AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

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April 22, 2019

By U.S. Mail & Email
University of California Board of Regents
Office of the Secretary and Chief of Staff to the Regents
1111 Franklin St., 12th Floor
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regentsoffice@ucop.edu

Mark Laret, President/CEO
UCSF Health
Medical Center Administration
Box 0296 550 16th St., Floor 4
San Francisco, CA 94143
Mark.Laret@ucsf.edu

Re: *UCSF Partnership with Dignity Health*

Dear Regents and Mr. Laret:

We understand that in December 2018, the University of California, San Francisco submitted to the Board of Regents for approval an affiliation agreement with Dignity Health. *See* UCSF Health, *FAQ: UCSF Affiliation with Dignity Health*, at https://tinyurl.com/y5e7yvf8. Dignity Health is a Catholic healthcare organization that is restricted from providing certain medical services by religious rules known as the Ethical and Religious Directives for Catholic Healthcare Service. *Id.* We write because we have serious concerns that the affiliation between UCSF and Dignity Health would violate the Establishment Clause of the First Amendment to the U.S. Constitution. Religious organizations must not be allowed to decide what care is provided to UCSF's patients.

The University of California cannot legally enter into an agreement that binds the University, its employees, or its medical students to conform to religious doctrine in either the services that they provide or the information that they present to patients. We request that you do not approve any affiliation agreement that would require the University to abide by the ERDs or any other religious doctrine, and that you either end UCSF's affiliation with Dignity Health or alter the affiliation so that UCSF neither agrees to abide by the ERDs nor enforces them in any way.

The Establishment Clause prohibits government from taking any action that has the purpose or effect of advancing or endorsing religion, or from becoming excessively entangled with religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Clause bars "a fusion of governmental and religious functions or a concert or dependency of one upon the other." *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

In accordance with these principles, the U.S. Supreme Court has held that "delegation of state power to a religious body" is constitutionally forbidden. *Hernandez v. Comm'r*, 490 U.S. 680, 696-97 (1989); *accord Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982); *Allegheny*, 492 U.S. at 591. In *Larkin*, for example, the Court invalidated a Massachusetts statute that gave churches veto power over the liquor-license requests of nearby applicants. *Id.* at 117, 127. Because the statute "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards," it impermissibly "enmeshe[d] churches in the processes of government. . . ." *Id.* at 127. "[F]ew entanglements," the Court concluded, "could be more offensive to the spirit of the [U.S.] Constitution." *Id.* For similar reasons, the University of California cannot legally enter into any agreement that would require UCSF or any university faculty, staff, or students to abide by or enforce the ERDs or any other policy or treatment path dictated by religious doctrine, because to do so would be an unconstitutional delegation of governmental authority to religious authorities.

The act of enforcing the ERDs would also violate the Establishment Clause in a different way: Governmental action violates the Establishment Clause if it either promotes practices because they are required by a particular religious tenet or prohibits practices because they are disfavored by certain religious sects. *See Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 106-08 (1968). The Establishment Clause "'forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.'" *Edwards*, 482 U.S. at 593 (quoting *Epperson*, 393 U.S. at 106-07 (emphasis omitted)). For example, in *Epperson*, the U.S. Supreme Court held that a state violated the Establishment Clause by prohibiting schoolteachers from teaching evolution when the state did so because evolution is contrary to the religious beliefs of some citizens. If UCSF were to adhere to the ERDs, the University would violate the Establishment Clause by acting or refraining from acting because of the religious beliefs of the Catholic Church.

Because the affiliation would violate the federal Establishment Clause, it would also violate Article 1, section 4, of the California Constitution. The courts have generally used the same tests for legal claims under the California Constitution as under the U.S. Constitution, but they have also noted that the California Constitution's "no preference" clause is "more protective of the principle of separation than the federal guarantee." *Hewitt v. Joyner*, 940 F.2d 1561, 1566 (9th

Cir. 1991). California courts have thus, for example, interpreted the "no preference" clause "to require that not only may a governmental body not prefer one religion over another, it also may not *appear* to be acting preferentially." *Id.* at 1567 (emphasis in original). A formal affiliation between UCSF and a Catholic healthcare organization cannot help but appear to be governmental endorsement of Catholicism.

We ask not only that you deny UCSF's request for approval of the affiliation with Dignity Health, but also that you end the affiliation—or at the very least alter the affiliation so that UCSF neither agrees to abide by the ERDs nor enforces them in any way. If you have questions, you may contact Ian Smith at (202) 466-3234 or ismith@au.org.

Sincerely,

Richard B. Katskee, Legal Director
Ian Smith, Staff Attorney