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Question 1

Dissent – *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005)

The case before us centers around the claim that executives of two Kentucky county courthouses violated the Establishment Clause of the First Amendment by posting a version of the Ten Commandments on the courthouse wall. I agree in full with Justice Scalia's dissent, but wish to emphasize several issues which are implicated by the facts of this case.

Under the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), adherence to the Establishment Clause requires evidence that the government's actions had a secular purpose. One lingering question in this field remains as to whether the development of the presentation should have any bearing on determining whether the government's purpose was secular or religious. The courthouses in question, after initially posting only the Ten Commandments, posted other exhibits relating to Kentucky's "precedent legal code" to satisfy the concerns set forth in the lawsuits filed against them. From my perspective, it should not be dispositive to the constitutional question if secular items were put up concurrently with, or after, the religious item in question. If the courthouses put up secular items after receiving complaints about the Ten Commandments, they are complying with the Constitution to the same degree as they would be had they posted secular materials and the Commandments simultaneously. In both instances, the visible end result of the government's actions is a conglomeration of secular and religious items which do not advance any particular religion. There is no requirement that a party have a certain motivation in comporting with the Constitution, only that they do so. Just as the Court would have nothing to say about a racist government official who begrudgingly hires an African American, the Court should not question the motives behind an administrator of a courthouse who reluctantly, but nonetheless, puts up secular items alongside the Commandments.

The concurrence's parade of horribles results from an incorrect interpretation of the Establishment Clause and a fundamental misunderstanding of history. First, I disagree with Justice O'Connor's concurrence, in which she states that the purpose behind the counties' display "conveys an unmistakable message of endorsement to the reasonable observer." The fact that our currency says "In God we Trust" does not mean that the government requires that everyone using that currency should similarly trust in that same God. Similarly, the fact that the President's speeches usually conclude with "God Bless the United States of America" would not convey to an objective observer that a citizen who does not believe in God is an outcast within the societal or political community. Likewise, the content of the message conveyed by the Commandments should not be inferred to espouse a particular religious view, but rather a moral code applicable in any civilized society to religious and non-religious citizens alike.

Second, I also disagree with Justice O'Connor's contention that a holding in favor of the courthouses effectively says that Americans who do not accept the Commandments' validity are outside the First Amendment protections. As Senator Daniel Patrick Monynihan famously said, "everyone is entitled to his own opinion, but not his own facts." Whether or not one "accepts" the Commandments as a religious symbol or not, no one can reasonably dispute the fact that those Commandments have shaped Western legal traditions, and it is these traditions which the postings in the courthouses represent. For example, the Commandment's teachings that one should neither kill nor steal are unmistakable rationales underlying the penal codes' prohibition of homicide and theft. Similarly, the maintenance of Sunday closing laws is based in part upon the Commandment's instruction to observe the Sabbath. These are not beliefs to "accept," but merely facts to "acknowledge." The courthouse's acknowledgement of these facts does not in itself constitute a violation of the Establishment Clause.

Question 2

The Defense of Marriage Act (DOMA – "Act") achieves its stated purpose by instituting a classification based on one's sexual preferences. Although classifications of this type have consistently been analyzed under the rational basis standard, history alone will not suffice to justify its continued usage. That being said, for several reasons, rational basis review still proves to be the most appropriate standard, because classifications based on sexual preferences do not rise to the level of a suspect, or even a quasi-suspect class, which is afforded heighted scrutiny.

Although the factors in *Lyng v. Castillo*, 477 U.S. 638 (1986) are designed to determine who qualifies for strict scrutiny, their application is also helpful in the intermediate scrutiny to shed light on the absence of several fundamental requirements which entitle certain classes to more exacting scrutiny. Most notably, those homosexual couples to whom the Act applies do not exhibit obvious or immutable characteristics which define them as a distinct group, nor are they politically powerless. There is no evident biological characteristic which separates them from heterosexuals, nor is there is anything genetically immutable, such as race or gender, which is deserving of increased protection. Further, although their sexual orientation distinguishes homosexuals from heterosexuals, allowing such an internal distinction largely swallows the rule. For example, while a person's internal political beliefs separates them intrinsically from others in society who do not share those same political views, one could not reasonably argue that these types of orientations entitle us to constitutional protections of a heightened standard. Similarly, the monetary contributions of GLBT groups to political organizations and candidates, as well as their penchant for grassroots advocacy make members of this classification politically *powerful* rather than politically *powerless*. Classifications based on sexual preferences are more akin to

other classifications such as age and disability, which do not implicate invidious discrimination, and thus do not necessitate the heightened review afforded by intermediate scrutiny.

This Court also believes that the traditional rational basis standard is more appropriate than a hybrid form of rational basis review which more closely scrutinizes government actions impacting minority interests. Such a hybrid standard is amorphous and untested, and thus should neither be memorialized within, nor given the precedential value derived from, an opinion of this high Court. Although one might argue that the traditional rational basis approach would be ineffective at ensuring equal protections for homosexuals, this Court's use of the rational basis standard in previous sexual orientation cases suggests that it is anything but a rubber stamp of approval. In the majority opinion in *Romer v. Evans*, 517 U.S. 620 (1996) and in Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court subjected sexual orientation classifications to a rational basis review. In both instances, the Court noted that the law in question suggested animus on the part of the state, and that such a bare attempt to harm a disfavored group fails the rational basis review. The same level of scrutiny will be applied here, and the classifications in the Act will be constitutional if they serve a *legitimate* state interest and are *reasonably related* to that interest.

Applying the rational basis review to DOMA leads to the conclusion that the Act is constitutional, because it serves legitimate state interests, and is reasonably related to those interests. Under this standard, the classification based on sexual orientation need not be compelling or important, and this Court should not second-guess the wisdom or efficacy of the public policy behind the law. *See Mass. Bd. Retirement v. Murgia,* 427 U.S. 307 (1976). This "legitimate interest" prong is satisfied if the government seeks to achieve goals which are not prohibited by the Constitution, including advancing public safety, health, and morals. Most

notably with regards to DOMA, the government is well within its purview to determine how to allocate public resources, which was upheld as a legitimate interest in *Dandridge v. Williams*, 397 U.S. 471 (1970). Similarly, as is true with laws prohibiting polygamy and prostitution, it is not per se unconstitutional to uphold laws with moral undertones, and similarly, the preservation of traditional marriage is not per se illegitimate. Lastly, as a practical matter, the state has a legitimate interest in recognizing and perpetuating the ability of heterosexual couples to procreate and ensure the continuation of the species. It should be noted that the interests proffered in defense of the Act are distinguishable from those considered inadequate in *Romer*, because while the referendum in *Romer* had the effect of purposefully burdening a politically unpopular group, the interests pursued through the legislative process by DOMA reflect the consideration of how to best allocate federal benefits, and the desire to advance the perpetuation of humankind. Accordingly, the interests served by the classification are legitimate.

The classification based on sexual orientation within DOMA is also reasonably related to achieving those interests. Although there is no clear cut way to determine if a law is reasonably related to a state interest, this Court has stated that because the rational basis review is the most relaxed form of judicial scrutiny, a law will be upheld unless the government's actions are clearly wrong or an exercise of arbitrary power. *See Matthews v. DeCastro,* 429 U.S. 181 (1976). In this case, the classification is not arbitrary, as the definition of marriage as between one man and one woman, especially for taxpayer status, is reasonably related to determining the government proscribed allocation of federal benefits. If for example, federal resources were denied to those with red hair, there would be a persuasive argument that such a classification is not reasonably related to those ends. Furthermore, with regards to the interest of the state to promote procreation, the classification is not only reasonably related to such a goal, but actually

necessary to achieve such a result. While there are likely more narrowly tailored ways, through sexual orientation-neutral alternatives, through which the same results could be attained, DOMA under the rational basis test need not meet that high standard. This Act is therefore constitutional because it serves a legitimate state interest and is reasonably related to that interest.

As an aside, it is important to note that for plaintiff's wishing to assert that DOMA is unconstitutional, an equal protection claim is a better route than a substantive due process claim. The difference between one's individual rights and rights as part of a group relative to other groups is more than mere semantics. Under a substantive due process analysis, the courts would first need to determine if the law implicates a fundamental right. Depending on the level of specificity with which the courts view the definition of marriage under DOMA, challengers could potentially fail to meet even this threshold inquiry. For example, while the general right to marry is universally considered a fundamental right, the right for *homosexuals* in particular to marry is likely not a fundamental right. The Supreme Court, depending on its membership, has on several occasions used a textual or originalist approach in determining which rights are fundamental. By holding a right to be fundamental only if it is "rooted in our history and traditions," the court could determine that the right of same-sex couples to marry has not been historically recognized, and thus is not subject to protection under a substantive due process analysis. Given this risk, it would be more effective for plaintiffs to argue that DOMA is purely a tool to harm a politically unpopular group, which would not meet a rational basis review under an equal protection claim, rather than an infringement on an individual's fundamental rights.

Question 3

The tweets written by Shashank Tripathi are considered "speech" under the First Amendment, and do not fall under any categorical exclusion from free-speech protection. The tweets are clearly "speech," because "speech" is broad enough in this context to include spoken as well as written words and communicative conduct. Just as a handwritten letter or an email would be considered "speech," a tweet would not fail to qualify merely because it takes the form of characters on a social media platform. Furthermore, at their core, the New York statutes criminalize the circulation of false reports which may result in "public alarm" or "inconvenience." There is no doubt that Tripathi's tweets are false, and would fall under this statute, assuming there are no constitutional safeguards. Although the courts have recognized several types of speech which are not protected under the First Amendment, false statements are not contained within any of these categories. Historical First Amendment exceptions include fighting words, incitement, true threats, defamation, and obscenity. False statements regarding the impact of the storm, although certainly in bad taste if done intentionally, and potentially counterproductive to relief efforts, do not fall under these types of unprotected speech. False tweets will be unlikely to provoke an imminent breach of peace or unlawful action, or inflict reputational harm on another person. Similarly, such tweets do not express any intent to commit an unlawful violent act, nor can they be considered obscene material.

The false tweets by Tripathi in this case are analogous to the false statements made by the respondent in *United States v. Alvarez*, 132 S.Ct. 2537 (2012). As the Court in *Alvarez* suggested, if we as a nation are serious about ensuring fundamental free speech rights, some false statements are an inevitable byproduct of the open expression of views. Those statutes which permissibly regulate false speech for the falsity itself, such as those dealing with false

statements made to government officials and perjury, are limited in nature, and not implicated by the tweets in this case. It is unquestionable that the falsity of the tweets, which were picked up by major news outlets and broadcast over a wider audience, have the potential to create alarm to the public and to emergency personnel, but the rights that the First Amendment seeks to guarantee are too fundamental and too ingrained in our democratic system to be uprooted because of a mere "inconvenience." These tweets by Tripathi are speech, and their falsity is not enough in itself to justify any categorical exclusion.

The "likes" on Tripathi's Facebook account by Ryan Callahan are more difficult to designate as "speech," because they are neither spoken nor written words in itself, but rather conduct relating to another person's speech. The "like" by Callahan more appropriately qualifies as expressive and communicative conduct, because rather than typing the word "like" next to Tripathi's comments, or registering his own written commentary, he clicked on an icon which registered his agreement with a pre-existing statement. Protected speech under the First Amendment is broad enough to encompass conduct if it meets two criteria. To be considered "speech," conduct must have: 1) an intent to convey a particular message; and 2) there is a substantial likelihood, given the circumstances, that the message would be understood by others viewing the conduct. An analysis of these factors leads this court to conclude that Callahan's "liking" of Tripathi's Facebook posts is expressive conduct entitled to free-speech protection.

The conclusion that Callahan's conduct is expressive enough to constitute "speech" under these criteria is neither indisputable nor conclusive. It is purely a question of degree as to the particularity that the conduct's message must convey. Similarly, the exactness to which the message understood by spectators of the conduct must correlate with the intention of the communicator is also nebulous. That being said, the Supreme Court's decision in *Texas v.*

Johnson, 491 U.S. 397 (1989) assists this court in concluding that Callahan's "like" of the Facebook comments, although not the traditional communicative conduct envisioned in previous cases, is nonetheless protected First Amendment "speech."

In *Johnson*, the burning of an American flag was found to be a permissive form of expressive conduct. The desecration of the flag was viewed by the Court as a way to convey Johnson's message of dissatisfaction with the government's policies. The Court also noted that this message was understood by those protestors who witnessed the conduct, as they performed similar acts and engaged in speech similarly protesting the government. It is important to note that this dissatisfaction with the government is a broad message – it does not convey any problem with specific policies or government officials – it only a generalized, as opposed to a particularized, message. Nonetheless, the Court in *Johnson* found this to be sufficient to satisfy the first prong of the "conduct-as-speech" criteria. Also, while Johnson's dislike of the American flag was certainly obvious to those around him, the anti-government feelings generated within other protestors by his actions could have indeed been very different than those held by Johnson which led him to engage in that conduct in the first place. Still however, this was sufficient to satisfy the second prong of the criteria in the eyes of the Court.

The example of *Johnson* is given to show that the standard used to designate conduct as "speech" is flexible. Understanding this caveat is essential to the conclusion that Callahan's "like" of the Facebook comments is conduct. First, Callahan's "like" denoted his general agreement with Tripathi's initial comments relating to flooding of the New York Stock Exchange and the entrapment of the Governor. Whether he agreed with these comments because he was an ardent communist who despised the NYSE as the symbol of capitalism or because he was a Republican who enjoyed the plight of a Democratic governor, the fact is that his conduct

of pressing the "like" icon indicated his concurrence with Tripathi's posts. This agreement was clearly conveyed by Callahan's conduct. Similarly, those other Facebook users who read Callahan's "like" were able to contemplate and understand his satisfaction with the posts. Just like the protestors in *Johnson* did not know the exact motivation behind the burning of the flag, the readers of Callahan's "like" did not know the exact motivation behind his agreement with Tripathi's posts. Despite only a generalized understanding of the message and its motivation, the court here should, as it did in *Johnson*, find such conduct sufficient to fall under the purview of the First Amendment. The government's ability to regulate such conduct would effectively prevent Callahan from expressing his satisfaction with comments which only incidentally impact the state's disaster response efforts. Furthermore, this denial of Callahan's ability to agree or disagree with any comments in the marketplace of ideas, for any motivation whatsoever, is exactly the type of government regulation the First Amendment protects against.

For these reasons, both Tripathi's tweets and Callahan's "like" of those statements on Facebook constitute protected speech that should be subjected to a First Amendment analysis.