ASUCI JUDICIAL BOARD

"The Judicial Board has final judicial authority for ASUCI, which extends to all cases arising under the governing documents of ASUCI, all official actions of ASUCI officials and staff, and any matters delegated to the Judicial Board by the Senate or Student Advocate General."

JUDICIAL DISSENT ON R52-85: "Interfaith Space for Students; Advocacy call for next academic year"

SHANTHARAJ, C.J., and BOKAEI and ANDERSON, JJ., upheld the Resolution without an opinion. MENTER, J., filed a dissenting opinion. DISNEY, J., and SHIN, J., took no part in the consideration or decision of the case.

JUSTICE MENTER, dissenting.

This is a case about discrimination. Senate Resolution 52-85 recommends that the University of California, Irvine "establish a space" for "religious and spiritual clubs and organizations" by the beginning of next quarter. R52-85, ¶ 2, 5. The resolution plainly and on its face discriminates on the basis of religion. Under the ASUCI Constitution, all legislation must comply with UCI's Policy on Nondiscrimination. ASUCI Constitution, Art. 2 § 4(a). Though the members of the Board agree that this constitutional provision prohibits the Senate from passing discriminatory legislation, the majority holds that R52-85 is not impermissibly discriminatory. However, because I believe this resolution unconstitutionally discriminates on the basis of religion, I would strike it down.

It is a bedrock principle of First Amendment law that statutes may not, on their face, discriminate on the basis of religion. By advocating the creation of a space specifically for "religious and spiritual" clubs, R52-85 stands in direct conflict with this principle. Because this resolution is unconstitutional under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, it violates the University of California Policy on Nondiscrimination, and therefore the ASUCI Constitution.

The majority believes that resolutions such as this, which facially draw lines on the basis of a constitutionally suspect classification, are not motivated by any invidious discriminatory motive, but a desire to foster diversity. The majority may be correct as to the sympathetic ends behind this legislation, but the ASUCI Constitution prohibits these means. We do not encourage religious diversity by enshrining religious differences in law, but by treating

people equally regardless of those differences. Accordingly, I respectfully dissent from the majority's holding.

I

A

The ASUCI Constitution, Art. 2 § 4(a), requires that ASUCI "adhere to the UCI campus implementation of the University of California Nondiscrimination Policies". As the Judicial Board has not previously had the occasion to interpret or apply this provision of the Constitution, it is worth discussing how analysis under this provision should work.

At the threshold is the question of whether this Board's subject-matter jurisdiction extends to UCI's Policy on Nondiscrimination in the first instance. In other words, we must first ask whether we even have any power to interpret or apply the Policy. The ASUCI Constitution, after all, only grants the Judicial Board the power to interpret "the governing documents of ASUCI", Art. VIII § 2(a), and it is true that UCI's Policy on Nondiscrimination is not such a document *per se*. The Policy is, however, incorporated into the ASUCI Constitution by Article 2, Section 4(a). It is impossible to decide whether a statute is consistent with this provision of the Constitution without first deciding whether the statute is consistent with the Policy. Interpreting this provision of the Constitution therefore necessarily involves an interpretation of the Policy on Nondiscrimination. Our power to interpret and apply the Policy flows inexorably from our general constitutional jurisdiction.

Indeed, the only effect that Art. 2 § 4(a) can have is to grant the Judicial Board subject-matter jurisdiction over constitutional challenges brought under the Nondiscrimination Policy. It is not as though this provision is necessary for us to be bound by the Policy; even if it were absent from our Constitution, ASUCI would still required

to adhere to the Policy on Nondiscrimination. On its own terms, the Policy applies to "[a]ll groups operating under the authority of The Regents, including … student governments." *Policy on Nondiscrimination,* University of California PACAOS-20.00. A person wishing to bring a challenge against ASUCI for failure to comply with this Policy could therefore do so in a State or Federal court of competent jurisdiction, regardless of the ASUCI Constitution. Our Constitution's express mention of the Policy must therefore be read to require that the government of ASUCI act as a check on itself. We must ensure our own compliance with the Policy, notwithstanding any other institution's authority to enforce it.

B

Having concluded that the Judicial Board has a responsibility to interpret the Policy on Nondiscrimination, we must now determine how to interpret it. Though the Policy contains detailed guidelines applying to discrimination on the basis of sex, PACAOS-150.00, and disability, PACAOS-140.00, it contains no specific provisions regarding discrimination on the basis of religion. Instead, the Policy generally prohibits "legally impermissible, arbitrary, or unreasonable discriminatory practices". PACAOS-20.00. When the Policy does not contain a specific applicable guideline, determining whether a statute complies with the Policy necessarily requires a determination of whether the statute engages in "legally impermissible … discriminat[ion]." Emphasising this point, the Policy notes that its purpose is to "reflect fully the spirit of the law". An interpretation of the Policy therefore entails an interpretation of relevant State and Federal antidiscrimination law.

To understate the matter, State and Federal law have a good deal to say about the legality and illegality of

various forms of discrimination. It is therefore impractical and unnecessary to decide today the full scope of the Nondiscrimination Policy's prohibition against illegal discrimination. In a more difficult case, it may be unclear whether the Policy intends to incorporate a particular component of State or Federal law, or whether it treats such law as irrelevant. There are, however, a few components of antidiscrimination law that the Policy obviously incorporates. Certainly, the Policy incorporates those laws to which it expressly refers, such as the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101. Furthermore, it clearly incorporates landmark antidiscrimination statutes like the Civil Rights Act of 1964, 78 Stat. 241. Most relevant to this case, however, the Policy incorporates the provisions of the United States Constitution governing discrimination. Cases involving discrimination on the basis of race or immigration status may therefore be brought under the Equal Protection Clause, U.S. Const. Amend. XIV § 1; and cases involving discrimination on the basis of religion should be analysed under the Establishment and Free Exercise Clauses of the First Amendment. U.S. Const. Amend. I.

Though our application of the Policy on Nondiscrimination incorporates Federal constitutional law, it is still worth noting that we are not directly interpreting the United States Constitution. We only look to the United States Constitution to the extent that it is necessary to determine the meaning of the Nondiscrimination Policy. When the Policy contains specific provisions relevant to the case at hand, then we are bound by those provisions, regardless of their compatibility with State or Federal law. If a litigant wishes to challenge the Nondiscrimination Policy itself as incompatible with the law, then she may do so in State or Federal court. The ASUCI Constitution does not grant us

general subject-matter jurisdiction over state or Federal law; it only references such law through the Policy on Nondiscrimination. Our review is therefore limited to the terms of the Policy itself, as that is all that our Constitution incorporates.

In this case, however, where the Policy does not contain any specific provision governing the particular form of discrimination before us today, we must rely on the provision of the policy generally prohibiting "legally impermissible" discrimination. PACAOS-20.00. We therefore look to the relevant provisions of the Constitution of the United States to determine whether R52-85 violates the Policy.

II

Though the Constitution of the United States prohibits any discrimination bearing no rational relation to a legitimate government purpose, it subjects discrimination on the basis of certain classifications to a higher level of scrutiny. *United States v. Carolene Products Co.,* 304 U.S. 144, at 152 n.4 (1938). The First Amendment to the Constitution specifically governs religious classifications, requiring that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. Taken together, these two clauses of the First Amendment—the Establishment Clause and Free Exercise Clause, respectively—prohibit discrimination on the basis of religion.

Furthermore, when the government regulates speech, the First Amendment contains even stronger protection against discrimination. The Free Speech Clause of the First Amendment prevents the government from "abridging the freedom of speech". *Id.* The Supreme Court has consistently interpreted this clause to prohibit the government from regulating speech because of its content,

or because of the viewpoint the speech expresses. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The prohibition against content-based and viewpoint-based discrimination means that the government may not treat speech with which it agrees more favorably than speech with which it disagrees.

In order to effectuate the First Amendment's nondiscrimination principles, the Supreme Court has clarified the judicial analysis that must be performed when a challenge is brought under the Establishment, Free Exercise, or Free Speech clauses.

A

More than almost any other provision of the Constitution, the Establishment Clause has sparked intense and intractable judicial debate. The Justices of the United States Supreme Court have, on numerous occasions, expressed sharply opposing views about the scope and purpose of the Establishment Clause. *Cf. Lee v. Weisman*, 505 U.S. 631 (Scalia, J., Dissenting) (arguing that the Establishment Clause should be interpreted to accommodate longstanding and historically accepted religious practice) (1992); *City of Boerne v Flores*, 521 U.S. at 536 (Stevens, J., Concurring in Judgment) (arguing that the Establishment Clause prohibits the government from implementing special accommodations for religious practice) (1997). Despite these differences, however, some clear principles have emerged from the Court's precedents.

Challenges brought under the Establishment Clause are adjudicated using the test first laid out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test requires that a challenged government action has "a secular purpose", that it not "have the principal or primary effect of advancing or inhibiting religion", and that it "not foster an excessive entanglement with religion". *Lamb's Chapel v. Center Moriches School District*, 508 U.S. at 395

(1993). Though a law can violate the Establishment Clause by preferring specific religious denominations over others, *Larson v. Valente*, 456 U.S. 228 (1982), neutrality between specific denominations is not the only requirement for a law to be compatible with the Constitution. Just as a government may not show favoritism between religious denominations, neither may it prefer religion over irreligion. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at 573 (1989).

The primary purpose of the Establishment Clause is to regulate the relationship between church and state. Those advocating disestablishment at the time of the country's founding recognized that government involvement with religion "harmed both civil government and religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577 (slip op., at 12) (Sotomayor, J., Dissenting) (2017). Though Thomas Jefferson's view that there must remain a "wall of separation" between the two has not been incorporated into our jurisprudence, *Letter from Thomas Jefferson to the Danbury Baptist Association*, the Establishment Clause nevertheless prevents too close a relationship between the government and religion. Governmental favoritism towards a specific religious denomination, or towards religion in general, "sends … the message" that those benefiting from this favoritism are "insiders, favored members of the political community", and that those who do not benefit are "outsiders, not full members of the political community". *Sante Fe Independent School District v. Doe*, 530 U.S. at 290 (internal quotation marks omitted) (2000). Such a message is inappropriate in pluralistic society, and incompatible with a government that is constitutionally required to treat all people equally regardless of their religion.

B

The Free Exercise Clause enshrines similar nondiscrimination principles. However, while the Establishment Clause regulates the relationship between the government and religion as an institution, the Free Exercise Clause protects the personal liberty of practitioners of a religion. At its core, the Free Exercise clause absolutely prohibits "any governmental regulation of religious beliefs as such", as well as governmental discrimination "against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, at 402 (1963). The Free Exercise and Establishment clauses work most closely together in cases involving laws that discriminate in favor of religion. Both of these clauses prohibit the government from treating certain religious beliefs or practices more favorably than it treats others, and the Establishment Clause in particular prevents too close a relationship between church and state.

Constitutional challenges brought under the Free Exercise Clause are adjudicated under the framework laid out in the cases *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)[1]. Under *Lukumi*, the Free Exercise Clause prohibits a law if "the object of the

[1] Many States, as well as the Federal Government, have Religious Freedom Restoration Acts. These Acts displace the *Lukumi-Smith* framework, prohibiting laws that "substantially burden a person's exercise of religion", regardless of whether that burden is the object of the law. *See, for example,* 42 U.S.C. § 2000bb-1. California, however, does not have such a law, and the Federal Religious Freedom Restoration Act is not binding on the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). For the purpose of our Free Exercise analysis, we therefore only need to consider whether R52-85 is a "neutral law of general applicability", *Smith*, 494 U.S. at 879 (1990), or whether it is discriminatory on the basis of religion.

law is to infringe upon or restrict practices because of their religious motivation", or if the law "discriminate[s] on its face" on the basis of religion. 508 U.S., at 533. For a law to comport with the Free Exercise Clause, it cannot specifically or intentionally target religion. It must be a "neutral law of general applicability", *Employment Division of Oregon v. Smith*, 494 U.S. 872 at 879 (1990).

C

Though the Establishment and Free Exercises clauses specifically govern discrimination on the basis of religion, the Free Speech clause more generally prohibits the government from discriminating against speech because of its content. As the Supreme Court has explained, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, at 2226 (2015). The prohibition against content-based discrimination operates with maximum force when the government attempts to regulate speech occurring in a public forum, or when the government attempts to regulate speech based on the viewpoint it expresses. *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819 (1995).

Freedom of speech was among the first rights that the Supreme Court recognized as fundamental. *Gitlow v. New York*, 268 U.S. 652 (1925). Essential to the right is the absolute prohibition on regulation of speech due to "its message, its ideas, its subject matter, or its content". *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, at 95 (1972). Content-neutrality ensures that public debates are resolved by "free trade in ideas", and not by government fiat. *Abrams v. United States*, 250 U.S. at 630 (Holmes, J., dissenting) (1919). As Justice Brandeis famously explained:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. … They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; … that public discussion is a political duty, and that this should be a fundamental principle of the American government."

Whitney v. California, 274 U.S. at 375 (Brandeis, J., concurring) (1927). In preservation of this "fundamental principle", the Supreme Court subjects laws discriminating against speech on the basis of its content to the most exacting judicial scrutiny.

D

When a law discriminates against speech due to its content, or when it discriminates on the basis of religion, it is subject to strict judicial scrutiny. *Reed* at 2226; *Lukumi*, at 546. Laws subject to strict scrutiny are only constitutional if they are "narrowly tailored to further a compelling government interest." *Grutter v. Bollinger*, 539 U.S. 306 at 326 (2003). Furthermore, strict scrutiny requires that that the law further its goal via the least restrictive of all available alternatives. *Regents of Univ. of California v. Bakke*, 438 U.S. at 357 (Opinion of Brennan, J.) (1978). Strict scrutiny is a demanding test, designed to "smoke out" illegitimate discrimination. *City of Richmond v. J. A. Croson Co.*, 488 U.S. at 493 (plurality opinion of O'Connor, J.) (1989). A law that discriminates on the basis of religion is highly unlikely to survive strict scrutiny. *Lukumi*, at 546.

Strict scrutiny was originally developed by the Supreme Court to provide special protection to rights that the Constitution treats as fundamental, and to protect "discrete and insular minorities" from discrimination by a politically powerful majority. *United States v. Carolene Products Co., supra,* at 152 n.4. Though, in general, the courts show deference to legislation developed through a democratic process, such deference is out of place when dealing with a classification that the Constitution strongly disfavors, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), or a right that the Constitution closely protects. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2309 (2016). In such cases, the courts must allow the law only if it is absolutely necessary.

III

The majority and I are still together at this point in the analysis. The members of the Board agree that we have the jurisdiction to hear claims brought under the Policy on Nondiscrimination, and that adjudicating these claims may require turning to relevant State or Federal law. Furthermore, the majority does not dispute the basic principles of First Amendment law as I have explained them here.

We differ, however, when it comes to the application of these principles to the resolution in this case. Though the majority would prefer not to apply traditional First Amendment analysis here, there is no reason why Resolution 52-85 should not be subject to the standard framework under which Free Exercise, Free Speech, and Establishment Clause claims are adjudicated. The nondiscrimination principles contained in the First Amendment are readily applicable to—and, indeed, have been repeatedly applied in—the context of student-run organizations at a university. And when we apply these principles, they compel the ineluctable conclusion that a

statute such as this, which expresses a bare preference[2] for religion over irreligion, cannot be reconciled with our Constitution's prohibition against religious discrimination.

The Supreme Court has repeatedly considered First Amendment challenges to an educational institution's treatment of student groups, and has consistently held that religious and nonreligious groups must be treated equally. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the University of Missouri at Kansas City made its facilities generally available for use by student groups, unless those student groups were religious. One religious student group, upon being informed that it was no longer allowed to use the university's facilities, sued in Federal court, alleging that the university violated the Free Exercise and Free Speech clauses of the Constitution by discriminating against religious groups.

The Supreme Court sided with the student group. The Court found that, by generally allowing student groups to use university facilities, the university had created a public forum, and was therefore required to allow all student groups equal access to its facilities. *Id* at 267-270. Because the university's restrictions were "discriminatory … based on the religious content of the group's intended speech", the Court subjected those restrictions to strict scrutiny. Finally, the Court found that the university's policy could not be justified by any compelling interest, and therefore struck it down.

A number of other cases have involved constitutional challenges to an educational institution's unequal treatment of religious and nonreligious groups, and they have almost all come to the same conclusion: the

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[2] On the Constitution's prohibition of bare preferences, unjustified by a larger public good, see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Columbia L. Rev. 1689 (1984).

institution may not discriminate on the basis of religion. In *Lamb's Chapel v. Moriches Union Free School District*, *supra*, the Supreme Court struck down a New York law that authorized school districts to allow the use of school facilities for after-school activities only when those activities were not religious. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Supreme Court struck down a similar school policy that prohibited the use of school facilities for after-school religious worship. And in *Rosenberger v. Rectors and Visitors of University of Virginia*, *supra*, the Supreme Court ruled unconstitutional the University of Virginia's denial of funding to a student publication, because the denial of funding was based on the publication's religious content.

Though most of the discrimination in this line of cases was targeted against religion, the same principles apply in the inverse case, where the government discriminates in favor of religion. Viewpoint-neutrality means that, if the government cannot favor a specific viewpoint, then neither can it favor the opposite viewpoint. Furthermore, if a government may not discriminate on the basis of a certain classification, it does not matter in what direction that discrimination occurs. *Adarand Constructors Inc. v. Peña, supra*. The Supreme Court clarified this point most recently in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, *supra*. The Court emphasized that denying a benefit "solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order", *Id.* (slip op., at 6) (internal quotation marks omitted), and that this was true regardless of whether the benefit was denied to individuals "'*because of their faith, or their lack of it*'", *Id.* at 7 (emphasis in original) (quoting *Everson v. Board of Education of Ewing*, *supra* at 16). The same constitutional principles that prohibit the

government from excluding religious groups from a certain benefit also prohibit the government from excluding secular groups from a certain benefit.

Indeed, these principles may apply with special force when the government grants benefits specifically to religious groups. Despite growing secularism, a vast majority of Americans are religious. See Pew Research, America's Changing Religious Landscape, online at http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ (all Internet materials as last visited June 15, 2017). Because the religiously unaffiliated (and especially those who self-identify as non-believers) remain such a small minority, discrimination against religion is far less likely to be invidious than discrimination in favor of religion. Indeed, multiple sociological studies have concluded that Americans distrust atheists more than they distrust almost any other religious or ethnic group[3]. To be sure, there is no specific reason to believe that this animosity motivated the ASUCI Senate to pass R52-85. But if we are required to subject discrimination against religion to strict judicial scrutiny as a matter of law, then we should be at least as skeptical of discrimination in favor of religion.

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[3] See, for example, Gallup, "Atheists, Muslims See Most Bias as Presidential Candidates", online at http://www.gallup.com/poll/155285/Atheists-Muslims-Bias-Presidential-Candidates.aspx (finding that Americans were less willing to vote for an atheist presidential candidate than a candidate from any other religious group); Edgell, Gerteis, and Hartmann, "Atheists as 'Other': Moral Boundaries and Cultural Membership in American Society", online at https://www.soc.umn.edu/assets/pdf/atheistAsOther.pdf (finding that Americans would disapprove of their children marrying atheists more than any other religious or ethnic group, and that Americans believe their worldview to be more incompatible with atheists' than with any other demographic).

For one thing, such favoritism towards religion runs directly into the first prong of the *Lemon* test, which requires that government action have a "secular … purpose." *Lemon v. Kurtzman*, 403 U.S. at 612. When the government adopts a policy that singles out religious groups for special treatment, it is indisputable that the purpose of the policy is not secular, and that the policy has the "principal [and] primary effect" of "advancing … religion". *Lamb's Chapel*, at 395. Though the Constitution takes no issue with students' private religious speech on university campuses, when an educational institution goes out of its way to further religious speech, it violates the Establishment Clause. *Sante Fe Independent School District v. Doe, supra*.

Finally, because the resolution in this case expressly specifies religion as the criterion by which student groups should be allowed access to university facilities, it violates the First Amendment's basic requirement that a law not "discriminate on its face" on the basis of religion. *Lukumi*, at 533. A law facially discriminating on the basis of religion is, by definition, not a "neutral law of general applicability", *Smith*, at 879. The Free Exercise Clause therefore requires that the resolution be subject to "the most exacting scrutiny." *Trinity Lutheran Church, supra* (slip op. at 10) (Opinion of the Court).

IV

For a law to survive strict scrutiny, it must be "narrowly tailored to further a compelling government interest". *Grutter v. Bollinger,* 539 U.S. at 326. Narrow tailoring generally requires that the law must choose the least restrictive means available to accomplish that interest. *Bakke*, *supra*, at 357. Resolution 52-85 explains the primary interest that it is intended to further when it notes that religious groups have been left without a space

to meet for several quarters. R52-85, ¶ 4. The resolution therefore intends to remedy this problem. Additionally, the majority believes that laws such as this, which create spaces designated for specific classes of people, are designed to promote diversity on campus. To determine whether this resolution is constitutional, we must examine whether those interests are compelling, and whether the resolution is narrowly tailored to further those interests.

A

Strict scrutiny analysis presents certain questions unique to a student government context. Interests that the United States Constitution does not consider compelling for a State or Federal government may nevertheless be compelling for ASUCI. For example, while Federal courts may only barely consider legitimate a state's interest in the architectural aesthetic of a shopping center, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), ASUCI's interest in the quality of the Vendor Fair may be much more substantial. A state, after all, has far more important concerns. Relative to a state's interest in the health and safety of its population, concern over a city center's architecture style may seem trivial. But events like the Vendor Fair are part of the core function of ASUCI. The question of whether an interest is compelling for ASUCI may therefore not be answerable by looking only to State or Federal law, but instead should be answered within the context of student government.

The Supreme Court has never laid out a definitive test to determine whether a particular government interest is or is not compelling. There is therefore no reason, in this case, to attempt such a task for ASUCI. We can, however, identify a few principles to help us determine whether a specific interest is or is not compelling. Certainly, if the interest is expressly mentioned in the ASUCI Constitution, we should grant it

a good deal of weight. An interest in ensuring sufficient space for student groups satisfies this criterion. The ASUCI Constitution declares in the Preamble that ASUCI "desires … to provide a forum for the expression of student views and interests". ASUCI Constitution, Preamble. It further guarantees to all students the "right to organize" and the "right to freedom of association". Art. 3 § 1(g)-(h). An interest in ensuring that students have adequate meeting space can fairly be considered a part of those goals.

Furthermore, we can consider compelling ASUCI's interest in encouraging student diversity on campus. The Supreme Court has made it clear that a university has a compelling interest in the diversity of its student body. *Fisher v. University of Texas*, No. 14-981 (2016). Though the set of interests considered compelling for ASUCI is not coextensive with that same set for a State or Federal government, when an interest is considered compelling for a State, we should probably consider it compelling for ASUCI as well. In other words, when it comes to which interests are considered compelling, what is good enough for the government is good enough for us. And in this case, the same academic and social concerns that justify judicial respect for a university's interest in student body diversity also apply to ASUCI. The resolution's interest in furthering student body diversity can therefore be considered compelling.

B

Examining the stated purposes of Resolution 52-85, we can conclude that they are compelling. However, mere reference to compelling government interests cannot save a discriminatory statute from unconstitutionality. For the resolution to survive strict scrutiny, it must be narrowly tailored to further those interests.

R52-85, however, is not narrowly tailored. As legitimate as its ostensible purpose may be, the substance of the resolution itself is only marginally connected to this purpose. Neither of the justifications offered for the resolution provide the kind of close "means-end fit" necessary to satisfy the narrow tailoring component of heightened judicial scrutiny. *Sessions v. Morales-Santana*, No. 15-1191 (Opinion of the Court) (slip op. at 19) (2017).

1

Resolution 52-85 seeks to establish a meeting space for student groups that currently have none. However, by limiting itself to only "religious and spiritual club and organizations", the resolution undermines this goal. R52-85, ¶ 2. This limitation makes clear that the resolution is not intended to resolve the general problem of insufficient meeting space for student groups, but is only intended to address the specific problem of insufficient meeting space for "religious and spiritual" groups. While the general interest may be compelling, the specific interest is not. ASUCI cannot, consistent with the Nondiscrimination Policy, have an interest in ensuring meeting space for religious groups in particular. The opening clauses of First Amendment manifestly forbid establishments of religion from holding any special position in the eyes of the government.

Were the resolution designed to ensure that student groups in general had sufficient access to meeting space, it would have no reason to limit its reach to only religious and spiritual groups. If the problem is that there are not enough rooms for every club and organization, then the creation of more rooms solves this problem, regardless of whether those rooms are designated for use by religious groups specifically, or are equally intended for use by all student groups. The religious restriction is therefore unnecessary to further the resolution's legitimate goals.

Those same goals could have been just as well accomplished without the restriction. Analyzed through the lens of strict scrutiny, this failure to employ the least restrictive means available allows us to conclude that the resolution is not justified by a legitimate government interest, but instead impermissibly discriminates on the basis of religion. *Bakke,* at 357.

2

The majority posits an alternate theory, although one not advanced by the text of the resolution, that it is sometimes necessary to draw lines on the basis of constitutionally suspect classifications in order to encourage student body diversity. The majority points to UCI's Black Resource Center and LGBT Resource Center[4] as instances in which the university relied on a suspect classification, not as a means of carrying out invidious discrimination, but as a means of fostering diversity. Though it is not necessary (or even without our jurisdiction) to decide on the constitutionality of these programs, the Supreme Court has recognized that the achievement of meaningful diversity sometimes requires discrimination on the basis of a suspect classification. See, for example, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas*, No. 14-981 (2016). However, the Court has still subjected such discrimination to strict judicial scrutiny.

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[4] Though the Supreme Court's decisions in the area have yet to expressly specify the level of scrutiny afforded to classifications on the basis of sexual orientation, *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), a careful reading of precedent suggests that such classifications are likely constitutionally suspect. See, for example, *Sessions v. Morales-Santana, supra,* at 9 (citing *Obergefell* in the context of heightened scrutiny analysis). See also *Latta v. Otter*, 771 F.3d 456 (CA9 2014) (striking down state bans on same-sex marriage as failing to meet the test of heightened scrutiny).

Distinctions drawn on the basis of a suspect classification, the Supreme Court has explained, are "by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, at 100 (1943). As such, they are only upheld if they are "shown to be necessary to the accomplishment of some permissible state objective". *Loving v. Virginia*, 388 U.S. 1, at 11 (1967). Even when the purported goals of a discriminatory policy are benevolent, strict scrutiny is still applied in order to ensure that the policy's purported goals are the same as its actual goals, and that the discrimination is absolutely necessary to further those goals. Policies designed to foster diversity must still meet the "substantial burden" imposed by the test of strict scrutiny. *Fisher v. University of Texas*, 133 S. Ct. at 1415 (2013).

This is a burden that R52-85 cannot meet. In large part, this is because UCI already has a commendably diverse student body, regardless of the resolution. UCI has been ranked as the top school in the country in terms of economic diversity. New York Times, Top Colleges Doing the Most for Low-Income Students, online at https://www.nytimes.com/interactive/2015/09/17/upshot/top-colleges-doing-the-most-for-low-income-students.html. Furthermore, UCI can claim substantial racial diversity as well, with as many as 86% of UCI students coming from minority racial or ethnic backgrounds. University of California Irvine, Student Characteristics, online at https://www.nytimes.com/interactive/2015/09/17/upshot/top-colleges-doing-the-most-for-low-income-students.html. Though data on religious demography are harder to come by, there is every reason to believe that UCI also excels with respect to religious diversity. The university hosts a number of active religious organizations, from Hillel to the Muslim Students Union. Furthermore, a large majority of

UCI students report that they have "gained a deeper understanding of other perspectives through interactions with students with different religions beliefs". *Ibid.* In short, R52-85 is not necessary to encourage student body diversity at UCI, because such diversity has already been substantially accomplished.

However, even if UCI were not as diverse as it is, there would still need to be a showing that the resolution actually furthers the goal of religious diversity. If R52-85 does not encourage religious diversity, then it cannot possibly be justified by such an end. Indeed, there is no evidence to support the argument that this resolution in particular would encourage religious diversity, nor is there any mechanism proposed by which it would do so. A resolution that fails to further a compelling government interest in the first instance is clearly not narrowly tailored to further that interest. Without a demonstration that the resolution is necessary to further its legitimate goals, we must strike it down as unconstitutionally discriminatory on the basis of religion.

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Since the nation's founding—and especially since the ratification of the Fourteenth Amendment—the United States Constitution has embodied the principle that every person is equal before the law. This ideal is also enshrined within the ASUCI Constitution, as incorporated through the University of California Policy on Nondiscrimination. It is therefore our duty to enforce the Constitution's guarantee of equality. In this case, that means striking down Resolution 52-85 as discriminatory on the basis of religion.

The majority may find no fault in R52-85, seeing it as nothing more than a harmless attempt to ensure that student groups without access to a meeting space are able to secure one. However, as sympathetic as this goal may

be, fundamental First Amendment principles prohibit the resolution from accomplishing that goal by discriminatory means. The majority may consider these principles too rigid or formalistic to be of use in a student government context, but that is no excuse for refusing to apply them. Nondiscrimination analysis is guided by carefully crafted judicial rules, because our own intuitions about what is or is not discriminatory may not live up to the reality that targets of discrimination actually face. Even though the majority may not see the discriminatory message inherent in this resolution, that message is still there. And by upholding the resolution, the Judicial Board becomes complicit in that message.

In light of our moral and constitutional duty to guarantee equality before the law, I cannot join in that complicity. Accordingly, I respectfully dissent.

Aviel Menter, Associate Justice