *Id*. at 388.

II. The Supreme Court Has Repeatedly Held That Courts Should Defer to Universities on Academic Judgments.

These principles of freedom and deference to university decision-making, particularly where decisions are guided by faculty expertise and involvement, have found expression for more than 60 years in the Supreme Court's First Amendment and Fourteenth Amendment jurisprudence, beginning with *Sweezy*, the Court's first decision to deal expressly with academic freedom.

In *Sweezy*, the Court overturned the contempt-of-court conviction of a lecturer at the University of New Hampshire who had refused to cooperate with the state attorney general's inquiry into "subversive activities." In an influential concurring opinion, Justice Frankfurter explained,

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – *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. at 263 (Frankfurter, J., concurring in the judgment) (emphasis added).

In the Court's next major academic freedom case, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), which struck down a loyalty oath requirement, Justice Brennan described academic freedom as "of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment." *Id*. at 603.

In *Bakke*, the Court for the first time addressed one of Justice Frankfurter's "four freedoms" — the freedom "to determine for itself on academic grounds who may be admitted to study." In holding that a faculty-devised admissions policy could appropriately take account of the educational benefits of diversity in its student body, Justice Powell's pivotal opinion expressly rested on considerations of academic freedom: "The freedom of a university to make its own judgments as to education includes the selection of the student body." 438 U.S. at 312 (opinion of Powell, J.). *Bakke* represented "perhaps the Court's most significant affirmation to that date that academic freedom ... contained a significant component of institutional autonomy for colleges and universities" as

against outside influences. Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 491 (2005).

In another decision that same year, the Supreme Court again emphasized the need for deference to academic decisions made by universities through their faculties. Rejecting a student's due-process challenge to dismissal from an academic program, Justice Rehnquist observed that "[c]ourts are particularly ill-equipped to evaluate academic performance." *Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 92 (1978).

In *National Labor Relations Board v. Yeshiva University*, the Court recognized that the "professional expertise" of faculty members "is indispensable to the formulation and implementation of academic policy." 444 U.S. 672, 689 (1980). "The 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met." *Id*. at 688 (internal citation omitted).

The Supreme Court reaffirmed all of these principles in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which, like *Bakke*, balanced constitutional considerations and upheld a university's right to apply the academic judgments of its faculty in the student admissions process. Justice O'Connor situated the decision in the context of the Court's jurisprudence on academic freedom. "[U]niversities occupy a special niche in our constitutional tradition," she wrote, and "educational autonomy" has "a constitutional dimension, grounded in the First Amendment." *Id*. at 329.

The Court gave perhaps its closest and most explicit attention to freedom for faculty academic decision making in *Ewing*, a case that involved a student who claimed he had been inappropriately dismissed from an academic program where the dismissal was based on faculty members' evaluation of his academic performance. The Court rejected the student's complaint.

Writing for a unanimous Court, Justice Stevens emphasized that "the faculty's decision was made conscientiously and with careful deliberation.... When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the

faculty's professional judgment." 474 U.S. at 225. University faculties have "the widest range of discretion" when they make academic judgments, and this discretion is part and parcel of the "autonom[y of] the academy itself." *Id*. at 225 n.11 and 226 n.12.

Following *Ewing*, this Court has recognized that, while judges must resolve the legal question presented by a lawsuit, "we will extend judicial deference to the evaluation made by the [academic] institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education" on the basis of illegitimate discriminatory intent. *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1048 (9th Cir. 1999). The *Zukle* court said it was joining other circuits in recognizing that "an educational institution's academic decisions are entitled to deference." *Id*. at 1047. *See also Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 841 (9th Cir. 2006) (noting that the Supreme Court "has underscored that 'complex educational judgments' should be left largely to schools" and that "[t]he importance of 'educational autonomy' – at least in the post-secondary environment – is rooted in the First Amendment").

III. The University of California's a-g Guidelines Were Developed by Faculty, to Whom Authority Has Been Delegated for Determining Standards for Admission and Student Preparation.

Like most major universities, the University of California has long recognized that faculty must have primary responsibility for decision-making on educational questions. The University's Academic Personnel Manual explains that "[a]cademic freedom requires that teaching and scholarship be assessed by reference to the professional standards that sustain the University's pursuit and achievement of knowledge. The substance and nature of these standards properly lie within the expertise and authority of the faculty as a body." UC Academic Personnel Manual APM-010, *available at* http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf.

Accordingly, the UC Board of Regents has formally delegated responsibility to the UC Academic Senate "to determine academic policy," including "set[ting] conditions for admission." *About the Senate*, UC Academic Senate web site, *available at* http://www.universityofcalifornia.edu/senate/about.html. Echoing the principles that the AAUP first articulated in 1915, UC policy recognizes that "[a]cademic freedom requires that the Academic Senate be given

primary responsibility for applying academic standards, subject to appropriate review by the Administration, and that the Academic Senate exercise its responsibility in full compliance with applicable standards of professional care." UC Academic Personnel Manual APM-010, *available at* http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf.

The a-g guidelines, which help govern UC's decisions on high school preparation for prospective students, are the product of faculty experts from many disciplines exercising their collective professional judgment, as the district court record in this case clearly establishes. The Board of Admissions and Relations with Schools ("BOARS") is a standing committee of the Academic Senate, and it comprises faculty from a wide range of academic disciplines. SER0166. The Academic Senate's bylaws expressly charge BOARS with responsibility for "oversight of the standards and process for reviewing and certifying courses submitted by high schools pursuant to the University's a-g subject matter requirements." *Id*.

Through the a-g requirements, the UC faculty "has expressed its expectations about the preparation that high school students need for

further study at the University." SER0167. UC's assessment of the content and rigor of high school courses flows directly from the determination by its faculty that "development of learning and thinking skills is of critical importance." SER0168. These skills include "understanding of and facility with the methods of particular academic disciplines," along with the skills of "critical thinking, analytical writing, and evaluation and proper use of relevant evidence to draw conclusions." *Id*.

In short, the a-g requirements established by UC through BOARS and the Academic Senate are a quintessential example of academic policies "that largely are formulated and generally are implemented by faculty governance decisions." *Yeshiva*, 444 U.S. at 688. Because "[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students," these requirements are entitled to deference by the courts. *Ewing*, 474 U.S. at 225 n.11 (quoting *Horowitz*, 435 U.S. 78, 96 n.6 (Powell, J., concurring)).

IV. UC's Decisions on the Courses at Issue in This Case Are Appropriate Exercises of Academic Judgment.

In this case, the plaintiffs challenge UC's decisions, which are made by applying the faculty's a-g guidelines, to decline recognition for certain courses taught by religiously affiliated high schools. Based on the standards set by its faculty, UC has determined that these courses do not provide students with the body of knowledge and rigorous habits of mind that they would need for study in what is justly regarded as one of the nation's foremost public university systems.

Plaintiffs attempt to frame this case as one about government infringement of religious liberty, but their allegations of discrimination are groundless. In advancing their claim, plaintiffs almost completely ignore what the record makes clear: that UC's decisions about the courses in question are made pursuant to policies and guidelines established by faculty experts — and sometimes involve direct evaluation of a course by faculty members themselves.

Plaintiffs (at 16) cite one example of a rejected course and claim that the decision was "the *ipse dixit* of a single faculty member." But this statement is misleading. Faculty members do sometimes review

individual courses, as UC discusses in its brief. But whether the decision on a particular course is made by a faculty member or another member of UC's academic staff, it is undisputed that the decisions are made by applying the a-g standards. Under the auspices of BOARS and the Academic Senate, these standards are established by panels of faculty experts from each relevant discipline. Thus, all decisions to approve or reject specific high school courses are guided by these faculty members' professional judgments.

Where a case involves "principled" decisions rooted in "sound" professional judgment, the Supreme Court has counseled against exactly what plaintiffs have attempted to do here: labeling such decisions as "viewpoint discrimination." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998). In *Arkansas Educational Television*, the Supreme Court analogized the discretion afforded to journalists making editorial decisions to "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum." *Id*. at 674. The same may be said for a university determining the academic qualifications of its students. In such cases, courts should avoid interfering "in judgments that should be

left to the exercise of [professional] discretion." *Id*. *See also* Vikram Amar and Alan Brownstein. *Academic Freedom*, 9 GREEN BAG 2d 17, 22 (2005) (arguing that *Arkansas Educational Television* stands for the principle that "[j]udicial deference ... furthers the institutional and practical goals of preventing the courts from assuming unacceptably intrusive roles they are ill equipped to perform"). As Justice Stevens has observed,

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written…. Judgments of this kind should be made by academicians, not by federal judges.

Widmar v. Vincent, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring in the judgment). *See also Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 243 (Souter, J., concurring in the judgment) (questioning the notion that "viewpoint neutrality" may be imposed on a university's activities).

Amplifying plaintiffs' theme of discrimination, the *amicus curiae* brief of the American Center for Law and Justice ("ACLJ") claims that

UC "targets" particular courses out of "unveiled hostility" toward religion. ACLJ Br. at 5, 26. Remarkably, the ACLJ brief asserts that the University's decisions to approve or reject particular courses are "unsupported by any legitimate, much less compelling, educational purpose." *Id*. at 5. ACLJ offers no evidence or serious argument to support this assertion. Nowhere does the brief discuss, or even acknowledge, the vital role of faculty in setting UC's admissions policies and prescribing the detailed, specific criteria found in the a-g requirements.

Plaintiffs and their *amici* believe they can prevail by painting an unattractive picture of religious hostility by UC. But as the district court properly recognized (and as UC persuasively argues in its brief), this case is not about infringement of plaintiffs' right to freely express their religious convictions; even if it were, no showing of religious hostility has been made. Rather, it is about the university's freedom —indeed, its public *obligation* — to exercise academic judgment through the faculty about "who may be admitted to study."

The Supreme Court has squarely addressed the role of courts in these circumstances and has held unequivocally that "[w]hen judges are

asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment." *Ewing*, 474 U.S. at 225. "Plainly, they should not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id*. In keeping with their obligation to "safeguard ... academic freedom" as "'a special concern of the First Amendment,'" courts must be "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Id*. at 226 (quoting *Keyishian*, 385 U.S. at 603). Moreover, where admissions decisions are made pursuant to academic criteria, "good faith on the part of a university is presumed absent a showing to the contrary." *Grutter*, 539 U.S. at 329 (internal quotation marks omitted).

Nothing in the arguments offered by plaintiffs or their *amici* comes close to demonstrating that UC and its faculty have failed to act in good faith or have "not actually exercise[d] professional judgment" in developing and applying the a-g guidelines to the courses at issue in this case. Moreover, "[t]he a-g guidelines do not require any student to believe any particular viewpoint. Rather, they are designed to ensure

that students understand and can think critically about the designated academic subjects, regardless of belief." SER0296. Here, the Supreme Court's admonition in *Keyishian* is directly on point: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues...." 385 U.S. at 132 (internal quotation mark omitted).

As UC argues in its brief (at 32), plaintiffs' attempt to characterize the academic decisions in this case as religious discrimination has no logical stopping point, because "every time a University rejected a student based on her admission essay, a University press turned down a book for publication, or a professor gave an essay a low grade, there would be a potential First Amendment lawsuit." *See also Mauriello v. Univ. of Medicine and Dentistry of New Jersey*, 781 F.2d 46, 51 (3d Cir. 1986) ("In an educational setting, a [plaintiff] bears a heavy burden in persuading the courts to set aside a faculty's judgment of academic performance.").

This Court has recognized that "[l]ike judges, teachers should not punish or reward people on the basis of inadmissible factors — race, religion, gender, political ideology — but teachers, like judges, must

daily decide which arguments are relevant, which computations are correct, which analogies are good or bad…." *Brown v. Li*, 308 F.3d 939, 948 (9th Cir. 2002) (opinion of Graber, J.) (quoting *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995)). As well, this case is about *academic* judgments regarding potential students, not about any sort of *punitive* action that was taken against a current student, much less any applicant or group of applicants. *See Horowitz*, 435 U.S. at 90 (recognizing a difference between academic and disciplinary dismissals and observing that courts are "ill-equipped" to review "academic appraisals" by faculty).

Where, as here, allegations of prejudice and discrimination have been leveled at university policies, "courts … have exercised restraint in displacing what appear to be bona fide academic judgments" and "have sought to distinguish decision making on academic grounds from invalid or subjective prejudice." J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 941 (2006). This is appropriate, because the "essence" of academic freedom is "the autonomy of academic institutions to maintain scholarly standards and processes

without the outside intrusion of political tests or controls," *id*. at 953, and "faculty control" of academic decisions is "central[]" to such freedom, *id*. at 929. A court must scrutinize a plaintiff's bare allegations to determine whether the facts demonstrate actual discrimination or rather an appropriate "appraisal" by "faculty and staff" of the plaintiff's ability to meet legitimate academic standards. *Hankins v. Temple Univ. (Health Sciences Ctr.)*, 829 F.2d 437, 443 (3d Cir. 1987) (citing *Horowitz* , 435 U.S. at 96 n.6 (Powell, J., concurring)); *accord*, *Powell v. Nat'l Bd. of Medical Examiners*, 364 F.3d 79, 88 (2d Cir. 2004) (citing *Ewing*, 474 U.S. at 225).

In summary, "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). The arguments offered by plaintiffs do not come close to overcoming this presumption of academic freedom because they utterly fail to show that the decisions made by the University were "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment." *Ewing*, 474 U.S. at 227.

CONCLUSION

The course-related decisions in this case arise not from impermissible religious discrimination, but from the academic judgments of faculty members whose professional role requires them to set standards and expectations for student preparation. These decisions thus implicate UC's academic freedom under the First Amendment to determine appropriate standards for student admission, and this academic freedom warrants deference by the courts. For these reasons, the judgment of the district court should be affirmed.

Dated: April 21, 2009

Respectfully submitted,

s/ Stephen Sanders

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached *amicus* brief is proportionately spaced, has a typeface of 14 points, and contains 4,679 words.

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CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the

Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 08-56320

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 21, 2009.

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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