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Question 1:

In the case of *Employment Division, Dept. of Human Services v. Smith*, 494 U.S. 872 (1990), I concur in judgment only. The strict scrutiny standard of review should still apply in violations of the Free Exercise Clause of the First Amendment. Because the majority abandons this standard, I cannot join in the opinion.

There are two justifications for strict scrutiny in free exercise claims: first, the historical and structural similarities between the Free Exercise Clause and the Equal Protection Clause, and second, the similarities in purpose and scope between the Free Exercise Clause and the Free Speech Clause. The discussion begins with the former.

The history of racial discrimination in this country informed the Court's interpretation of the Fourteenth Amendment to the U.S. Constitution. *Slaughter-House Cases*, 83 U.S. 36 (1873). "The clear and central purpose of the 14th Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1 (1967). To accomplish this historical purpose, the Court has established strict scrutiny review for claimed state violations of the Equal Protection Clause of the Fourteenth Amendment. *Adarand Constructors, Inc.*, 515 U.S. 200 (1995). Broadly speaking, these historical principles apply in the context of freedom of religious exercise.

Within the first few lessons taught in elementary school classes about the history of the United States, students learn that the first English colonizers who came to North America did so to escape religious persecution. In short, the Pilgrims came to this land for the opportunity to practice their religion free from governmental intrusion. As the decades passed, many other religious groups facing persecution (including Catholics and Quakers) came to America for the same reason. This history of the freedom of religion underscores the significance of the explicit

first amendment provision protecting religious exercise. The importance of these two respective principles led to their enumeration as individual rights in the fundamental source of U.S. law, the Constitution. They had to be specifically enumerated because history has shown us how easily these individual liberties may be curtailed by the majority. As these two clauses are designed to protect the freedom of minorities, they should both invite exacting judicial review of potential violations. The opinion, in abandoning this symmetry, leaves hard-fought religious freedoms under-protected.

Free-exercise claims also deserve strict scrutiny as the purpose of protecting religious freedoms is analogous to the protections afforded to free speech. Freedom of thought and speech, according to Justice Cardozo, is "the indispensable condition of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319 (1937). The purpose of this freedom is to support the democratic process and the "marketplace of ideas." With the first-amendment protections of free speech, citizens enjoy individual autonomy, and government may not interfere in the realm of public discourse. This is important because we are a diverse nation; people from many cultures and backgrounds share in our political and social life. Thus, even where government only incidentally regulates speech, the Court applies heightened scrutiny. At minimum, this heightened scrutiny should apply to free exercise claims, as the purpose and policy is similar.

In a nation with a heterogeneous religious landscape, a nation where morality still arguably informs policy making by the government—*See Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia J., dissenting), the purpose of protecting religious minorities from government intrusion should invite strict scrutiny. Laws of general application interfere with religious exercise no less than those laws that directly address religious practice. There are definable

limits to religious conduct just as there are with categories of speech. Protecting religious exercise with strict scrutiny review allows for no more lawlessness than does protecting speech at that level. In conclusion, just as true threats and obscenity (for example) are not afforded constitutional protection, similarly harmful religious practices (e.g., human sacrifice) can and would be restricted.

In conclusion, while I disagree with abandoning strict scrutiny for claimed violations of the Free Exercise Clause, I nevertheless agree with the opinion that the particular exercise of religious conduct in this case is not constitutionally protected. The state has a compelling governmental interest in regulating the health and safety of its population by proscribing the use of drugs. The means employed are narrowly tailored to accomplish this purpose; the state has criminalized the possession and use of those particular substances that it wishes to eliminate. Therefore, as the criminal statute in this case passes strict scrutiny, I find that there is no violation of the petitioners' rights under the Free Exercise Clause of the First Amendment.

Question 2:

Proposal 2, a ballot initiative to amend Michigan's state constitution, requires that all educational institutions and the state itself "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin," in the context of employment, education, and contracting. This proposal was meant to ban affirmative action programs in Michigan. The proposal passed and took effect as of December 2006; thereafter, a group of Michigan citizens challenged the proposal as a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The District Court dismissed the case, the Circuit court reversed. The legal issues involved in the appeal include (1) whether Proposal 2 is a broad denial of equal protection, as was Amendment 2 in *Romer v. Evans*, 517 U.S. 620 (1996), and (2) whether the proposal's classifications pass judicial scrutiny.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A state action must underlie a claimed violation of the Equal Protection Clause; private action is outside the scope of the Fourteenth Amendment. *Civil Rights Cases*, 109 U.S. 3 (1883).

Part I – *Proposal 2 and the amendment at issue in Romer.* In *Romer*, the citizens of Colorado passed a ballot measure stating, in relevant part, that the state—including all state agencies and political subdivisions—was prohibited from enacting, adopting, or enforcing any statute, regulation, ordinance, or policy that recognized or gave any protection to gay and lesbian people. While the State claimed this amendment only abolished special rights or treatment for gay and lesbian people, the Court relied on the Colorado court's interpretation, which concluded that the amendment would repeal existing protections against discrimination based on sexual orientation.

The Court invalidated the amendment, stating "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

In analyzing whether Proposal 2 violates the Equal Protection Clause, many similarities exist between the amendment at issue in *Romer* and the proposal here. Both involve an amendment to the state constitution and are not a product of the legislative or administrative policy-making process. Both amendments implicate state action: e.g., hiring practices at schools and government offices. Considering the merits of the equal protection claim, both seek to abolish providing any preferential treatment based on a particular social classification. At first glance, this last conformity would seemingly resolve the issue; however, a more exacting comparison distinguishes this case from *Romer*.

Amendment 2 abolished legal protections against discrimination, while Proposal 2 addresses the limited scope of beneficial classifications. The *Romer* amendment failed because it "withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination." In contrast, Proposal 2 does nothing to limit protections; in fact, it explicitly provides that the state "shall not discriminate against" the listed groups. Additionally, the discriminatory scope of Amendment 2 included both public and private spheres. The amendment removed protections for gay and lesbian people in the form of anti-discrimination laws in public accommodation, housing, sale of real estate, insurance, health and welfare services, and private education and employment. The scope of Proposal 2 is limited to public education, employment, and contracting.

Also, Amendment 2 singled out a particular class, where Proposal 2 is designed to limit preferential treatment of all classes affected by "affirmative action." The *Romer* amendment

failed because it was "at once too narrow and too broad. It identifie[d] persons by a single trait and then denie[d] them protection across the board." Proposal 2, on the other hand, does not deny protection on the basis of a single trait. Instead, it limits the extension of beneficial "affirmative action" in all cases. In short, the Colorado amendment effectively allowed both private and state actors to discriminate on the basis of sexual orientation, while the Michigan proposal merely requires the state to abandon affirmative action. If the proposal had only removed affirmative action on the basis of sex and allowed affirmative action otherwise, then Michigan would be in the same position as Colorado in *Romer*. As the facts stand, though, the proposal at issue has neither of the unconstitutional deficiencies of the *Romer* amendment. As such, the analysis turns to the usual equal protection review of balancing of governmental interests against the means chosen.

Part II – *Review of the governmental interest and Proposal 2 as the means by which that interest is accomplished.* The analysis here is unique in that the challenged proposal implicates two different standards of review. One, classifications based on race, color, ethnicity, and national origin receive strict scrutiny; "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.*, 515 U.S. 200 (1995). Two, classifications based on a person's sex are afforded intermediate scrutiny; they are constitutional if "the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (internal quotation marks omitted). As Proposal 2 involves classifications of both race and sex, this opinion addresses each issue separately, with the racial component addressed first.

The Proposal 2 classification concerning race, color, ethnicity, and national origin. Not only does Proposal 2 concern two distinct standards of review, the scope of the proposal includes separate spheres that guide this review. First, the proposal applies to racial classifications in education. In *Grutter v. Bolinger*, 529 U.S. 306 (2003), the Court held that states have a compelling interest in attaining a diverse student body. This interest does not entail a school mechanically applying strict statistical admission guidelines, which means would not be narrowly tailored. Rather, the school as a policy took race into account as a "plus factor" that supports a student's admission criteria. In the context of employment and public contracting, the Court has identified remedying past discrimination as a compelling state interest. *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). However, as there is no support from either the state or the plaintiffs, the interest of remedying past discrimination is not applicable in this case. That leaves Proposal 2 as essentially the inverse of the situation in *Grutter*; the stated interest here is ending race-based policies in higher education and public employment.

Thus, while having a diverse student body is a compelling state interest, there is also a compelling interest in self-governance. The sources of the race-based policies at issue are different here and in *Grutter*. In the latter, the Court deferred to the university's policy choices, where the former 2 is the product of a state-wide election. The Court noted in *Grutter* that it tends to defer to a university's policy decisions. Nevertheless, as the public institutions of higher education are ultimately accountable to the state and its citizens, state-wide policy normally trumps any conflicting institutional policy. Finally, acknowledging that policies designed to benefit minorities are not mandatory, although permissible, there is no constitutional violation where the voters of a state have decided to abandon such policies. Although a close call, the

compelling state interest of self-government does outweigh the interest in having a diverse student body.

The means employed in this case, a state-wide abandonment of affirmative action, are narrowly tailored to the state's purpose. As discussed *supra*, the proposal is carefully drafted to accomplish the state's policy goal of discontinuing affirmative action without singling out or overburdening any class of people. Unlike *Romer*, the proposal here applies to all classes that are affected: i.e., those classes that have historically benefitted from affirmative action. Additionally, the proposal does not expose any class to discrimination. Again, as the voters of Michigan apparently were unhappy with the state's affirmative action policy, this proposal concerns only the policy of affirmative action and does not unduly affect classes outside of that realm. Thus, as Proposal 2 both provides a narrowly tailored means to effect the compelling state interest of self-government and does not allow discrimination on the basis of race, the proposal does not violate the Fourteenth Amendment.

The Proposal 2 classification concerning sex. Proposal 2 is a narrowly tailored means to accomplish the compelling state interest of self-government, and not at the expense of infringing on equal protection grounds as to race. As classifications based on sex are subject to a less stringent standard of review than are those based on race, those sections of Proposal 2 applicable to sex classifications are therefore also constitutional.

Conclusion – Proposal 2, while possibly politically unpopular, does not violate the Equal Protection Clause of the Fourteenth Amendment. The Sixth Circuit court is thus reversed, and this case is remanded to the District Court, where summary judgment in favor of the defendants should be granted.

The statute in this case is a content-specific direct suppression of speech. The Calvert statute directly restricts the category of "sexually violent speech." Granted, this category is implicitly defined; the statute identifies only "statements." However, by limiting the relevant statements to those that create a reasonable apprehension of sexual harm, the statute is implying that the relevant statements would be sexual in nature. For that portion of the statute dealing specifically with "statements," the strict-scrutiny standard from *Johnson* would apply. To address briefly the Circuit court's determination that the statute does not "regulate speech" for the purposes of the First Amendment, this statute—while not part of the criminal code—affects the free expression of ideas. Even though Calvert has not outright banned such sexually violent speech, civil commitment is still a powerful disincentive to people who wish to speak about this subject. This noted, the issue of whether this restriction is constitutional is discussed *infra* in Part II of this opinion.

Turning to the statute's restriction of "acts," the issue is whether such conduct is expressive under *Johnson*. First, like the flag burning in *Johnson*, the relevant acts covered by the Calvert statute are identified as those that have an audience. For the statute to apply, there must have been a witness to the particular acts: the necessary "reasonable apprehension of harm" must exist in an objective witness's mind. Thus, the acts at issue here satisfy the second, "likely understandable message," prong of *Johnson*. However, the relevant acts in the statute are defined too broadly to meet the first, "intent to convey," prong. The Court analyzed Johnson's actual conduct and not the statute itself in *Johnson*. *See* n. 2. Here, it is the statute itself that is challenged, not as it was applied. And the statute is applicable to conduct where the actor does not intend to convey a message. For example, a person could be committed if, in the privacy of his home, he engaged in conduct (just what sort of conduct we leave for others' imagination) that

Question 3:

The statute at issue provides, in pertinent part, that "an individual who, through acts or statements, creates a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person" may be civilly committed as a "sexually violent person." This opinion addresses (1) whether the statute implicates the Free Speech Clause of the First Amendment of the U.S. Constitution, and (2) whether the speech restricted by the statute falls into any category of unprotected speech.

The First Amendment provides, in relevant part, that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. This freedom from federal interference was incorporated by the Fourteenth Amendment and made applicable against individual states. Aside from spoken and written statements, conduct can qualify as first amendment speech if (1) the person engaged in that conduct intends to communicate a message and (2) there is a great likelihood that the message would be understood by a person who observes that conduct. *Texas v. Johnson*, 419 U.S. 397 (1989).

Part I – *Whether the Calvert statute implicates the Freedom of Speech.* As the statute applies to both "statements" and "acts," this section will consider the two separately, beginning with the former. Where the state has restricted speech on the basis of its content—where the government bans an entire viewpoint or category of speech—strict scrutiny applies. *Boos v. Barry*, 485 U.S. 312 (1988); *Johnson*. To survive strict scrutiny, the restriction must be narrowly tailored to a compelling state interest. *Id.* Another less-strict standard is applied where a state enacts a content-neutral restriction of speech: where the regulation is unrelated to the suppression of expression. *U.S. v. O'Brien*, 391 U.S. 367 (1968).

creates a reasonable apprehension of harm in a peeping tom who clandestinely watched the conduct. In such a case, this statute would apply even though the person who engaged in the conduct had no intent to communicate a message. Thus, the statute does not meet the first prong of the *Johnson* expressive-conduct test. To conclude: the "acts" portion of the Calvert statute does not restrict expressive conduct and is therefore outside of the free-speech protections of the First Amendment.

Part II – *Bases for allowing the statutory restriction because the speech at issue is unprotected.* The State of Calvert has argued that even though the statute restricts speech, Morgan's statements in this case are actually unprotected speech, which would thus be outside the scope of First Amendment protections. The state's arguments for each of the categories of unprotected speech are taken in turn.

First, the state argues the speech at issue qualifies as incitement. Government can regulate speech that advocates violence when such speech is directed to inciting or producing imminent lawless action and is likely to incite such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Additionally, Morgan's actual statements in no way advocate violence or lawlessness, let alone likely and imminent lawless action. Although he stated that he would be "a serious danger to society," that was his own observation, not an exhortation. The speech here does not qualify as incitement.

Next, the state argues that the speech amounts to fighting words. Speech is unprotected where it is likely to provoke the average person to retaliate violently. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Here, it is unlikely that an average person would want to fight Morgan for approaching law enforcement and begging for help. Such a confession, while

disturbing, is not a strong personal affront that would likely cause a fight. Thus, the statements are not fighting words.

The state most persuasively argues that the statements at issue were true threats. True threats, defined as statements where the speaker intends to communicate a serious expression of an intent to commit an unlawful act of violence against a particular individual or group, is another category of speech not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343 (2003). Morgan, in speaking to the state authorities, intended to covey to them that he was a real threat to children. Morgan asserted he was likely to re-offend, to rape another child. This expression was serious; he pleaded with his audience to act on his warning and lock him up. Because the statements communicate Morgan's serious expression of his "desire, need, want to have sex with children," they constitute a true threat and are therefore not protected under the First Amendment.

Finally, the state argues that Morgan's statements were obscene. Under the three-part test in *Miller v. California*, 413 U.S. 15 (1973), while such speech could possibly be characterized as descriptions of "hard core" sexual conduct, Morgan's statements did not appeal to the prurient interest and they did have value. Morgan was appealing to the agents' sympathies and law enforcement concerns, and the statements were also valuable to his audience for diagnostic purposes. In any event, because the statements fall in the "true threats" category, we do not reach the issue of obscenity as applied in this case.

Conclusion – Morgan's statements and the statute under which he was institutionalized are outside of the scope of first amendment speech protections. Morgan's actual statements are unprotected as true threats, and the statute is constitutional because it regulates conduct. The judgment of the Circuit court is affirmed.