

**No. 08-56320**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

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

Plaintiffs-Appellants,

v.

**ROMAN STEARNS, et al.,**

Defendants-Appellees.

---

*On Appeal from the United States District Court  
for the Central District of California, Case No. CV-05-6242-SJO  
The Honorable James Otero, United States District Judge*

---

**BRIEF OF AMICI CURIAE CALIFORNIA STATE UNIVERSITY AND  
UNIVERSITY OF NEVADA, LAS VEGAS, IN SUPPORT OF  
DEFENDANTS-APPELLEES**

---

F. Andrew Hessick  
James Weinstein  
1100 S. McAllister Avenue  
Tempe, AZ 85287-7906  
Phone: (480) 965-7553  
Fax: (480) 965-2427

*Attorneys for Amici Curaie*  
CALIFORNIA STATE UNIVERSITY, et al.

## TABLE OF CONTENTS

	<b>Page</b>
STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I. THE WIDESPREAD USE OF DECISIONS BASED ON CONTENT IN ADMISSIONS TO PUBLIC UNIVERSITIES IS NECESSARY AND APPROPRIATE .....	3
A. Content-Based Evaluations Are Commonplace In The Admissions Process At Public Universities .....	3
B. Content-Based Distinctions In Admissions Are Necessary To Fulfill Public Universities' Educational Missions .....	8
C. Even If Strict Scrutiny Applied, Public Universities' Consideration Of Content Of Classes Would Be Constitutional .....	15
II. APPELLANTS' POSITION WOULD HAVE HARMFUL IMPLICATIONS IN OTHER ASPECTS OF PUBLIC HIGHER EDUCATION.....	19
CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE.....	22

## TABLE OF AUTHORITIES

**Page(s)**

### FEDERAL CASES

<i>Ark. Educ. Television Comm’n v. Forbes</i> , 523 U.S. 666 (1998).....	9, 10
<i>Brown v. Li</i> , 308 F.3d 939 (9th Cir. 2002) .....	11
<i>Eu v. S.F. County Democratic Cent. Comm.</i> , 489 U.S. 214 (1989).....	17
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	passim
<i>Keyishian v. Bd. of Regents of Univ. of N.Y.</i> , 385 U.S. 589 (1967).....	10, 11
<i>Nat’l Endowment for the Arts v. Finley</i> , 524 U.S. 569 (1998).....	9, 10
<i>People for the Ethical Treatment of Animals, Inc. v. Gittens</i> , 414 F.3d 23 (D.C. Cir. 2005).....	9
<i>Pleasant Grove City, Utah v. Summum</i> , 129 S. Ct. 1125 (2009).....	20
<i>Police Dep’t of Chi. v. Mosley</i> , 408 U.S. 92 (1972).....	8
<i>Regents of Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978).....	16
<i>Regents of Univ. of Mich. v. Ewing</i> , 474 U.S. 214 (1985).....	11, 12, 13, 14
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996).....	17
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957).....	10, 11, 12
<i>United States v. Am. Library Ass’n.</i> , 539 U.S. 194 (2003).....	9, 10
<i>United States v. Playboy Entm’t Group, Inc.</i> , 529 U.S. 803 (2000).....	16, 17
<i>Univ. of Pa. v. E.E.O.C.</i> , 493 U.S. 182 (1990).....	11
<i>Video Software Dealers Ass’n v. Schwarzenegger</i> , 556 F.3d 950 (9th Cir. 2009) .....	16

## **STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

*Amici* are two public universities. Like Appellee the University of California, these universities make admissions decisions based, in part, on the content of high school courses that applicants take and the grades that the applicants receive in those courses. These admission standards are critical for *amici* to attain the atmosphere of learning and academic discussion that is central to the mission of public education.

### **SUMMARY OF ARGUMENT**

Public universities make widespread use of content-based criteria in admissions. Some public universities review and approve the content of particular high school courses for purposes of admissions. Other public universities require that applicants take high school courses with particular content, although these universities rely on the course titles or the high school's categorization of the courses to determine whether an applicant has met the content requirements. Most public universities also make other content-based evaluations in admissions, such as assessments of applicants' admissions essays.<sup>1</sup>

---

<sup>1</sup> When we refer to "content-based" evaluations in this brief, we include evaluations based on viewpoint, so long as those evaluations do not constitute "invidious viewpoint discrimination" as defined in the Supreme Court's decisions and in Defendants-Appellees' brief. *See* Defendants-

These content-based determinations are appropriate and constitutional. The Supreme Court has repeatedly held that courts should give great deference to government decisions in the context of a government mission that, by its nature, requires evaluations of the content of speech. University admissions decisions fit squarely within this category. This is especially true for determinations whether an applicant's coursework has adequately prepared the applicant for university study. The breadth and rigor of an applicant's high school curriculum, and the applicant's performance in that curriculum, are recognized predictors of how the applicant will perform at a university. Indeed, because the university's right to make admissions decisions is one of the central elements of constitutionally protected academic freedom, even greater deference is due to a public university's judgments in conjunction with admissions than is due to other government decisions that require content-based evaluations.

Even were this Court to apply strict scrutiny, the University's policy would pass constitutional muster. As the Supreme Court made clear, when strict scrutiny is appropriate, the analysis that applies to decisions that depend on professional academic judgment is different from the close judicial evaluations ordinarily associated with strict scrutiny. When "strict

---

Appellees' Brief at 29-31, 39-40. Like the University of California, *Amici* do not engage in invidious viewpoint discrimination.

scrutiny” applies to academic judgments, that scrutiny is “deferential” to account for the fact that it is the university, rather than a court, that is in the best position to make the professional academic judgment.

## ARGUMENT

### I. **THE WIDESPREAD USE OF DECISIONS BASED ON CONTENT IN ADMISSIONS TO PUBLIC UNIVERSITIES IS NECESSARY AND APPROPRIATE**

#### A. **Content-Based Evaluations Are Commonplace In The Admissions Process At Public Universities**

Public colleges and universities are a principal source of higher education in America. Currently, over seven million students are enrolled in public universities, and every year, public universities receive millions of applications for admission. *See* [http://nces.ed.gov/programs/projections/projections2016/tables/table\\_15.asp](http://nces.ed.gov/programs/projections/projections2016/tables/table_15.asp). Graduates have used their public educations to serve society in numerous important roles. Recent Presidents who attended public universities include Jimmy Carter (the U.S. Naval Academy), Gerald Ford (the University of Michigan), and Lyndon Johnson (Southwest Texas State Teachers College, now Texas State University). Public universities play an especially important role in ensuring educational opportunities for those who cannot afford the escalating tuitions of private universities.

Universities need to ensure that admitted students are adequately prepared for university study, and that they admit students who will gain the most from the university and who will add the most to the university and to society. For these reasons, most public universities have developed criteria by which to evaluate the preparation of their applicants and to determine to which of the large number of applicants they will grant the privilege of admission.

The University of California's a-g Guidelines are one way that the University evaluates prospective students—with respect to both the breadth of the body of knowledge to which they have been exposed and the essential critical thinking and study skills that will be necessary for study at the university level. The University of California is not unique in its consideration of the content of high school classes in admissions decisions. For example, *amicus* California State University, employing the same a-g Guidelines as University of California, allows applicants to secure admission by receiving an adequately high grade in approved courses.<sup>2</sup> Like the University of California, California State University has determined that its selection of which applicants to admit is best accomplished through a

---

<sup>2</sup> See [http://www.csumentor.edu/planning/high\\_school/subjects.asp](http://www.csumentor.edu/planning/high_school/subjects.asp).

process that considers the actual content of the applicants' high school courses.

Other public universities do not specifically review and approve the content of particular high school classes in conjunction with admissions, but they nevertheless require satisfactory performance in classes with prescribed content for admission. The University of Oregon, for example, requires satisfactory performance in high school courses in core subject areas like mathematics and English.<sup>3</sup> University of Idaho,<sup>4</sup> University of Montana,<sup>5</sup> Arizona State University,<sup>6</sup> University of Nevada,<sup>7</sup> Oregon State University,<sup>8</sup> University of Idaho,<sup>9</sup> University of Minnesota,<sup>10</sup> University of Arizona,<sup>11</sup> as well as many other public universities, have similar admission criteria.

Some public universities that do not specifically review and approve particular high school classes nevertheless generally evaluate the content and quality of applicants' high school classes in making admission decisions.

---

<sup>3</sup> See <http://admissions.uoregon.edu/freshmen/requirements>

<sup>4</sup> See <http://www.students.uidaho.edu/default.aspx?pid=15583>

<sup>5</sup> See <http://admissions.umt.edu/freshman.html>

<sup>6</sup> See <http://students.asu.edu/freshman/requirements>

<sup>7</sup> See <http://www.ss.unr.edu/admissions/apply/freshman/requirements.asp>,  
<http://www.unlv.edu/admissions/requirements.html>

<sup>8</sup> See [http://oregonstate.edu/admissions/firstyear/gen\\_requirements.html](http://oregonstate.edu/admissions/firstyear/gen_requirements.html)

<sup>9</sup> See [http://www.uidaho.edu/futurestudents/admissions/admission\\_requirements/corerequirements.aspx](http://www.uidaho.edu/futurestudents/admissions/admission_requirements/corerequirements.aspx)

<sup>10</sup> [http://admissions.tc.umn.edu/admissioninfo/fresh\\_requirements.html#core](http://admissions.tc.umn.edu/admissioninfo/fresh_requirements.html#core)

<sup>11</sup> [https://admissions.arizona.edu/requirements/Competency\\_Requirements.aspx](https://admissions.arizona.edu/requirements/Competency_Requirements.aspx).

For example, one of the main criteria for admission to the University of Virginia is excellent performance in a “rigorous secondary-school program” in a variety of core subject areas.<sup>12</sup> The University of Minnesota likewise considers whether the applicant participated in an “exceptionally rigorous academic curriculum,”<sup>13</sup> as do numerous other public universities, including Oregon State University,<sup>14</sup> University of Washington,<sup>15</sup> and The Ohio State University.<sup>16</sup>

The basis for such consideration is straightforward. The differences in the content and difficulty of classes offered at different high schools, or among classes offered at a single high school, mean that students’ high school GPAs alone may provide an inaccurate basis for determining which students are best prepared for university study. An A in Calculus from one high school may be equivalent to B+ in Calculus from another school that requires students to master more advanced techniques. Differentiating between those classes is by its nature a content-based decision.

---

<sup>12</sup> <http://www.virginia.edu/undergradadmission/highschool.html>.

<sup>13</sup> <http://admissions.tc.umn.edu/answers/index.html>.

<sup>14</sup> [http://oregonstate.edu/admissions/firstyear/gen\\_requirements.html](http://oregonstate.edu/admissions/firstyear/gen_requirements.html) (listing “strength of the program taken within the context of the high school attended” as an admission criterion).

<sup>15</sup> <http://admit.washington.edu/Requirements/Freshman/CorePDF> (listing considers “rigor of curriculum” in evaluating applicants’ academic preparation and performance).

<sup>16</sup> [http://undergrad.osu.edu/pdf/OSUfresh\\_packet.pdf](http://undergrad.osu.edu/pdf/OSUfresh_packet.pdf).

That the University of California and other public universities consider successful performance in classes in core subject areas in admissions decisions does not mean that those universities discourage prospective students from taking classes outside of those areas. To the contrary, public universities on the whole encourage prospective students to take classes on a broad variety of topics. *See, e.g.*, Declaration of Mark M. Rashid, ¶ 5. SER0167-68. As under the admissions standards of the University of California, public universities generally allow a prospective applicant to take classes on any subject and still qualify for admission, so long as he demonstrates proficiency in the core subject areas in accordance with the universities' specified criteria.

In addition to basing admission in part on the quality and content of classes taken in high school, many, if not most, public universities make other content-based evaluations in admissions. For example, most public universities consider essays submitted by applicants in admissions decisions.<sup>17</sup> Universities do not use these essays solely to evaluate the writing skills of the applicant; the content of the ideas expressed in the

---

<sup>17</sup> For example, the University of Michigan requires two short answer essay questions (250 words or less) and one extended essay question (500 words or less) as part of the application process.  
<http://www.admissions.umich.edu/prospective/prospectivefreshmen/requirements.php>.

applicant's essay also affects universities' decisions. For example, the University of Oregon reports that, "[t]he student's application essay is an important tool in determining academic motivation."<sup>18</sup>

**B. Content-Based Distinctions In Admissions Are Necessary To Fulfill Public Universities' Educational Missions**

The mission of public universities is to teach students and to prepare them for the challenges of today's world. Deciding which students to admit is critical to the fulfillment of that mission. If a university attempts to impart information to students who are not sufficiently prepared, either in the breadth of their knowledge or the quality of their analytic skills, that information will fall on deaf ears. Moreover, creating a body of students who are fully prepared for university study is necessary to develop an atmosphere of learning, which is essential to fostering the learning of all students at a university.

The courts have therefore recognized that public universities' content-based distinctions in the admissions process are appropriate, and not prohibited by the First Amendment. It is true that the First Amendment ordinarily forbids states from making decisions based on the content of speech. *See, e.g., Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). But that restriction does not apply where the government is acting as an

---

<sup>18</sup> <http://admissions.uoregon.edu/freshmen/apply/standardreview>

educator, employer, or patron. *See, e.g., People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005) (noting that government may engage in content and viewpoint discrimination in “produc[ing] films and publications,” and “run[ning] museums, libraries, television and radio stations, primary and secondary schools, and universities.”). As the Supreme Court has explained, these tasks by their nature require the government to make distinctions based on content. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (holding that government may discriminate on the basis of content in determining which arts to fund, because “[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding”); *see also United States v. Am. Library Ass’n.*, 539 U.S. 194, 204 (2003) (allowing public libraries to discriminate on the basis of content in order to fulfill its mission of providing materials); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672-673 (1998) (holding that public broadcasters may discriminate on the basis of viewpoint, because broadcasting by its nature requires editorial discretion). The Supreme Court has recognized that, in these contexts, the government has “broad discretion” to make content-based distinctions, *Am. Lib. Ass’n*, 539 U.S. at 204, and courts must uphold the government’s determination if it is “reasonable” in

light of the government's mission. *Id.* at 208; *accord Finley*, 524 U.S. at 587; *Forbes*, 523 U.S. at 672-673.

Education is a government mission that by its nature requires decisions based on content. Universities must decide which courses to offer; professors must decide the content of each assignment and examination question; and faculties must decide which speakers to invite for lectures. For this reason, the Supreme Court has explicitly stated that heightened scrutiny should not apply to decisions by “a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum.” *Forbes*, 523 U.S. at 674.

Particularly great deference is due to policies like the University of California's course approval policy because they implicate academic freedom. The Supreme Court has specifically recognized that universities play a “vital role” in our democracy by “guid[ing] and train[ing] our youth.” *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967), (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250, (1957) (Frankfurter, J., concurring in the judgment)). They serve “the important purpose of public education,” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and “the

crucial role . . . in the dissemination of ideas in our society,” *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 195 (1990).

For universities to carry out their educative mission successfully, they must have the freedom to make decisions regarding education. The Supreme Court has repeatedly stressed that academic freedom is a “special concern of the First Amendment.” *Keyishian*, 385 U.S. at 603. Accordingly, to ensure that the judiciary does not trench on this academic freedom, the Supreme Court has instructed 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.” *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

As both this Court and the Supreme Court have recognized, one of the key components of academic freedom is the power of “autonomous decisionmaking by the academy itself.” *Id.* at 226 n.12; accord *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002). Autonomy to make educational decisions is necessary for “a university to provide that atmosphere which is most conducive to speculation, experiment and creation.” *Brown*, 308 F.3d at 951 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, concurring in judgment)). As with other aspects of academic freedom, this educational autonomy is “grounded in the First Amendment.” *Grutter*, 539 U.S. at 329.

The constitutionally protected educational autonomy includes the power of the university to “make its own judgments as to . . . the selection of its student body.” *Id.* Indeed, the Supreme Court has described the ability “to determine, on academic grounds, who may be admitted to study . . . as one of ‘the four essential freedoms’ of a university.” *Ewing*, 474 U.S. at 226 n.12 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the judgment)).<sup>19</sup> The description recognizes that the composition of the student body is critical to establishing the intellectual atmosphere that leads to the dissemination of information and the development of new ideas. *See Grutter*, 539 U.S. at 317.

Establishing academic prerequisites is essential to universities’ establishing an atmosphere of creativity, communication, and learning. Prerequisites ensure that a student is capable not only of learning the material taught in class, but also of contributing usefully to the class for the development of new ideas. The particular prerequisites necessary will vary with the circumstances of the university, and each university needs the ability to exercise its own professional academic judgment in specifying the criteria for its prerequisite courses.

---

<sup>19</sup> The remaining three essential freedoms are the authority “to determine who may teach, what may be taught, [and] how it shall be taught.” *Sweezy*, 354 U.S. at 263.

The Supreme Court recognized this principle in *Ewing*, which held that a state university had the right to dismiss a student who, in the university's view, failed to perform adequately in his classes. The University of Michigan had established a six-year special joint undergraduate and medical school program. 474 U.S. at 215. Enrollment in the final two years of the program was conditioned on passage of a national standardized test. *Id.* Scott Ewing sued the University after he was expelled for failing to pass the standardized test. *Id.* at 216. The Supreme Court refused to hold that the expulsion was improper. Noting the importance of academic autonomy, *id.* at 226 n.12, the Court explained that "University faculties must have the widest range of discretion in making judgments as to the academic performance," *id.* at 225 n.11. Accordingly, the Court stated, "[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," and "may not override [an academic decision] 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.* at 225. Explaining that the University's decision to expel Ewing based on his poor performance was not "a substantial departure from

accepted academic norms,” the Court declined to interfere with that decision. *Id.* at 227.

*Ewing*’s reasoning applies equally to judgments regarding academic performance necessary to justify initial admission to a public university. Just as it falls within accepted academic norms for a university to decide, based on the content of a student’s work or examination results, whether to permit that student to progress in an academic program, it falls within accepted academic norms for a university to decide whether to admit a student in the first place based on the content of the classes that the student has taken in high school and the student’s performance in those classes.

A university must have the authority to admit only those students who have demonstrated that they have acquired the skills that, in the university’s judgment, are necessary to perform at the university level. Inadequate preparation for university study not only limits the unprepared student’s ability to learn and participate in class; it also limits the potential for learning for other, more prepared students, because more class time and resources must be devoted to teaching the unprepared students the basic materials. Moreover, because students learn from each other, the presence of inadequately prepared students risks stifling the development of new

knowledge—thereby undermining one of the essential goals of the First Amendment.

Policies like the University of California’s approval policy are designed to ensure that the classes offered in high school adequately prepare students for the rigors of university study. In promulgating its a-g approval policy, for example, the University of California faculty determined, based on its professional judgment, that students must have preparation in classes that are academically challenging, require substantial reading, and involve analytical and critical thinking. They must also have already mastered basic, generally accepted information in a variety of fields of study. The University of California’s determination that these attributes are important for prospective students to be prepared for study and the creation of an atmosphere of learning is merely one example of the types of content-based admissions judgments that public universities must make in their admissions processes. Those determinations are entitled to deference from this Court.

**C. Even If Strict Scrutiny Applied, Public Universities’ Consideration Of Content Of Classes Would Be Constitutional**

Even if the University’s approval policy and policies similar to it were subject to strict scrutiny, they would be constitutional because such policies are necessary to promote the compelling interest of developing a student

body that “will contribute the most to the ‘robust exchange of ideas.’” *Grutter*, 539 U.S. at 329 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

To satisfy strict scrutiny, a government program normally “must be narrowly tailored to promote a compelling Government interest.” *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009) (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000)). However, in those limited circumstances—such as the consideration of an applicant’s race to obtain a diverse student body—in which “strict scrutiny” is the appropriate standard of review of professional academic judgments, courts have applied a more deferential standard in light of the superior expertise of the academic institution in making academic judgments.

*Grutter v. Bollinger* provides an example. There, the University of Michigan Law School maintained a policy under which race played a role in admissions. Barbara Grutter, a white female who had been denied admission to the Law School, sued the University, alleging that the University’s consideration of her race violated her right to equal protection. The University acknowledged that its policy should be evaluated under strict scrutiny because that policy discriminated on the basis of race, but it argued

that its policy satisfied that standard because the policy was necessary to achieve the compelling interest of diversity. Respondents' Brief, 2003 WL 402236, at \*14.

The Supreme Court concluded that the University's policy satisfied strict scrutiny. In doing so, the Court did not follow the ordinary path of evaluating for itself whether the interest asserted by the government was compelling. *See Shaw v. Hunt*, 517 U.S. 899, 909-910 (1996) (rejecting claim that "an effort to alleviate the effects of societal discrimination is . . . a compelling interest"); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (rejecting claim that "preserving party unity during a primary is . . . a compelling state interest"). Instead, the Court "defer[red]" to the University's conclusion that achieving a diverse student body was a compelling interest, explaining that the "complex educational judgments" involved in admissions decisions "lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328.

The Court also applied a deferential standard in determining whether the University's policy was narrowly tailored. The narrowly tailored requirement ordinarily requires the government to show that no "less restrictive alternative would serve the Government's purpose." *Playboy Entm't Group*, 529 U.S. at 813. But the *Grutter* Court applied a more

deferential standard. The Court rejected the argument that “[n]arrow tailoring . . . require[d] exhaustion of every conceivable race-neutral alternative” in the university context. *Grutter*, 539 U.S. at 339. Instead, the Court recognized the need for a deferential standard in light of the University’s expertise in determining how best to accomplish its goal. *Id.* at 334, 340.

Under *Grutter*, evaluation by public universities of the content of high school classes—be it explicitly, as under the University of California’s a-g approval policy and California State University’s admissions criteria, or implicitly as under other public universities’ policies—would survive strict scrutiny even if such a level of review were appropriate. In deciding to evaluate the content of high school classes in making admissions decisions, public universities exercise their academic judgment in determining that certain criteria in the selection of students are critical to their educational mission. *Id.* at 328. As in *Grutter*, this Court should defer to such determinations. *Id.* Such policies also satisfy the narrowly tailored requirement. Those policies are put in place pursuant to universities’ making the judgments necessary to achieve their educational goals. Without such policies, universities would risk admitting students who are not prepared for university study and whose presence would detract not only

from the learning of other students at the university, but also from the pursuit of knowledge generally at universities.

**II. APPELLANTS' POSITION WOULD HAVE HARMFUL IMPLICATIONS IN OTHER ASPECTS OF PUBLIC HIGHER EDUCATION**

As discussed above, the courts have recognized not only the lack of a First Amendment restriction on public universities' making content-based distinctions that are related to their educational missions, but also the affirmative protection of the First Amendment to this aspect of academic freedom. This is true not just with respect to public universities' decisions about whom to admit, but also with respect to public universities' other academic decisions—such as what courses to offer, what to teach in these courses, how to evaluate students' performance in their course work, how to assess professors' performance, whether to grant tenure to faculty, and the like.

Each of these types of decisions requires content-based determinations. For example, in determining the content of a particular course, a university must make a choice among what ideas to present. All ideas obviously should not be presented, both because there is a finite amount of time and because the lack of differentiation will obscure the teaching of those ideas that have emerged, through academic scrutiny, to be

the most significant. *Cf. Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1138 (2009) (explaining that, if government could not discriminate on the basis of viewpoint or content in selecting monuments in public parks, those parks would become “clutter[ed]” with monuments, thereby undermining the importance of all monuments).

Likewise in making tenure decisions, a university needs to evaluate the content of a professor’s scholarship. Such factors as whether that scholarship follows the analytic methods that are accepted in the academic community and relies on academically appropriate evidence are clearly content-based. Yet it is plainly appropriate for a university to consider these factors in tenure decisions. For example, in determining whether to grant tenure to a history professor, a university is undoubtedly entitled to consider whether the professor’s works insightfully examine historical events based on the human motivations and other circumstances that existed at the time, rather than simply attributing such events to supernatural phenomena.

None of these sorts of decisions can be made in a formulaic manner. Nothing in appellants’ argument limits their asserted restriction on content-based decisions to the particulars of the University of California’s a-g policy. Adopting Appellants’ position therefore poses the potential for





## CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2009, 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.

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:

Bird, Wendell R., Attorney  
BIRD, LOECHL, BRITTAIN & McCANTS, LLC  
1150 Monarch Plaza  
3414 Peachtree Road, NE  
Atlanta, GA 30326

Patti, Christopher M., Attorney  
UNIVERSITY OF CALIFORNIA  
Office of the General Counsel  
8th Floor  
1111 Franklin St.  
Oakland, CA 94607-5200

s/ Frederick Andrew Hessick III