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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ASSOCIATION OF CHRISTIAN
SCHOOLS INTERNATIONAL, et al.,

Plaintiffs,

v.

ROMAN STEARNS, et al.,

Defendants.

NO. CV 05-06242 SJO (MANx)

**ORDER GRANTING DEFENDANTS'
"MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFFS' AS-APPLIED CLAIMS"**
[Docket No. 172]

This matter is before the Court on Defendants' "Motion for Summary Judgment on Plaintiffs' As-Applied Claims," filed May 28, 2008. Plaintiffs filed an Opposition, to which Defendants replied. The Court heard oral argument from the parties on July 18, 2008. (Docket No. 221.) Because Plaintiffs fail to raise a genuine issue of material fact in support of their "as-applied" claims, Defendants' Motion is GRANTED.

I. BACKGROUND

Plaintiffs – Calvary Chapel Christian School ("Calvary"), five Calvary students, and the Association of Christian Schools International ("ACSI") – brought suit against Defendants – several University of California ("UC") employees – for developing and implementing an admissions process that allegedly violates the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause.

1 UC admits most California applicants based on achievement in high school courses and
2 standardized tests. However, UC only considers courses that it has approved to ensure that
3 admitted students took courses that provided those students with the knowledge and skills to
4 succeed in their studies at UC.¹

5 The focus of Plaintiffs' suit is the method by which UC approves high school courses.
6 Plaintiffs allege that this method is unconstitutional on its face and as applied to specific courses.

7 Earlier this year, the Court ruled on one round of summary judgment motions brought by
8 the parties. In those motions, Defendants requested summary judgment only on Plaintiffs' facial
9 claims, while Plaintiffs requested summary judgment on all of their claims – both facial and
10 as-applied. After determining that Defendants' policies and actions are subject to rational basis
11 review, the Court granted summary judgment in favor of Defendants on Plaintiffs' facial claims.
12 Plaintiffs' request for summary judgment was denied in its entirety, leaving Plaintiffs' as-applied
13 claims remaining for adjudication. Upon the parties' request, the Court granted Defendants leave
14 to file a second summary judgment motion concerning Plaintiffs' as-applied claims.

15 Now, Defendants move for summary judgment on Plaintiffs' as-applied claims.

16 II. DISCUSSION

17 Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories,
18 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to
19 any material act and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.
20 P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A "material" fact is one that
21 could affect the outcome of the case, and an issue of material fact is "genuine" if "the evidence
22 is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty*
23 *Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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27 ¹ This Court's "Order Denying Plaintiffs' Motion for Summary Judgment and Granting
28 Defendants' Motion for Partial Summary Judgment" (the "Prior Order") describes the UC
admissions process in greater detail. (Prior Order 1-4.)

1 Plaintiffs identify 38 courses² proposed by religious schools and rejected by UC
2 that Plaintiffs believe were unconstitutionally denied approval. Defendants argue that they are
3 entitled to summary judgment for numerous procedural and substantive reasons.

4 A. Defendants' Procedural Arguments

5 Defendants offer several reasons why they are entitled to summary judgment as to most
6 of the course rejections without addressing the merits of Plaintiffs' as-applied claims: (1) Plaintiffs
7 do not have standing to challenge UC's decision to reject courses offered by schools other than
8 Calvary; (2) Plaintiffs failed to raise most of their as-applied claims in a timely manner; and
9 (3) Plaintiffs failed to timely disclose expert conclusions regarding individual course decisions.³

10 1. Standing for Non-Calvary Course Decisions

11 Defendants contend that Plaintiffs do not have standing to pursue their claims regarding
12 UC's rejection of courses taught at schools other than Calvary. (MSJ 8.) ACSI, an organization of
13 Christian schools, claims that it has associational standing to pursue as-applied claims on behalf
14 of its member schools that had courses rejected.

15 Associational standing permits an organization to litigate as a representative of its members
16 if: "(a) [the organization's] members would otherwise have standing to sue in their own right;
17 (b) the interests [the organization] seeks to protect are germane to the organization's purpose; and
18 (c) neither the claim asserted nor the relief requested requires the participation of individual
19 members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

20 Defendants concede that ACSI satisfies prongs (a) and (b) of the *Hunt* test, arguing only
21 that ACSI does not satisfy prong (c) because the claims asserted and the relief requested require
22 the participation of individual members. Plaintiffs counter that its claims and relief do not require
23 the participation of individual members and, even if they did, Defendants waived their objection.

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25 ² Plaintiffs originally filed a list of 41 challenged course decisions (Docket No. 167), but
withdrew three of those challenges (Docket No. 192).

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27 ³ Defendants also argue: (1) Plaintiffs do not have standing for prospective injunctive relief;
28 (2) Plaintiffs' challenges regarding seven of the course decisions are barred by the statute of
limitations; and (3) Plaintiffs' expert opinions are given by individuals addressing subject matter
outside their field of expertise. The Court does not address these issues.

1 a. Defendants Did Not Waive Their Standing Objection.

2 Generally, standing cannot be waived if based on constitutional requirements imposed by
3 Article III. See *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517
4 U.S. 544, 551 (1996). Constitutional standing requires at a minimum: "(1) an injury in fact[;] (2) a
5 causal relationship between the injury and the challenged conduct[;] and (3) a likelihood that the
6 injury will be redressed by a favorable decision." *Id.*

7 However, federal courts also impose judicially created "prudential" standing requirements
8 that further limit their jurisdiction. *Id.* Prudential elements of standing, unlike the constitutional
9 requirements, can be waived if they are "not properly raised before the district court." *Pershing*
10 *Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 900 (9th Cir. 2000).

11 The third prong of the associational standing test is prudential. *United Food*, 517 U.S. at
12 555-57 ("Resort to general principles, however, leads us to say that the associational standing
13 test's third prong is a prudential one.").⁴ Accordingly, a standing challenge based on this prong
14 may be waived if it is not timely asserted or "if the time and manner" is merely "strategic." See
15 *Pershing Park*, 219 F.3d at 900.⁵

16 Although Defendants did not object to associational standing until this recent Motion for
17 Summary Judgment, that objection is timely raised in light of the circumstances of this case. Until
18 this Motion, Plaintiffs had not identified any as-applied challenges to non-Calvary courses.

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20 ⁴ The first two *Hunt* prongs "address[] the Article III requirements" for standing and cannot
21 be waived. *United Food*, 517 U.S. at 555.

22 ⁵ Defendants argue that "the Ninth Circuit has not treated *Hunt's* third prong as waivable,
23 instead reviewing challenges to associational standing . . . even when standing had not been
24 raised in the district court." (Reply 6 (citing *Associated Gen. Contractors of Cal., Inc. v. Coal. for*
25 *Econ. Equal.*, 950 F.2d 1401, 1405 (9th Cir. 1991) (analyzing associational standing as a form of
26 constitutional standing, which cannot be waived).) Since the Ninth Circuit's decision in *Associated*
27 *General Contractors*, the Supreme Court ruled in *United Food* that *Hunt's* third prong is prudential
28 and therefore may be waived. "[W]here intervening Supreme Court authority is clearly
irreconcilable with our prior circuit authority[,] . . . district courts should consider themselves bound
by the intervening higher authority and reject the prior opinion of this court as having been
effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Even if *Associated*
General Contractors supports Defendants' assertion that associational standing cannot be waived,
it has been effectively overruled by *United Food*.

1 Accordingly, Defendants may challenge ACSI's associational standing.

2 b. ACSI Does Not Have Associational Standing.

3 Whether an organization satisfies the third *Hunt* prong depends on the claims it asserts and
4 the relief it requests. The more specific claims and relief are to individual organization members,
5 the less likely it is that the organization has standing. Courts are likely to grant associational
6 standing where "the [l]aw does not require the participation of individual [association] members,
7 [because] there is complete identity between the interests of the consortium and those of its
8 member[s] . . . and the necessary proof could be presented 'in a group context.'" *N.Y. State Club*
9 *Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 n.4 (1988) (quoting *Hunt*, 432 U.S. at 344).
10 Similarly, associational standing is often granted where the challenge raises a pure question of
11 law that is not specific to individual members. See *Playboy Enters., Inc. v. Pub. Serv. Comm'n of*
12 *P.R.*, 906 F.2d 25, 35 (1st Cir. 1990) (citing *Auto. Workers v. Brock*, 477 U.S. 274, 286 (1986)).

13 Both parties propose general rules in support of their positions. Plaintiffs argue that an
14 organization generally holds associational standing if it brings suit for declaratory relief. (Opp'n 5
15 ("*Hunt* itself says (unanimously) that it is met by an association's constitutional claims in a
16 declaratory and injunctive suit (such as this)").) Defendants argue that an organization
17 generally does not hold associational standing if it brings an as-applied challenge. (MSJ 10
18 ("Courts in the Ninth Circuit have repeatedly held that organizations lack associational standing
19 to bring as-applied constitutional claims, as opposed to facial claims.").)

20 Here, Plaintiffs seek declaratory relief on their as-applied claims. This challenge seemingly
21 falls into both of the parties' general categories, leaving ACSI with and without standing. However,
22 further inquiry into the claims asserted and relief requested reveals that ACSI does not have
23 standing.

24 First, Plaintiffs' claim for declaratory relief is individualized. As an initial matter, Plaintiffs do
25 not make clear what specific declaratory relief they seek regarding their as-applied claims.
26 Defendants suggest that Plaintiffs seek an order that Defendants must reconsider (or perhaps
27 approve) specific proposed courses. (MSJ 13.) Plaintiffs do not rebut this assertion.

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1 This individualized declaratory relief does not fit the mold of injunctive relief that Plaintiffs
2 argue has been approved by the Supreme Court. Relying on *Hunt*, Plaintiffs argue that declaratory
3 relief begets standing because "neither the interstate commerce claim nor the request for
4 declaratory and injunctive relief requires individualized proof and both are thus properly resolved
5 in a group context." (Opp'n 5 (quoting *Hunt*, 432 U.S. at 344).) Yet, the individualized nature of
6 each course rejection inhibits any resolution "in a group context."

7 Plaintiffs' other Supreme Court quotation also demonstrates why ACSI does not have
8 associational standing. "[A]ssociational standing does not exist for damages suits because
9 'damages claims are not common to the entire membership, nor shared by all in equal degree'
10" (Opp'n 5 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975).) This reasoning applies equally
11 to Plaintiffs' as-applied challenges. Individual course decisions "are not common to the entire
12 membership." Relief would not be "shared by all in equal degree." Instead, each course decision
13 affects only one ACSI school, and relief would benefit only that school.

14 Second, "the relief sought is only half the story." *Rent Stabilization Ass'n of City of N.Y. v.*
15 *Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993). Even if Plaintiffs' individualized declaratory relief request
16 did not prohibit associational standing, the individualized nature of Plaintiffs' as-applied claims
17 would bar standing. When the claims require an "ad hoc factual inquiry" for each member
18 represented by the association, the organization does not have associational standing. See
19 *Dinkins*, 5 F.3d at 596 (2d Cir. 1993). For example, in *Rent Stabilization Ass'n*, an association
20 representing landlords claimed that some of its members suffered takings as a result of the
21 government's rent stabilization scheme. *Id.* at 592-93. This association sought declaratory relief.
22 *Id.* at 596. Yet, the court denied associational standing because it "would have [had] to engage
23 in an ad hoc factual inquiry for each landlord who allege[d] that he ha[d] suffered a taking" to
24 determine whether a taking had occurred. *Id.*

25 Plaintiffs contend that the Ninth Circuit has allowed associational standing for as-applied
26 challenges. However, the cases Plaintiffs cite in support of this proposition are distinguishable
27 from the circumstances of this case. See, e.g., *Alaska Fish & Wildlife Fed'n & Outdoor Council*,

1 *Inc., v. Dunkle*, 829 F.2d 933, 937-38 (finding associational standing where members sought
2 declaratory relief that two government agreements affecting all of Alaska were void).

3 Accordingly, ASCI does not have associational standing to pursue as-applied claims based
4 on individual course rejections.

5 2. Plaintiffs' Recently Disclosed As-Applied Claims and Evidence.

6 Defendants also argue that they have been unfairly surprised because Plaintiffs did not
7 raise most of their as-applied challenges until May 1, 2008 and failed to disclose nearly all of the
8 expert opinions they rely on in their Opposition until June 18, 2008.

9 a. Plaintiffs' Recently Disclosed Claims

10 Defendants object that Plaintiffs failed to identify the specific course decisions that are the
11 subject of their as-applied claims until May 1, 2008. Plaintiffs argue that they revealed the specific
12 courses they seek to challenge through their Complaint, discovery, and prior motion for summary
13 judgment.

14 First, Plaintiffs' Complaint only specifically identifies courses proposed by Calvary. Second,
15 Defendants served Plaintiffs with an interrogatory specifically asking Plaintiffs "to identify all
16 courses at any ASCI-affiliated school for which Plaintiffs contend [course] approval was improperly
17 refused." (Friedland Decl. Ex. 10.) Plaintiffs responded that "ACSI is aware of various courses at
18 [Calvary] being rejected by UC, is aware of biology and history courses of Grace Baptist Schools
19 of Redding, Cal. being rejected, is aware of biology courses of Calvary Baptist Schools of
20 LaVerne, Cal. being rejected, and has heard of various other biology and physics courses being
21 rejected by UC." (Friedland Decl. Ex. 10.) Plaintiffs failed to update or supplement this response.

22 In addition, Plaintiffs brought a motion for summary judgment on their facial and as-applied
23 claims. Yet, Plaintiffs did not identify the specific courses it was challenging. Plaintiffs provided no
24 argument on their as-applied claims, focusing only on their facial claims. Although Plaintiffs
25 referred to a declaration containing a list of hundreds of courses, most of these courses were
26 submitted by non-ACSI schools and the declaration did not purport to bring as-applied challenges
27 to these courses. (Watters Decl. Apps. A-C.)

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1 Plaintiffs failed to disclose which non-Calvary courses they sought to challenge "as-
2 applied." Although Defendants have always known which ACSI schools' courses UC had rejected,
3 Defendants did not know which courses Plaintiffs sought to litigate. Defendants rejected more than
4 175 courses proposed by ACSI schools during the relevant time period. At no point, did Plaintiffs
5 specify which of these 175 courses it would challenge through as-applied claims.

6 To hold that Defendants' knowledge of which courses were rejected is sufficient notice as
7 to Plaintiffs' as-applied claims would have forced Defendants to prepare to defend every single
8 rejection of an ACSI school's course. Defendants' experts would have had to evaluate 175 course
9 descriptions in anticipation of trial.

10 Accordingly, Plaintiffs waived their as-applied claims as to courses not specifically
11 identified.

12 b. Plaintiffs' Recently Disclosed Expert Conclusions

13 Defendants object that Plaintiffs present new expert testimony in support of their claims.
14 Plaintiffs identified their as-applied challenges on May 1, 2008, and then asked their experts to
15 provide opinions on the reasonableness of those course rejections. The newly acquired expert
16 affidavits, in which the experts analyze each of Plaintiffs' 38 challenged course rejections, were
17 signed by the experts on June 12, 2008 (Vitz), June 12, 2008 (Stotsky), June 9, 2008 (Behe), and
18 June 13, 2008 (Guevara).

19 The discovery deadline passed on July 15, 2007. Federal Rule of Civil Procedure
20 26(a)(2)(C) required all expert discovery to be complete at least by August 21, 2007, 90 days
21 before the trial date. (Docket No. 48.) One month after this expert discovery deadline passed, this
22 Court continued the trial date indefinitely in light of the massive volume of filings and issues
23 presented by the first round of summary judgment motions. (Docket No. 145.) This continuance
24 did not revive the discovery period for experts.

25 Nearly all of the relevant opinions in Plaintiffs' recently obtained expert affidavits were not
26 disclosed in those experts' reports. Expert reports must contain "a complete statement of all
27 opinions the witness will express and the basis and reasons for them" and the "data or other
28 information considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii).

1 Under Rule 37(c)(1), opinions not included in expert reports must be excluded unless the
2 lack of disclosure was "substantially justified" or "harmless." Plaintiffs make no argument that their
3 failure to disclose these opinions was justified. At oral argument, Plaintiffs conceded that they did
4 not prepare for the as-applied challenges because they did not expect the Court to reach those
5 claims. (Tr. of July 18, 2008 MSJ Hearing 17 ("Had the Court ruled that there were [discriminatory]
6 policies, and that they were unconstitutional, the Court would never have had reason to get to
7 particular courses."), 18 ("[F]rom our standpoint, the time for doing so had not come and would
8 not come if your Honor ruled in our favor on our motion for summary judgment [as to our facial]
9 claims."))

10 Clearly, Defendants are prejudiced as they are unable to have their experts rebut the
11 opinions of the Plaintiffs' experts. The sanction of exclusion is "a self-executing, automatic
12 sanction to provide a strong inducement for disclosure of material" and "gives teeth to [the Rule 26
13 disclosure] requirements" *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106
14 (9th Cir. 2001) (internal quotation marks omitted).

15 Accordingly, Plaintiffs' recently acquired expert opinions will be excluded.

16 B. Defendants' Substantive Arguments

17 Remaining are Plaintiffs' as-applied challenges to four rejected Calvary courses and a
18 Biology course identified in Plaintiffs' interrogatory response. Plaintiffs argue that Defendants'
19 decisions to deny approval for these courses violate the Free Speech Clause, Free Exercise
20 Clause, Establishment Clause, and Equal Protection Clause. Each clause is addressed in turn.

21 1. Free Speech Clause

22 Plaintiffs primarily argue that Defendants engaged in viewpoint discrimination and content
23 regulation prohibited by the Free Speech Clause. As discussed in the Prior Order, Defendants
24 necessarily facilitate some viewpoints over others in judging the excellence of those students
25 applying to UC. Therefore, the decision to reject a course is constitutional as long as: (1) UC did
26 not reject the course because of animus; and (2) UC had a rational basis for rejecting the course.

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1 a. Animus

2 Defendants argue that Plaintiffs waived any animus argument when Plaintiffs' counsel
3 stated "We do not intend to argue the case based on proving animus" at the hearing on the
4 parties' first round of summary judgment motions. (Tr. of Feb. 14, 2008 MSJ Hearing 39.) Plaintiffs
5 dispute this argument, explaining that they did not intend to argue animus until this Court used that
6 term to describe the punishment of disfavored viewpoints prohibited by *National Endowment for*
7 *the Arts v. Finley*, 524 U.S. 569, 587 (1998).

8 Regardless of whether Plaintiffs waived this issue, they fail to present evidence of animus
9 sufficient to raise a genuine issue of material fact. The prototypical example of government animus
10 is found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).⁶ There,
11 the city council passed an ordinance prohibiting some, but not all, forms of animal killing so that
12 members of the Santeria religion could not sacrifice animals during their worship ceremonies at
13 a local church. "[T]he record . . . compel[led] the conclusion that suppression of the central
14 element of the Santeria worship service was the object of the [city] ordinance," *id.* at 534, in part
15 because of comments made at a city meeting at which the issue was addressed.

16 One councilman said that Santeria devotees "are in violation of everything this country
17 stands for" and another asked "[w]hat can we do to prevent the Church from opening?" *Id.* at 541.
18 A city official told the city council that Santeria was a sin, "foolishness," "an abomination to the
19 Lord," and the worship of "demons" and urged the city council "not to permit this Church to exist."
20 *Id.* at 541-42. Also, the city attorney commented that the ordinance indicated that "[t]his community
21 will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542.

22 This evidence of animus demonstrated that the city used an ordinance that otherwise has
23 a rational basis to punish a disfavored viewpoint. Similarly, Plaintiffs would have to show that
24 Defendants rejected the challenged courses to punish religious viewpoints rather than out of
25 rational concern about the academic merit of those religious viewpoints.

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⁶ In a subsequent case, the Supreme Court characterized the animus in *Lukumi* as
"manifest." *Locke v. Davey*, 540 U.S. 712, 724 (2004).

1 Here, Plaintiffs provide no evidence of animus. Instead, Plaintiffs essentially argue that
2 Defendants had no rational basis for their actions and therefore they must have been motivated
3 by animus. This argument adds nothing to the constitutional analysis; if Defendants had no rational
4 basis, the Court need not reach the issue of animus.

5 Accordingly, there is no genuine issue of material fact as to this issue. Defendants'
6 decisions to reject the courses challenged by Plaintiffs were not motivated by animus.

7 b. Rational Basis Review

8 Defendants' course approval decisions are subject to rational basis review. (Prior Order 37.)
9 Under rational basis review, government regulation is "accorded a strong presumption of validity."
10 *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Rationality review "is not a license for courts to
11 judge the wisdom, fairness, or logic of government regulation." *FCC v. Beach Commc'ns, Inc.*, 508
12 U.S. 307, 313(1993); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he
13 judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy
14 determinations."). "The burden is on the one attacking the [regulation] to negative every
15 conceivable basis which might support it." *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356,
16 364 (1973); *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) ("When conducting
17 rational basis review the court will not overturn . . . government action unless [it] is so unrelated
18 to the achievement of any combination of legitimate purposes that the court can only conclude that
19 the government's actions were irrational.").

20 "When judges are asked to review the substance of a genuinely academic decision . . . ,
21 they should show great respect for the faculty's professional judgment." *Regents of Univ. of Mich.*
22 *v. Ewing*, 474 U.S. 214, 225 (1985). "Plainly, [courts] may not override [this judgment] unless it
23 is such a substantial departure from accepted academic norms as to demonstrate that the person
24 or committee responsible did not actually exercise professional judgment." *Id.* Indeed, "restrained
25 judicial review of the substance of academic decisions" enables academic freedom to thrive. *Id.*;
26 *see also id.* at 226 n.12 ("Academic freedom thrives not only on the independent and uninhibited
27 exchange of ideas among teachers and students, but also, and somewhat inconsistently, on
28 autonomous decisionmaking by the academy itself") (internal citations omitted).

1 Plaintiffs challenge Defendants' decision to reject four Calvary courses and a non-Calvary
2 Biology course.⁷ To survive summary judgment, Plaintiffs must offer enough facts to create a
3 genuine issue of material fact as to whether no rational basis existed to reject a course.

4 i. Calvary's English Course – Christianity and Morality in
5 American Literature

6 Plaintiffs challenge Defendants' decision to deny approval for *Christianity and Morality in*
7 *American Literature*, an English course submitted by Calvary. (See Pls.' Ex. 617; Costales Decl.
8 Tab 1.)

9 This course proposed a primary text published by A Beka titled *Classics for Christians*.
10 Jeanne Hargrove, a UC course reviewer, found this text inappropriate as a primary text in English
11 because its "selection of works and pedagogical apparatus were inconsistent with . . . expectations
12 regarding critical thinking and broad exposure to writers' key works." (Hargrove Decl. ¶ 5.)

13 Defendants' English expert, Professor Samuel Otter,⁸ concurs, finding the text inadequate
14 for a college-preparatory English class because it "fails to provide substantial readings and
15 because it insists on specific interpretations [of those readings]" (Otter Decl. Ex. A, at 4.) "Such
16 a combination contradicts the emphasis on analytical and critical thinking required [by the A-G
17 Guidelines]." (Otter Decl. Ex. A, at 7.) These deficiencies rendered the text inadequate to provide
18 "analytical and critical skills." (Otter Decl. Ex. A, at 4.) Further, Professor Otter specifically notes
19 that the text's failures are "not because it offers a 'Christian and civic' perspective on its materials
20" (Otter Decl. Ex. A, at 4.)

21 In addition, the primary text is an "anthology of excerpts," which UC does not approve, no
22 matter the content of the excerpts. "College-preparatory courses are expected to require students
23 to read full-length works." (Lynch Decl. No. 1 Ex. 2, at 5.) Plaintiffs' English expert,
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26 ⁷ Although Plaintiffs identified two other courses in its interrogatory response, their list of
27 as-applied claims does not include these courses and their Opposition does not address them.

28 ⁸ Professor Otter has taught American literature for sixteen years at the University of
California, Berkeley. (Otter Decl. Ex. A, at 3.)

1 Dr. Sandra Stotsky,⁹ agreed in her deposition that a general rule against anthologies of excerpts
2 is reasonable. (Lynch Decl. No. 2 Ex. 104.)

3 Plaintiffs offer little admissible evidence to the contrary. Dr. Stotsky submitted a declaration
4 comparing the viewpoints of several English texts, including the A Beka anthology. (Watters Decl.
5 Ex. W.) However, she does not refute Professor Otter's conclusions that the text is inappropriate
6 for college-preparatory work and insists on specific interpretations of its content. Dr. Stotsky also
7 does not opine that Defendants unreasonably rejected this course.

8 Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a
9 rational basis for rejecting Calvary's proposed English course.

10 ii. Calvary's History Course – *Christianity's Influence on America*

11 Plaintiffs challenge Defendants' decision to deny approval for *Christianity's Influence on*
12 *America*, a History course submitted by Calvary. (See Pls.' Ex. 607.)

13 This course proposed a primary text published by Bob Jones University ("BJU") titled *United*
14 *States History for Christian Schools*. (Pls.' Ex. 607, at 11.)¹⁰ Professor James Given, while on the
15 UC course review committee, reviewed this text and concluded that the text failed to adequately
16 teach critical thinking and modern historical analytic methods. Professor Given reached this
17 conclusion because the text:

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

23
24 ⁹ Dr. Stotsky is an independent researcher and consultant in education. She received her
25 doctorate in reading research and reading education from the Harvard Graduate School of
Education and serves on the National Mathematics Advisory Panel. (Stotsky Decl. Ex. 1.)

26 ¹⁰ Plaintiffs argue that this course proposed "a secular text as well as the [BJU] textbook,
27 and those secular texts ensured that standard content and required skills were taught." (Opp'n 17
28 (internal citations omitted).) The only other text listed on the course description is *Pilgrims in Their*
Own Land: 500 Years of Religion in America. Plaintiffs offer no admissible evidence for their
contention that this "secular text ensured that standard content and required skills were taught."

1 (Given Decl. ¶ 8.)

2 Defendants' History expert, Professor Gary Nash,¹¹ concurred with Professor Givens'
3 evaluation, finding that the text should not be used as the primary text for a college-preparatory
4 History course. (Nash Decl. Ex. A, at 6.) Specifically, Nash found that the text failed to encourage
5 "historical thinking skills and analytical thinking" and failed to cover "major topics, themes, and
6 components of United States history." (Nash Decl. Ex. A, at 6.)

7 "From reading the [reviewed text], students will have little opportunity to exercise
8 independent judgment, to sharpen their critical thinking skills, or to consider multiple perspectives
9 of those who made our history." (Nash Decl. Ex. A, at 9.) These students "will have difficulty
10 understanding history as a discipline as it has been practiced since Herodotus and Thucydides
11 – a never-ending quest to reconstruct the past based on new evidence and informed by new
12 questions posed about the functioning of past societies." (Nash Decl. Ex. A, at 9.)

13 Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' History expert,
14 Professor Paul Vitz, submitted a declaration concluding that the BJU text covers the "basic facts,
15 events, and issues of [United States] history" (Watters Decl. Ex. X ¶ 34.) However, he does
16 not refute Professor Given's and Professor Nash's conclusions that the text fails to teach historical
17 analytic methods. Professor Vitz also does not opine that Defendants unreasonably rejected the
18 course.

19 Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a
20 rational basis for rejecting Calvary's proposed History course.

21 iii. Calvary's Government Course – Special Providence:
22 Christianity and the American Republic

23 Plaintiffs challenge Defendants' decision to deny approval for *Special Providence:*
24 *Christianity and the American Republic*, a Government course submitted by Calvary. (See Pls.
25 Ex. 608.)

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28 ¹¹ Professor Nash has taught History at the University of California, Los Angeles for
"nearly forty years." (Nash Decl. Ex. A, at 3.)

1 This course proposed a primary text published by BJU titled *American Government for*
2 *Christian Schools*. (Pls.' Ex. 608, at 37.) The UC reviewer found that "the content of the course
3 outline[] . . . is not consistent with the empirical historical knowledge generally accepted in the
4 collegiate community." (Costales Decl. Tab 3.)

5 Defendants' Government expert, Professor Mark Petracca concurred,¹² evaluating the BJU
6 Government text and finding that "[u]se of this [text] as the principal text in a United States
7 Government course will not provide adequate preparation for study at UC." (Petracca Decl. Ex.
8 A, at 2.) Professor Petracca found that the BJU Government text does not acknowledge the
9 commonly-accepted framework for scholarly analysis and provides little opportunity for critical
10 thinking. (Petracca Decl. Ex. A, at 2.) In addition, the text contains "many factual and empirical
11 assertions that are not generally accepted among political scientists [or] historians and that are
12 nevertheless not substantiated within the text by evidence." (Petracca Decl. Ex. A, at 3.)

13 Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' Government expert,
14 Professor Vitz, submitted a declaration concluding that the BJU Government text "appear[s] to
15 give a reasonably adequate presentation of the basic subject matter – the nature of the American
16 government" (Watters Decl. Ex. X ¶ 55.) However, he does not refute Professor Petracca's
17 conclusions that the text does not acknowledge the commonly-accepted framework for scholarly
18 analysis and contains factual and empirical assertions that are not generally accepted.
19 Professor Vitz also does not opine that Defendants unreasonably rejected the course.

20 Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a
21 rational basis for rejecting Calvary's proposed Government course.

22 iv. Calvary's Elective Course – *World Religions*

23 Plaintiffs challenge Defendants' decision to deny approval for *World Religions*, an elective
24 course submitted by Calvary.

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28 ¹² Professor Petracca has served for nine years as the Chair of the Department of Political
Science at the University of California, Irvine. (Petracca Decl. Ex. A, at 4.)

1 Defendants rejected this course for both History and elective credit. The feedback provided
2 to Calvary regarding this course is telling. As an initial matter, Defendants rejected the course as
3 an elective because the course was "intended for 9-12th graders and does not have a prerequisite
4" (Costales Decl. Tab 4, at 54.) Defendants noted that this deficiency could be corrected by
5 "redesign[ing] the course for 11th/12th graders only" or "add[ing] an appropriate prerequisite."
6 Plaintiffs do not argue that these bases for rejection are irrational.

7 In addition, Defendants noted three substantive deficiencies in the course description and
8 offered to approve the course if Calvary clarified these issues. (Costales Decl. Tab 4, at 54.) First,
9 Defendants could not confirm that the proposed text, *World Religions* by Dan Halverson, existed,
10 and asked Calvary to accurately identify the text. Second, Defendants asked Calvary to provide
11 further information about key assignments. Finally, Defendants asked Calvary to demonstrate how
12 the course treats the study of religion from the standpoint of scholarly inquiry. Defendants' religion
13 expert, Professor Robert Sharf,¹³ testified that these decisions were reasonable.

14 Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' religion expert,
15 Professor Daniel Guevara, offers no opinion specific to this course. (Watters Decl. Ex. H.) Further,
16 Plaintiffs offer nothing to refute Defendants' evidence that it had a rational basis for rejecting the
17 course completely unrelated to its subject matter. Finally, the course rejection feedback makes
18 clear that the course may have been approved with minimal clarification. Plaintiffs provide no
19 evidence that Calvary attempted to clarify the course content and received a second rejection.

20 Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a
21 rational basis for rejecting Calvary's proposed elective course.

22 v. The Non-Calvary Biology Course

23 Plaintiffs challenge Defendants' decision to deny approval for the Biology course submitted
24 by Calvary Baptist School. Although Calvary Baptist has a similar name, it is not the same school
25 as Calvary.

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¹³ Professor Sharf is the Director of Religious Studies at the University of California, Berkeley. (Sharf Decl. Ex. A, at 3-4.)

1 This course proposed a primary text published by A Beka titled *Biology: God's Living*
2 *Creation*. (Pls.' Ex. 624, at 40.) UC Professor Barbara Sawrey reviewed this text and concluded
3 that it was inappropriate for use as the primary text in college-preparatory science classes.
4 (Sawrey Decl. ¶ 3.) Professor Sawrey found the text problematic because it characterized religious
5 doctrine as scientific evidence, included scientific inaccuracies, failed to encourage critical
6 thinking, and took an "overall un-scientific approach to the subject matter." (Sawrey Decl. ¶ 3.)¹⁴

7 Sawrey's "judgment was based not on the fact that the textbooks contained religious
8 references and viewpoints, but on [her] conclusion that [the texts] would not adequately teach
9 students the scientific principles, methods, and knowledge necessary for them to successfully
10 study those subjects at UC." (Sawrey Decl. ¶ 3.)¹⁵ After forming her conclusions, Professor
11 Sawrey shared her findings with other members of the course review committee, who supported
12 her conclusions. (Sawrey Decl. ¶ 4.)

13 Defendants' biology experts, Professors Donald Kennedy¹⁶ and Francisco Ayala,¹⁷ reviewed
14 the A Beka text and a second Biology text published by BJU and concurred in her judgment.

15
16 ¹⁴ The UC Position Statement on Science Courses reflects these concerns:
17 The texts in question are primarily religious texts; science is secondary. . . . Courses
18 that utilize these texts teach students that their conclusions must conform to the
19 Bible, and that scientific material and methods are secondary. Students who [are]
20 taught to discount the scientific process and the scientific conclusions validated by
a wealth of scientific research are not being provided with an understanding of
scientific principles expected by the UC faculty.
(Wilbur Decl. No. 2 Ex. 2.)

21 ¹⁵ Similarly, some Christian schools have declined to use BJU and A Beka textbooks
22 because of concerns about the texts' academic merit. (Lynch Decl. No. 1 Exs. 47B ("[Valley
23 Christian School] felt that the A Beka books . . . did not represent the same level of academic rigor
24 as we could find in some other texts."), 47C ("[Patten Academy declined to use A Beka and BJU
25 textbooks] because they didn't provide the content that the principal and faculty believed would
prepare the youngsters to meet their post-high school goals."); cf. Lynch Decl. No. 1 Ex. 47A
26 ("[Oaks Christian School] acknowledge[s] that there was a much fuller treatment of evolution in
the secular book that [it] used [than the BJU biology textbook, which it did not use].").)

27 ¹⁶ Professor Kennedy, the editor-in-chief of *Science* magazine, teaches biology at Stanford
28 University, where he once served as President of the University. (Kennedy Decl. Ex. A, at 4-5.)

¹⁷ Professor Ayala teaches biological sciences at University of California, Irvine. (Ayala
Decl. Ex. A, at 4.)

1 Professor Kennedy determined that "[b]y teaching students to reject scientific evidence and
2 methodology whenever they might be inconsistent with the Bible . . . both texts fail to encourage
3 critical thinking and the skills required for careful scientific analysis." (Kennedy Decl. Ex. A, at 8.)
4 Professor Ayala found that the texts "reject the methodology generally accepted in science, which
5 relies on observation and experimentation and on the formulation of laws and theories that need
6 to be tested rather than accepted on the basis of the Bible or any other authority." (Ayala Decl. Ex.
7 A, at 4.)

8 Both professors concluded that neither the A Beka nor the BJU Biology texts are
9 appropriate for use as the principal text in a college preparatory biology course. (Ayala Decl. Ex.
10 A, at 28; Kennedy Decl. Ex. A, at 20.) In making this finding, Professor Kennedy reiterated
11 Professor Sawrey's initial conclusion that "the problem is not . . . that the creationist view is taught
12 as an alternative to scientific explanations, but that the nature of science, the theory of evolution,
13 and critical thinking are not taught adequately." (Kennedy Decl. Ex. A, at 7.)

14 Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' Biology expert,
15 Dr. Michael Behe, submitted a declaration concluding that the BJU text mentions standard
16 scientific content. (Watters Decl. Ex. U.) However, Professor Behe "did not consider how much
17 detail or depth" the texts gave to this standard content. (Watters Decl. Ex. U ¶ 4.) Therefore,
18 Professor Behe fails to refute one of Professor Kennedy's primary concerns that the nature of
19 science, the theory of evolution, and critical thinking are not taught adequately.

20 Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a
21 rational basis for rejecting Calvary Baptist's proposed Biology course.

22 2. Free Exercise and Establishment Clauses

23 In their prior summary judgment motion, Plaintiffs argued that Defendants exhibited
24 unconstitutional "hostility" toward religion, identifying 14 allegedly hostile acts that did not quite
25 qualify as facial challenges.

26 Nine of these acts were allegedly unconstitutional symbolic burdens in violation of the
27 Establishment Clause. In the Prior Order, this Court determined that these nine acts were not
28

1 unconstitutional symbolic hostility under the Establishment Clause. (Prior Order 44-47.) That
2 analysis still controls.¹⁸

3 The remaining five acts allegedly burdened Plaintiffs' religious practices in violation of the
4 Free Exercise Clause. In the Prior Order, this Court determined that two of these alleged acts were
5 not supported by any evidence and that Plaintiffs failed to show that two other acts had
6 burdensome consequences. (Prior Order 47-48.) That analysis still controls.

7 Accordingly, only one allegedly hostile act remains before the Court – "[UC] reviewers all
8 wrote that religion courses taught by Cantwell / Sacred Heart of Mary should be rejected because
9 they taught a single perspective." (Prior Order 48.) Because this allegedly burdensome hostile act
10 must be analyzed under the Free Exercise Clause, Plaintiffs must show that Defendants had no
11 rational basis for the course rejection or that Defendants rejected the course because of animus.

12 As mentioned above, Plaintiffs provide no evidence of animus similar to the facts in *Lukumi*.
13 In addition, Plaintiffs provide no expert testimony that this course was irrationally rejected.
14 Because Plaintiffs fail to raise a genuine issue of material fact, Defendants are entitled to summary
15 judgment on this claim.¹⁹

16 3. Equal Protection Clause

17 As discussed in the Prior Order, claims based on religious discrimination that survive the
18 *Lemon* test are subject to rational basis scrutiny under the Equal Protection Clause. (Prior Order
19 36-37 (citing *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); *Johnson v. Robison*, 415 U.S. 361,
20 375 n.14 (1974)).)

23
24 ¹⁸ Despite this analysis, the Court did not previously grant summary judgment in favor of
25 Defendants on this issue solely because Defendants had not moved for summary judgment on
these claims.

26 ¹⁹ To the extent Plaintiffs claim that specific course rejections violate the Free Exercise
27 Clause or Establishment Clause, Plaintiffs provide no analysis in addition to its arguments under
28 the Free Speech Clause. The Court's conclusion that the course rejections were rationally based
and not motivated by animus defeats Plaintiffs' challenge under the Free Exercise Clause and
Establishment Clause.

1 Because Defendants' course decisions survive rational basis scrutiny (see Part II.B.1.b of
2 this Order), Defendants are entitled to summary judgment on Plaintiffs' as-applied equal protection
3 claims.

4 III. RULING

5 Because Plaintiffs fail to raise any genuine issue of material fact to support their as-applied
6 claims, Defendants' Motion is GRANTED.

7 IT IS SO ORDERED.

8 Dated this 8th day of August, 2008.

/S/ S. James Otero

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10 _____
11 S. JAMES OTERO
12 UNITED STATES DISTRICT JUDGE
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