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Romer v Evans / Gays in the Military [2]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To: Jamie Gorelick; From: Chai Feldblum, Georgetown University Law Center; Re: The Employment Non-Discrimination Act of 1994 (ENDA) [partial] (2 pages)	06/16/1994	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Letter, Doug
OA/Box Number: 8292

FOLDER TITLE:

Romer v. Evans / Gays in the Military [2]

2015-0017-F
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



Department of Justice

STATEMENT OF

DEVAL PATRICK

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

CONCERNING

THE EMPLOYMENT NON-DISCRIMINATION ACT

S. 2238

PRESENTED ON

JULY 29, 1994

Mr. Chairman and Members of the Committee, I am pleased to provide this testimony today on the problems addressed by S. 2238, the Employment Non-Discrimination Act of 1994.

On behalf of the President, I want to commend you, Mr. Chairman, your colleagues in the House, Mr. Frank and Mr. Studds, and your more than 130 cosponsors in both chambers, for introducing this bill. It is a serious and thoughtful approach to address the problem of discrimination against gay men and lesbians. Because the President strongly supports the principle of non-discrimination based on sexual orientation, he will sign into law legislation passed by Congress that prohibits discrimination in employment based on sexual orientation.

The President and his Administration have consistently supported the principle of non-discrimination in employment. All Americans should be able to find jobs, keep jobs and earn promotions based on their qualifications and the quality of their work, not on irrelevant characteristics. This has been a core value in this country for many years.

As you know, thirty years ago, Congress enacted the Civil Rights Act of 1964, including Title VII which prohibits discrimination in employment based on race, color, religion, sex

and national origin. In 1967, the Age Discrimination in Employment Act was enacted to protect older Americans. Most recently, in 1990, Congress enacted the Americans with Disabilities Act to extend full civil rights protections to persons with disabilities. All of these are legislative markers on the road to full and productive participation in our free society.

These laws reflect Congress' deepening understanding of the notion that characteristics such as race, religion, sex, age and disability have no relevance to the ability of an individual to perform required functions of a job. Quite often, unfortunately, prejudice and stereotypes held by some employers still limit a gay or lesbian person's ability to obtain and keep a job. But as the President said in Riga, Latvia, recently, "Freedom without tolerance is freedom unfulfilled." In that spirit, this Administration believes the principle of non-discrimination in employment should be extended to include sexual orientation. The Administration wants to work with Congress to enact such a bill to make this principle a reality.

Our Nation prides itself on embracing the principle that persons should be judged based on merit and ability, not on class, culture or other extraneous factors. Our civil rights laws reflect this principle. By allowing employment discrimination on the basis of sexual orientation, our society

cheats itself out of the contributions of very able and talented individuals throughout the Nation. As the international market place becomes increasingly competitive, America does not have the luxury of wasting talent.

The Administration supports using the framework of Title VII to provide protections against discrimination based on sexual orientation. These well known standards -- covering the same employers, using the same standards, and providing the same enforcement mechanisms -- provide employers and employees with solid guidance on the law. S. 2238 takes this sound approach, building on 30 years of Title VII jurisprudence.

S. 2238 makes a number of exceptions to the basic Title VII provisions. The first is for instances of disparate impact. Disparate impact was first recognized as a basis for establishing a violation of Title VII by the U.S. Supreme Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971). In *Griggs*, the Court recognized that a facially neutral practice that appears fair in form but discriminatory in operation, and if not justified by business necessity, is prohibited by Title VII. The Civil Rights Act of 1991 amended Title VII to codify the disparate impact standard. S. 2238, however, explicitly excludes disparate impact as a method of proof in cases of discrimination on the basis of sexual orientation.

The President has always supported, and strongly respects, freedom of religion. The administration supports carefully crafted provisions to insure that civil rights laws do not unduly interfere with that freedom. Title VII excludes religious organizations from the prohibition from discrimination based upon religion. The Employment Non-Discrimination Act respects freedom of religion by providing a broad exemption for religious organizations, an exemption broader than in other employment discrimination laws.

The third distinction from Title VII pertains to benefits. Under Title VII, discrimination in the provision of employee benefits is prohibited. The Employment Non-Discrimination Act, by contrast, would not apply to the provision of employee benefits to an individual for the benefit of his or her partner.

The fourth exception is for members of the armed forces. Title VII does not apply to members of the armed forces. S. 2238 would not apply and would have absolutely no impact on uniformed military employment practices. The Administration agrees with this approach.

The President has consistently opposed the use of quotas in employment discrimination law and his position is no different here. In addition to the exceptions outlined above, S. 2238

explicitly prohibits the use of quotas. The Administration agrees that any bill addressing this issue should rule out the use of quotas.

The notion of providing antidiscrimination protection is not so novel as to be untested in the public and private sectors. Longstanding Federal employment policy prohibits discrimination based on non-job-related conduct, including discrimination based on sexual orientation. We know of nothing in that experience to suggest a loss or reduction in productive capacity or workplace goodwill. Eight states and over 80 local governments provide some form of protection. Indeed, 308 of your colleagues in the House and Senate have pledged not to discriminate in employment based on sexual orientation.

In the private sector, numerous companies such as General Motors, Miller Brewing Company, Citicorp, IBM, and AT&T have policies of non-discrimination based on sexual orientation. A number of these employers also provide the same degree of employee benefits to a person's partner, without regard to sexual orientation.

Until this year, Congress had not heard testimony on the issue of employment discrimination based on sexual orientation in nearly 15 years. I trust that over the course of these hearings you will hear from many witnesses who will document the problems

faced by lesbians and gay men in employment, and that their testimony will build a useful and solid record on the problem of employment discrimination based on sexual orientation. Hearing that testimony should lead you to the same conclusion we have reached: that Congress should pass a bill to embody the principle against discrimination in employment based on sexual orientation.

Mr. Chairman, thank you for the opportunity to testify today. We expect to have some technical comments on the bill, which we would like to supply for the hearing record. Beyond that, we look forward to working with you and the Committee to eliminate employment discrimination based upon sexual orientation.



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Associate Professor of Law

TO: Joel Klein
FROM: Chai Feldblum *CF*
DATE: 3/1/95
RE: ENDA

The LCCR Steering Committee has been meeting recently to prepare for the reintroduction of the Employment Non-Discrimination Act of 1995 (ENDA). I would like to have the group **consider the possibility of dropping all the findings** from the Senate version of ENDA. (The House version never had findings to begin with.)

The **sole reason** I would suggest this change to the coalition is if doing so would ensure that the Administration could endorse the bill. The main concern you raised last time we talked was that the Administration could not, in good conscience, endorse a bill that included findings which imply heightened scrutiny while it was pursuing a vigorous defense of the military ban.

As you know, I don't think that's true as a legal matter, given that the findings are mostly hortatory, not legally binding. In addition, I think it is short-sighted to allow your understandable defense of the military ban to dictate an insistence on rational basis review for gay people. As I have said (often!), I believe DOJ could accept quasi-suspect status as the appropriate constitutional standard for gay people and still defend the military ban. (Just like Rostker v. Goldberg.) If you guys did that, it would take care of your Colorado problem (because you then could easily submit an amicus brief in the Supreme Court in good conscience), you would be more honest as constitutional lawyers (since an unbiased legal analysis should indicate that heightened scrutiny is appropriate), and you could still say honestly that you are defending the military ban.

But, if you continue to insist on rational basis review, the Administration should still be able to endorse ENDA upon reintroduction. And, if it takes dropping the findings that imply heightened scrutiny to get that endorsement from you, I would like to try to do that.

What we need, though, is to find out whether dropping the findings **will**, in fact, gain the Administration's endorsement. Obviously, the LCCR group will not agree to drop the findings unless they have some guarantee they will get something back in return from the Administration.

The next LCCR meeting, on which I expect we will vote on the final draft, is scheduled for **Friday, March 10th** at 10:00 a.m. So I think we would need to know by then whether the Administration would be willing to endorse the bill if the findings were dropped. Is it possible to get a decision by then?

Also, we've made a bunch of other changes that you folks should like. Attached is a short description of those changes and the actual bill, as revised.

Thanks for your attention to this, Joel.

cc. Ralph Neas, LCCR
Daniel Zingale, HRCF



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Associate Professor of Law

CHANGES TO ENDA OF 1995

1. Religious Exemption: Section 7(b) has been changed to state that ENDA applies only to employees of religious organizations who perform solely for-profit activities. This change was made to accommodate the concerns of several religious organizations because the previous language implied that an employee who worked in both for-profit and not-for-profit activities would be covered by ENDA.
2. Coverage of Congress: The procedures and remedies available to congressional employees under section 9(b) now reflect those available under the Congressional Accountability Act of 1995.
3. Punitive Damages Against the Government: In accord with the Civil Rights Act of 1991, the United States no longer is liable for punitive damages under section 10(b).
4. Definition of Sexual Orientation: The definition of "sexual orientation" in section 19(12) is now simply "lesbian, gay, bisexual or heterosexual." The prohibition on discrimination based on either real or perceived sexual orientation has been preserved in section 3. The new definition tracks the approach of most state laws prohibiting discrimination on the basis of sexual orientation and removes the descriptive phrase "as manifested by identity, acts, statements, or associations." This phrase had given rise to bogus arguments that employers would be required to treat sexual misconduct by gay employees differently than sexual misconduct by heterosexual employees. The removal of the phrase does not change the coverage of the bill.

103D CONGRESS
2D SESSION

S. 2238

To prohibit employment discrimination on the basis of sexual orientation.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JUNE 7), 1994

Mr. KENNEDY (for himself, Mr. CHAFEE, Mr. AKAKA, Mr. JEFFORDS, Mr. BINGAMAN, Mr. PACKWOOD, Mrs. BOXER, Mr. BRADLEY, Mr. DODD, Mr. FEINGOLD, Mrs. FEINSTEIN, Mr. GLENN, Mr. HARKIN, Mr. INOUE, Mr. KERRY, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. LIEBERMAN, Mr. METZENBAUM, Ms. MIKULSKI, Ms. NOSELEY-BRAUN, Mr. MOYNIHAN, Mrs. MURRAY, Mr. PELL, Mr. RIEGLE, Mr. ROBS, Mr. SARBANES, Mr. SIMON, and Mr. WELLSTONE) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

A BILL

To prohibit employment discrimination on the basis of sexual orientation.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Employment Non-
5 Discrimination Act of 1994".

6 **SEC. 2. ~~FINDINGS AND PURPOSES.~~**

7 (a) ~~FINDINGS.~~ The Congress finds that—

Changes as of
3/1/95

The deletion of
findings is contingent
on a positive
Administration response.
Otherwise, no change re findings.

(1) an individual's sexual orientation bears no relationship to the individual's ability to contribute fully to the economic and civic life of society;

(2) historically, American society has tended to isolate, stigmatize, and persecute gay men, lesbians, and bisexuals;

(3) one of the main areas in which gay men, lesbians, and bisexuals face discrimination is employment;

(4) employment discrimination on the basis of sexual orientation violates fundamental American values of equality and fairness;

(5) the continuing existence of employment discrimination on the basis of sexual orientation denies gay men, lesbians, and bisexuals equal opportunity in the workplace and affects interstate commerce;

(6) individuals who have experienced employment discrimination on the basis of sexual orientation often lack recourse under Federal law; and

(7) gay men, lesbians, and bisexuals have historically been excluded from full participation in the political process, comprise a discrete and insular minority, and have historically been subjected to purposeful unequal treatment based on characteris-

ties not indicative of their ability to participate in or contribute to society.

~~(b) PURPOSES~~—It is the purpose of this Act—

(1) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation;

(2) to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation; and

(3) to invoke congressional powers, including the powers to enforce the 14th amendment to the Constitution and to regulate commerce, in order to prohibit employment discrimination on the basis of sexual orientation.

SEC. 3. DISCRIMINATION PROHIBITED.

A covered entity, in connection with employment or employment opportunities, shall not—

(1) subject an individual to different standards or treatment on the basis of sexual orientation;

(2) discriminate against an individual based on the real or perceived sexual orientation of persons with whom such individual is believed to associate or to have associated; or

(3) otherwise discriminate against an individual on the basis of sexual orientation, real or perceived.

SEC. 4. BENEFITS.

This Act does not apply to the provision of employee benefits to an individual for the benefit of his or her partner.

SEC. 5. NO DISPARATE IMPACT.

The fact that an employment practice has a disparate impact, as the term "disparate impact" is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of sexual orientation does not establish a prima facie violation of this Act.

SEC. 6. QUOTAS AND PREFERENTIAL TREATMENT PROHIBITED.

(a) QUOTAS.—A covered entity shall not adopt or implement a quota on the basis of sexual orientation.

(b) PREFERENTIAL TREATMENT.—A covered entity shall not give preferential treatment to an individual on the basis of sexual orientation.

SEC. 7. RELIGIOUS EXEMPTION.

(a) IN GENERAL.—Except as provided in subsection (b), this Act shall not apply to religious organizations.

(b) FOR-PROFIT ACTIVITIES.—This Act shall apply to a religious organization's for-profit activities subject to taxation under section 511(a) of the Internal Revenue Code of 1986 as in effect on the date of the enactment of this Act.

the relationship between a religious organization and an employee of that organization whose job pertains solely to the for-profit activities of the organization

SEC. 8. NON-APPLICATION TO MEMBERS OF THE ARMED FORCES; VETERANS' PREFERENCES.

(a) ARMED FORCES.—

(1) For purposes of this Act, the term "employment or employment opportunities" does not apply to the relationship between the United States and members of the Armed Forces.

(2) As used in paragraph (1), the term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(b) VETERANS' PREFERENCES.—This Act does not repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans.

SEC. 9. ENFORCEMENT.

(a) ENFORCEMENT POWERS.—With respect to the administration and enforcement of this Act—

(1) the Commission and the Librarian of Congress shall have the same powers, respectively, as the Commission and the Librarian of Congress have to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.);

(2) the Attorney General of the United States shall have the same powers as the Attorney General has to administer and enforce such title; and

(3) the district courts of the United States shall have the same jurisdiction and powers as such

courts have to enforce such title and section 309 of the Civil Rights Act of 1991 (2 U.S.C. 1209).

(b) PROCEDURES AND REMEDIES.—The procedures and remedies applicable to a claim for a violation of this Act are as follows:

(1) For a violation alleged by an individual, other than an individual specified in paragraph (2) or (3), the procedures and remedies applicable to a claim brought by an individual for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall apply.

(2) For a violation alleged by an employee of the House of Representatives ~~or of an instrumental-~~
~~ity of the Congress, the procedures and remedies ap-~~
~~plicable to a claim by such employee for a violation~~
~~section 201(a)(1) of the Congressional~~
~~of section 117 of the Civil Rights Act of 1991 (2~~
~~U.S.C. 601) shall apply.~~ *Accountability Act of 1995.*

(3) For a violation alleged by an employee of the Senate, the procedures and remedies applicable to a claim by such employee for a violation of section 302 of the Civil Rights Act of 1991 (2 U.S.C. 1202) shall apply.

SEC. 10. STATE AND FEDERAL IMMUNITY.

(a) STATE IMMUNITY.—A State shall not be immune under the 11th amendment to the Constitution of the

United States from an action in a Federal court of competent jurisdiction for a violation of this Act. In an action against a State for a violation of this Act, remedies (including remedies at law and in equity) are available for the violation to the same extent as such remedies are available in an action against any public or private entity other than a State.

(b) LIABILITY OF THE UNITED STATES.—The United States shall be liable for all remedies under this Act, *except for punitive damages,* to the same extent as a private person and shall be liable to the same extent as a nonpublic party for interest to compensate for delay in payment.

SEC. 11. ATTORNEYS' FEES.

In any action or administrative proceeding commenced pursuant to this Act, the court or the Commission, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee, including expert fees and other litigation expenses, and costs. The United States shall be liable for the foregoing the same as a private person.

SEC. 12. RETALIATION AND COERCION PROHIBITED.

(a) RETALIATION.—A covered entity shall not discriminate against an individual because such individual opposed any act or practice prohibited by this Act or because such individual made a charge, assisted, testified,

1 or participated in any manner in an investigation, proceed-
2 ing, or hearing under this Act.

3 (b) COERCION.—A person shall not coerce, intimi-
4 date, threaten, or interfere with any individual in the exer-
5 cise or enjoyment of or on account of his or her having
6 exercised, enjoyed, assisted, or encouraged the exercise or
7 enjoyment of, any right protected by this Act.

8 SEC. 13. POSTING NOTICES.

9 A covered entity shall post notices for employees, ap-
10 plicants for employment, and members describing the ap-
11 plicable provisions of this Act, in the manner prescribed
12 by, and subject to the penalty provided under, section 711
13 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

14 SEC. 14. REGULATIONS.

15 The Commission shall have the authority to issue reg-
16 ulations to carry out this Act.

17 SEC. 15. RELATIONSHIP TO OTHER LAWS.

18 This Act shall not invalidate or limit the rights, rem-
19 edies, or procedures available to an individual claiming
20 discrimination prohibited under any other Federal law or
21 any law of a State or political subdivision of a State.

22 SEC. 16. SEVERABILITY.

23 If any provision of this Act, or the application of such
24 provision to any person or circumstance, is held to be in-
25 valid, the remainder of this Act and the application of such

1 provision to other persons or circumstances shall not be
2 affected thereby.

3 SEC. 17. EFFECTIVE DATE.

4 This Act shall take effect 60 days after the date of
5 the enactment of this Act, and shall not apply to conduct
6 occurring before such effective date.

7 SEC. 18. DEFINITIONS.

8 As used in this Act—

9 (1) the term "commerce" has the meaning
10 given such term in section 701(g) of the Civil Rights
11 Act of 1964 (42 U.S.C. 2000e(g));

12 (2) the term "Commission" means the Equal
13 Employment Opportunity Commission established by
14 section 705 of the Civil Rights Act of 1964 (42
15 U.S.C. 2000e-4);

16 (3) the term "covered entity" means an em-
17 ployer, employment agency, labor organization, joint
18 labor-management committee, an entity to which
19 section 717(a) of the Civil Rights Act of 1964 (42
20 U.S.C. 2000e(a)) applies, an employing authority of
21 the House of Representatives, an employing office of
22 the Senate, or an instrumentality of the Congress;

23 (4) the term "employee of the Senate" has the
24 meaning given such term in section 301(c) of the
25 Civil Rights Act of 1991 (2 U.S.C. 1201(e));

(5) the term "employer" has the meaning given such term in section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b));

(6) the term "employment agency" has the meaning given such term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c));

(7) the term "employment or employment opportunities" includes job application procedures, hiring, advancement, discharge, compensation, job training, or any other term, condition, or privilege of employment;

(8) the term "instrumentalities of the Congress" has the meaning given such term in section 117(b)(4) of the Civil Rights Act of 1991 (2 U.S.C. 601(b)(4));

(9) the term "labor organization" has the meaning given such term in section 701(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d));

(10) the term "person" has the meaning given such term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a));

(11) the term "religious organization" means—

(A) a religious corporation, association, or society; or

(B) a college, school, university, or other educational institution, not otherwise a religious organization, if—

(i) it is in whole or substantial part controlled, managed, owned, or supported by a religious corporation, association, or society; or

(ii) its curriculum is directed toward the propagation of a particular religion;

(12) the term "sexual orientation" means lesbian, gay, bisexual, or heterosexual orientation, ~~real or perceived, as manifested by identity, acts, statements, or associations,~~ and

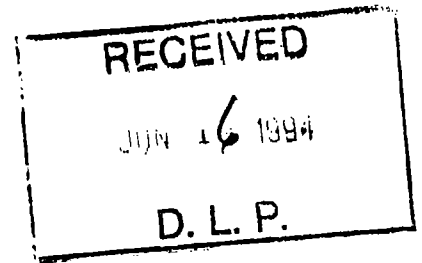
(13) the term "State" has the meaning given such term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

○



GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

Judith C. Areen
DeanChai R. Feldblum
Associate Professor of Law
Director
R. Scott Foster
Teaching Fellow

MEMORANDUM

TO: Jamie Gorelick

FROM: Chai Feldblum *CF*

RE: The Employment Non-Discrimination Act of 1994 (ENDA)

DATE: June 16, 1994

I talked with George Stephanopoulos yesterday about whether the Administration would be able to focus soon on the gay employment anti-discrimination bill so that we could have an Administration position -- of support, I hope -- when the bill is introduced in Congress next week. George mentioned he would be meeting with you today on this issue (and I assume others) and would know more after that meeting. I told him I would send you a brief memo on the bill, with some information.

As you may know, the Leadership Conference on Civil Rights endorsed the proposed bill last week. Ralph Neas and others have met with Deval Patrick and have shared with him the proposed language of the bill. I've talked with Bill Yeomans and Kerry Scanlon in the Civil Rights Division a few times about technical issues in the bill, but obviously, we're waiting for an official Administration position on the bill before we engage in any full-scale work together. In terms of any meeting, though, I believe Deval and others in his shop are basically familiar with the proposed bill at this point.

I'm sending over a series of questions and answers that we put together describing provisions of the bill. **These Q&A's are not yet public**, as we're still working on them. They might be useful for you, though, as a general description of the bill.

I would also note for you the following points about the bill:

* **The bill focuses just on employment discrimination.** This is consistent with the approach in other civil rights struggles, where just one arena was addressed first. (For example, in disability, discrimination in private housing was addressed before other areas were dealt with.)

* **The bill does not affect the military ban.** We did this by exempting the relationship between the United States government and members of the Armed Forces from the bill. (Section 8 in the Senate bill.) The reason for this is obvious.

* **There is a broad religious exemption in the bill.** This exemption is much broader than the one that currently exists in Title VII. For purposes of the civil rights coalition (and specifically, for purposes of the women's groups), it is important to state that this broad exemption is not in the bill because religious groups should not be expected to comply with civil rights laws generally -- but because this is a particular political problem around the issue of sexual orientation. This broad exemption was one of the very hard compromises for the gay community to swallow (it took lots of memos and conversations), but having it in the bill up-front obviously makes the Administration's position of support a lot easier.

* **The bill does not mandate the provision of health or other benefits to same-sex partners.** This was the second major compromise accepted by the gay community. To be honest, I initially argued that we could not, in good conscience, introduce a bill that did not mandate benefits, even if we ended up losing it down the line. I ultimately changed my mind and wrote a memo to the community putting forth reasons not to mandate benefits in the bill. While that position prevailed, it is important to note that we continue to believe denial of benefits to partnered couples is a form of employment discrimination. In the big picture, however, we believe it is smarter to address this issue on a voluntary basis. Again, this compromise up-front should help the Administration.

* **The bill does not allow a "disparate impact" claim.** One of the major controversies hindering passage of the Civil Rights Act of 1991 was the allegation that the existence of a disparate impact claim in Title VII (i.e., the ability to bring a claim because a neutral practice results in a statistical disparity between the number of qualified African-Americans, women, etc. in the workforce compared to the number of such qualified individuals in the relevant applicant pool) inevitably would force employers to engage in preferential treatment, and even quotas, in order to make their statistics look better. "This is a quota bill" almost killed the Civil Rights Act of 1991.

In order to avoid this political trap, ENDA **excludes the possibility of bringing a disparate impact claim.** So, in direct contrast to Title VII -- which was amended by the Civil Rights Act of '91 to explicitly **include** a disparate impact claim -- ENDA explicitly states that a disparate impact claim may **not** be brought. (Section 5 of the Senate bill.) This is not of huge legal concern to the gay community because disparate impact claims necessarily depend on the use of statistics -- and it is hard to do statistical analysis of the

percentage of gay people in a workforce, while respecting privacy.¹

* **The bill explicitly prohibits the use of quotas.** Both in response to the quota concerns raised during the Civil Rights Act of '91 debate -- and because of the "special rights" rhetoric raised against gay people all the time -- ENDA explicitly states that employers may not voluntarily adopt quotas or be mandated by a court to adopt quotas. This is ultimately probably not that different from Title VII caselaw.

* **The bill explicitly prohibits the use of preferential treatment.** There was significant debate over including this provision. It ultimately went in in order to ensure the strongest political defense of the bill. I.e., in response to the rhetoric that gay people want "special rights" (which is a sickening discussion in the first place), the bill explicitly prohibits preferential treatment on the basis of sexual orientation -- even when **voluntarily** undertaken by an employer. This is **different** from Title VII -- where, for example, an employer is allowed to voluntarily grant preferential treatment to African-Americans to make up for past discrimination. So, again, this is a significant compromise.

This bill is the result of about 18 months of work. For the first 12 months, we developed an omnibus bill -- including employment, housing, public accommodations, and governmental services. For the past 6 months, we have been working on the employment-only bill, refining various aspects of the bill. While obviously we would love to have an omnibus bill, having this bill pass will make an incredible difference in our lives as gay people. The area of employment discrimination is one of critical concern to gay men and lesbians. And (lucky for us!) this is one area where public polls demonstrate strong support for giving protection to gay men and lesbians. So, it's been **quite** a different experience working this issue on the Hill over the past few months, as compared to my experience on the military ban issue.

One of the most remarkable aspects of this work has been the coalition effort with the range of civil rights groups -- gender, race, disability etc. That is a marked change from the way an omnibus gay and lesbian civil rights bill has been developed and introduced for the past 15 years. For me, it is reminiscent of my work on the Americans with Disabilities Act -- in which a similar broad coalition was formed and in which, similarly, the ADA was an LCCR legislative priority. Having the then-Bush Administration support the ADA was critical to its success. Obviously, we're looking for similar current-Administration support for the civil rights push on this final issue of sexual orientation.

¹ Actually, one can do a statistical analysis of the number of **openly** gay people in the workforce vs. the relevant applicant pool -- but given the political need not to have a disparate impact claim, I haven't pushed this point. But there is a compromise here.

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THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

QUESTIONS AND ANSWERS

GENERAL QUESTIONS

1. Who will be protected under the Employment Non-Discrimination Act of 1994 ("ENDA")?

ENDA will protect heterosexuals, homosexuals (gay men and lesbians), and bisexuals from discrimination in the workplace based on sexual orientation.

2. What does ENDA do?

ENDA prohibits an employer from using an individual's sexual orientation as the basis for adverse or different treatment in employment or employment opportunities.

3. Why is ENDA necessary?

ENDA is necessary because gay men, lesbians, and bisexuals face serious discrimination in employment, ranging from being fired from a job, being denied a promotion, or experiencing harassment on the job.

4. Why does ENDA focus on employment discrimination?

Gay men, lesbians, and bisexuals face serious discrimination in employment, which strikes at the core of an individual's ability to participate in our society. A February 1994 Newsweek poll showed that "74% of all Americans favor protecting gays from job discrimination." A Mellman, Lazarus, Lake poll taken during the same period showed that 76% of those polled "believe that people should not be fired or discriminated against for being gay." ENDA addresses this critical issue of employment discrimination.

5. Who supports the principle of combatting anti-gay job bias?

Numerous civil rights and religious organizations have issued statements, or adopted policies, against anti-gay job bias. The Leadership Conference on Civil Rights, an organization of over 160 civil rights groups, has endorsed ENDA.

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EMPLOYERS/COVERED ENTITIES

6. What employers are covered by ENDA?

ENDA covers the same entities that the employment section of the Civil Rights Act of 1964 ("Title VII") covers. Federal, state and local governments, labor unions, and employment agencies are all covered under this bill, as they are under Title VII.

7. Does ENDA have a small business exemption?

Yes. ENDA does not cover employers with fewer than 15 employees.

8. Is the federal government covered under ENDA?

Yes. The federal government, and other state and local governmental entities, are covered in their capacity as employers.

9. Is the military covered under ENDA?

No. ENDA does not apply to the relationship between the United States government and members of the Armed Forces. Thus, this bill does not affect the existing military ban on gay men, lesbians, and bisexuals.

10. Is Congress covered under ENDA?

Yes. The Senate and the House of Representatives are covered under this bill, in the same manner in which Congress is covered under Title VII. This means the requirements of the law apply equally to Congress, with special enforcement mechanisms established separately for the House of Representatives and the Senate.

11. Are religious entities covered under the ENDA?

No. ENDA exempts all religious corporations, associations, and societies. ENDA also exempts educational institutions substantially owned, managed, controlled, or supported by religious organizations, or educational institutions whose curriculum is directed to the teaching of religious doctrine.

ENDA covers employment decisions related to a religious organization's for-profit activities which are subject to taxation (because they are substantially unrelated to religious purposes).

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To: Jamie Gorelick; From: Chai Feldblum, Georgetown University Law Center; Re: The Employment Non-Discrimination Act of 1994 (ENDA) [partial] (2 pages)	06/16/1994	b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Letter, Doug
OA/Box Number: 8292

FOLDER TITLE:

Romer v. Evans / Gays in the Military [2]

2015-0017-F
sb1241

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

~~CONFIDENTIAL~~ DRAFT -- JUNE 16, 1994EVIDENCE OF DISCRIMINATION AGAINST GAYS, LESBIANS AND BISEXUALS12. Is there really a problem with discrimination against gay men and lesbians in employment? Can't gay people do well in their jobs as long as they don't insist on making a big deal of their sexuality?

Many gay men, lesbians, and bisexuals can "pass" as straight in the workplace. Numerous surveys show that most gay people choose that strategy because they fear discrimination. But this strategy also puts gay people at a disadvantage when they cannot interact socially with their co-workers and supervisors in an equal way. Lesbians and gay men want to be as open about their sexual orientation as are heterosexual workers who have pictures of their spouses and families on their desks or who talk about their weekend dates. And "passing" is not a good substitute for assurances of nondiscrimination: studies show that passing increases stress and even reduces productivity for gay workers. Gay men, lesbians, and bisexuals who choose not to "pass" are often subject to discrimination on the job.

13. Do gay men, lesbians, and bisexuals who are honest about their lives really encounter discrimination?

Yes. Consider the following examples:

(b)(6) worked for a federal government agency. When a co-worker viciously and repeatedly harassed (b)(6) for being gay, he reported the harassment to his supervisors, but they refused to intervene. One day his tormenter cornered (b)(6) and beat him unconscious. The agency fired (b)(6)'s attacker, but other co-workers kept up the harassment for several years. Eventually, (b)(6) suffered a mental breakdown. When (b)(6) filed a federal court action under Title VII of the 1964 Civil Rights Act, he lost. The court noted that if the harassment had been based on sex or race, (b)(6) would have the right to sue and to prove his allegations. But the court dismissed (b)(6)'s case, ruling that federal law does not prohibit job discrimination based on sexual orientation.

(b)(6) worked as a warehouse overseer in New Hampshire. His work was excellent: he met and surpassed shipping quotas, reduced costs, and was given additional responsibilities, raises, and bonuses. After a year on the job, (b)(6) began to "come out" privately to a few of the other managers. A little while later, without warning, the director of operations called (b)(6) in, told him he was "not the man for the job," gave him a final paycheck, and escorted him off the premises. The company gave (b)(6) no other explanation for his firing; a fellow manager corroborated (b)(6)'s belief that he was fired for being gay.

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(b)(6) 001 is heterosexual. When the Tampa, Florida, bar where she worked as a waitress decided to target lesbian and gay customers, the bar fired all of its heterosexual staff, including (b)(6) 001. The Tampa lesbian and gay community learned about the bar's actions and staged a boycott; the bar subsequently went out of business.

(b)(6) 002 worked for Cracker Barrel Old Country Store in an Atlanta suburb. In 1991, Cracker Barrel issued a written policy against employing individuals "whose sexual preferences fail to demonstrate normal heterosexual values." When Cracker Barrel learned of (b)(6) 002's sexual orientation, they fired her. Her separation notice reads: "This employee is being terminated due to violation of company policy. The employee is gay." Cracker Barrel has fired more than a dozen employees because of their sexual orientation.

(b)(6) 003 works as a florist. At a recent job interview, his prospective employer asked whether the friend waiting to take him home was his "girlfriend." (b)(6) 003 said yes and got the job. At work, co-workers regularly made homophobic remarks. Nevertheless, (b)(6) 003 got positive reviews and raises, until his employer learned he was gay. Soon afterwards, (b)(6) 003's employer altered his job responsibilities and cut his hours so much that (b)(6) 003 lost his eligibility for health insurance. At that point (b)(6) 003 quit.

In addition to these individual cases, a survey conducted by the American Association of Physicians for Human Rights reported that 17% of lesbian, gay, and bisexual physicians were refused medical privileges, fired or denied employment, educational opportunities, or a promotion because of their sexual orientation.

14. Don't lesbians and gay men have higher per capita incomes when compared to other minority groups?

No. This myth of gay affluence comes from the misuse of marketing surveys that were never intended to describe the economic status of all lesbians and gay men. Those surveys are biased toward individuals with high incomes and do not take into account other important personal characteristics that affect earnings. More reliable data sources give a very different economic picture of lesbian, gay, and bisexual people. A recent study used a random sample from the U.S. population to compare behaviorally gay or bisexual people with heterosexuals who had the same race, sex, education, experience, location, and occupations. In that study, gay and bisexual men earned 11% to 27% less than otherwise similar heterosexual men. Lesbian and bisexual women in this sample earned from 5% to 14% less than heterosexual women. Those results show that discrimination against lesbians, gay men, and bisexuals also comes with an economic penalty -- lower earnings.

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BASES FOR CLAIMS/RELIEF

15. What actions of an employer are covered under ENDA?

ENDA covers an employer's decisions regarding employment and employment opportunities, such as hiring, firing, promotion, training or compensation. Such decisions may not be made on the basis of an individual's sexual orientation.

16. What would an individual have to show to prove discrimination?

ENDA adopts the same standards for proving intentional discrimination as have been used under Title VII. However, ENDA does not allow an individual to bring a traditional "disparate impact" claim -- that is, a claim that a facially neutral practice of the employer has a disproportionate adverse effect on persons of a particular sexual orientation. Thus, the standards for proving a "disparate impact" claim under Title VII do not apply to ENDA.

17. What is a traditional "disparate impact" claim?

A traditional disparate impact claim relies heavily on statistics. A plaintiff will usually compare the percentage of individuals of a particular gender, race, or ethnicity in an employer's workforce with the percentage of such individuals in the pool of qualified applicants. If there is a significant disparity between the percentages, the plaintiff may argue that one or more of the employer's seemingly neutral employment practices causes the adverse effect on the hiring of such individuals. If the plaintiff makes out this case, the employer must then show that the challenged employment practice is job-related and consistent with business necessity.

In the Civil Rights Act of 1991, Congress codified this "disparate impact" claim under Title VII.

ENDA explicitly states that the fact that an employment practice has a disparate impact (as that term is defined in the Civil Rights Act of 1991) on the basis of sexual orientation does not establish a prima facie violation of the law and, thus, that the employer has no burden to justify that practice.

18. Why are traditional disparate impact claims not allowed under ENDA?

The exclusion of a disparate impact claim from ENDA results from the fact that traditional statistical analysis, which lies at the core of most race or gender disparate impact claims, does not fit easily in the context of sexual orientation discrimination. Privacy concerns would ordinarily foreclose an accurate statistical count of gay men,

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lesbians, bisexuals, and heterosexuals in an employer's workforce and in the qualified applicant pool.

19. What kind of relief is available under this bill?

ENDA incorporates the enforcement mechanisms and remedies of Title VII. This means a plaintiff may receive injunctive relief, such as reinstatement in a job and/or back pay. A plaintiff may also get monetary damages to the extent allowed under Title VII.

NO QUOTAS/NO SPECIAL RIGHTS**20. What does the exclusion of a disparate impact claim under ENDA mean for employer concerns about quotas?**

It should alleviate any possible concern about quotas. During passage of the Civil Rights Act of 1991, some members of the business community argued that the right to bring a discrimination claim on the basis of statistics inevitably forced employers to adopt quotas on the basis of characteristics such as race and gender. Regardless of the merits of that claim, the underlying basis for that concern (the existence of a "disparate impact" claim) is not present in ENDA.

21. Does ENDA require quotas? Does ENDA allow quotas?

No. ENDA explicitly states that employers may not adopt quotas on the basis of sexual orientation.

22. Still, won't this bill give gay people special rights over heterosexuals?

No. The ENDA does not provide special rights to anyone -- not to gay men, lesbians, bisexuals, or heterosexuals. Indeed, the bill explicitly **prohibits** the use of preferential treatment on the basis of sexual orientation.

23. Will this bill adversely affect the employment opportunities of other racial, religious, ethnic, or gender minorities?

No. The bill ensures simply that a person of any race, religion, ethnicity or gender is not discriminated against on the basis of his or her sexual orientation. ENDA does not grant more rights to individuals on the basis of sexual orientation than Title VII grants to individuals on the basis of race, sex, religion, or national origin, or that the ADA grants to individuals on the basis of disability.

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BENEFITS

24. Does this bill address the problem that lesbians and gay men have in obtaining health benefits for their partners and children?

No. The denial of health and other benefits to the life partners of lesbians and gay men is a significant form of employment discrimination against gay people. Because benefits constitute almost a third of the cost of an employee, a gay person who is denied benefits for his or her life-partner is essentially being paid less than a heterosexual person who receives benefits for his or her spouse. This is a classic form of employment discrimination.

Nevertheless, ENDA does not take on the struggle regarding provision of benefits. Rather, the bill explicitly does not apply to the provision of benefits to an individual's partner.

Of course, employers remain free to provide benefits to their employees' same-sex partners if they wish to do so. More and more companies across the country are discovering it makes good business sense to extend such benefits to their gay and lesbian employees. This trend will be encouraged and nurtured by those opposed to employment discrimination on the basis of sexual orientation.

MISCELLANEOUS QUESTIONS

25. Does ENDA protect people who associate with gay men and lesbians from discrimination in the workplace?

Yes. Like the Fair Housing Amendments Act and the ADA, which prohibit discrimination against those who associate with people with disabilities, ENDA prohibits employers from discriminating against people who associate with gay men, lesbians, and bisexuals. Straight people, including parents and siblings of gay men, lesbians, and bisexuals, are often subject to harassment and other job discrimination because of their association with their gay family member or gay friend.

26. If this legislation becomes law, will employers still be able to require gender appropriate clothing on the job?

Yes. Under ENDA, an employer may require gender appropriate clothing on the job - as long as all individuals (gay men, lesbians, bisexuals, and heterosexuals) are required to wear gender appropriate clothing.

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Of course, requiring men and women to conform strictly to stereotypical views of male and female roles may violate Title VII as a form of sex discrimination. It would not, however, be a violation of this bill.

27. Why does the bill need to protect people who are perceived to be gay?

Individuals who are perceived to be gay, but who are not actually gay, face the same discrimination experienced by gay men, lesbians and bisexuals. Therefore, it is necessary for ENDA to cover these individuals. This is identical to the ADA, which protects people who are perceived to have disabilities.

28. Would this be the first law in the country to outlaw employment discrimination on the basis of sexual orientation? Are we breaking new ground with this law?

No. Eight states currently have laws that prohibit employment discrimination on the basis of sexual orientation. Wisconsin, the first state to pass such a law, did so in 1982. The other states that have anti-discrimination laws on the basis of sexual orientation are: California -- 1992; Connecticut -- 1991; Hawaii -- 1991; Massachusetts -- 1989; Minnesota -- 1993; New Jersey -- 1992; and Vermont -- 1992.

There are also at least 88 localities that have laws or ordinances prohibiting employment discrimination on the basis of sexual orientation. In addition, at least 39 cities or counties in the United States have council or mayoral proclamations banning discrimination based on sexual orientation in public employment.

29. If there are so many laws prohibiting employment discrimination on the basis of sexual orientation, why do we need this law?

We need a federal law in order to ensure comprehensive and consistent protection against discrimination on the basis of sexual orientation in employment. Most states and localities do not provide any protection against such discrimination. Indeed, in some states, the ability even to pass such laws is being threatened by ballot initiatives that would make it illegal to prohibit discrimination on the basis of sexual orientation.

30. What has been the experience in those states that have anti-discrimination laws? Have there been a flood of lawsuits?

The eight states forbidding sexual orientation discrimination in employment have had relatively low numbers of complaints filed. For instance, in 1993, the peak year for such complaints, only 90 people filed employment discrimination complaints alleging sexual orientation discrimination with the state of Massachusetts. This category

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accounted for only 2% of all complaints filed with the Massachusetts Commission
Against Discrimination.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JANE ABLE, et al.,

Plaintiffs,

v.

UNITED STATES, et al.,

Defendants.

Civil Action No.
CV94-0974
(Nickerson, J.)

DEFENDANTS' MEMORANDUM OF LAW ON THE APPROPRIATE
STANDARD OF REVIEW

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FOR THE EASTERN DISTRICT OF NEW YORK

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INTRODUCTION AND SUMMARY

This Court should decline plaintiffs' invitation to hold, for the first time in any litigation involving the military, that persons who are subject to discharge under the military's policy concerning homosexual conduct are a quasi-suspect class entitled to intermediate level scrutiny.¹ Instead, this Court should review plaintiffs' equal protection challenge under the rational basis standard. As we show below in Part I, all five courts of appeals that have addressed the issue have held that, in the military context, classifications based on homosexual conduct -- including both homosexual acts and statements demonstrating a likelihood of engaging in such acts -- are properly subject only to rational basis review.

As we show in Part II, rational basis review is particularly appropriate because the challenged policy is directed at conduct

¹ Plaintiffs do not contend that the classification at issue is a "suspect" class, subject to strict scrutiny review.

relevant to military readiness. Plaintiffs misapprehend the policy in arguing that it is directed at homosexual orientation. The policy expressly states that sexual orientation is a personal and private matter. A service member is subject to discharge because he (i) engages in homosexual acts, or (ii) states that he is a homosexual and fails to rebut the reasonable presumption that he engages in, or will likely engage in, homosexual acts.

The fact that the policy is conduct directed distinguishes the classification at issue in the military context from other protected classes. The very limited number of classifications that the Supreme Court has held are entitled to suspect or quasi-suspect status -- race, national ancestry or ethnic origin, alienage, gender, or illegitimacy -- are identified by characteristics in which conduct plays no definitional role.

Plaintiffs' argument that heightened scrutiny is required because the military's policy treats homosexual acts differently than heterosexual acts (Pltfs. Mem., pp. 2-3) also fails. The fact that the military treats some sexual acts differently than others does not justify creating a quasi-suspect class in the military context. Plaintiffs' argument on this point is an attempt to cloak in equal protection garb a substantive due process claim that they elsewhere foreswear. Moreover, plaintiffs' claim lacks merit in the military context because it fails to accord appropriate weight to the considered judgment of the Political Branches and military officials that "the presence in the armed forces of persons who demonstrate a propensity or

intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).

In addition, as we show in Part III, the deference afforded to military decisions can best be reconciled with the demands of equal protection by application of the rational basis standard, except in the most compelling circumstances such as when an invidious racial classification is at issue. The searching judicial inquiry that is part and parcel of heightened scrutiny review must not intrude on the well-established principle that Congress, not the courts, "has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." Weiss v. United States, 114 S. Ct. 752, 761 (1994). Congress's broad constitutional power under Article I, § 8 to raise and regulate military forces "necessarily connotes the [plenary] power to say who shall serve in them and in what way." United States v. MacIntosh, 283 U.S. 605, 622, 51 S. Ct. 570, 574 (1931).

As we show in Part IV, the Supreme Court has expressed great reluctance to expand the groups entitled to heightened scrutiny, see City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441, 105 S. Ct. 3249, 3255 (1985), and it would be especially inappropriate for this Court to expand those groups in this case. The Supreme Court's reluctance to grant protected status to additional groups has been based on separation of powers concerns, and

those concerns have special force in the military context. Thus, in the military context, there is an especially high burden on plaintiffs to justify extending protected status to a group that has heretofore not been accorded such protection.² Plaintiffs are unable to meet that heavy burden in this case. Their equal protection claim relates not to personal characteristics of members of a group, but to conduct by group members that in the military's unique living and working conditions remains the subject of often disputed, but deeply held, views about moral precepts, ethical values, and privacy concerns.

Finally, we show in Part V that plaintiffs' invocation of the "improper purpose" doctrine does not alter the application of the rational basis test to this case. Contrary to plaintiffs' argument, Supreme Court precedent, including both Heller v. Doe, 113 S. Ct. 2637 (1993), and City of Cleburne, supra, establishes that there is only one rational basis test, and pursuant to that test, a statute will be upheld unless it lacks any conceivable rational basis or rests on a bare desire to harm a politically unpopular group. Thus, plaintiffs' claim (contrary to express congressional findings and legislative history) that the challenged policy rests on an "improper purpose" does not alter the

² Although plaintiffs ask the Court to rely on the "legislative facts" they have marshalled in support of their argument for heightened scrutiny, plaintiffs concede that "the appropriate level of scrutiny is a question of law," and they have neither sought to make an evidentiary showing on this issue nor argued that a trial is needed to resolve the question. Pltfs. Mem., p. 9 n.4.

fact that the policy should be adjudicated pursuant to the rational basis test.

I. UNANIMOUS PRECEDENT ESTABLISHES THAT PLAINTIFFS' EQUAL PROTECTION CHALLENGE IS SUBJECT TO RATIONAL BASIS REVIEW.

The issue of what standard of review to apply to equal protection challenges to the military's conduct-directed policy governing service by homosexuals is not a new one. Five federal courts of appeals resolved the issue in challenges brought against the military's old policy. All five courts -- the District of Columbia Circuit, the Seventh Circuit, the Ninth Circuit, the Tenth Circuit, and the Federal Circuit -- held that rational basis is the proper standard, regardless of whether the challenge involved homosexual acts or a member's statement of homosexuality that gave rise to a reasonable inference that the member committed, or would likely commit, homosexual acts. See Steffan v. Perry, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc) (statements); Meinhold v. Department of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994) (statements); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (statements); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (statements); Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (acts); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (acts); accord High Tech Gays v. DISCO, 895 F.2d 563, 574 (9th Cir. 1990) (applying rational basis test to challenge by civilian homosexual applicants to Department of Defense security clearance policy).

Similarly, all district court decisions that remain in effect hold that rational basis review applies to equal protection challenges to the military's old conduct-directed policy governing military service by homosexuals. In Walmer v. Department of Defense, 835 F. Supp. 1307, 1313 (D. Kan. 1993) (appeal pending), the district court applied rational basis review in denying plaintiff's request for a preliminary injunction to enjoin her discharge in an acts case. Even the two district court decisions ruling against the validity of the old policy applied rational basis review. Cammermeyer v. Aspin, 850 F. Supp. 910, 914 (W.D. Wash. 1994) (appeal pending); Elzie v. Aspin, 841 F. Supp. 439, 442 (D.D.C. 1993) (granting preliminary injunction).³

The fact that plaintiffs challenge the new policy rather than the old policy does not affect the application of the unanimous precedents holding that rational basis review is the appropriate standard because the conduct-directed classification is the same under both policies. Indeed, the above precedent applies a fortiori because the new policy is embodied in an Act of Congress and thus reflects the considered judgment of the Political Branches and the appropriate military officials as to

³ We note that the district court's holding in Cammermeyer that the military's old policy violates equal protection does not have precedential effect in light of the Ninth Circuit's decision in Meinhold, which specifically construed the old policy to avoid reaching the constitutional issue. Similarly, the district court's decision in Elzie preliminarily enjoining the military from discharging a member based on his statement that he is a homosexual does not survive the D.C. Circuit's en banc decision in Steffan.

how to promote "the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).⁴

II. RATIONAL BASIS REVIEW IS PARTICULARLY APPROPRIATE BECAUSE THE MILITARY'S POLICY IS DIRECTED AT CONDUCT RELEVANT TO MILITARY READINESS.

1. In arguing for heightened scrutiny, plaintiffs assert that the challenged policy is impermissibly directed at homosexual orientation. Pltfs. Mem. at 4. This argument fundamentally misapprehends the relevant classification. Under the new policy, sexual orientation -- defined as "an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts (DOD Directive 1332.14 ("Definitions," O)) -- "is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct." *Id.* at H.1.a. A member is subject to discharge under the challenged policy because he engages in homosexual acts or because his un rebutted statement that he is a homosexual causes the military reasonably

⁴ The new policy challenged by plaintiffs differs from the old policy principally in that it: (1) expressly states that a person's sexual orientation is a personal and private matter, and that only homosexual acts, homosexual marriages, and statements of homosexuality (which give rise to a rebuttable presumption of a likelihood of engaging in homosexual acts) are grounds for separation; (2) spells out the procedures by which a member who states that he is a homosexual may rebut the presumption that he engages in or is likely to engage in homosexual acts; (3) clarifies that the policy is conduct-directed by eliminating the term "desires" from the definition of "homosexual"; (4) eliminates questions regarding sexual orientation; and (5) specifies the circumstances in which investigations will be commenced and how they will be conducted.

to conclude "that he engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Id. at H.1(b)(2). Thus, the new policy plainly is directed at homosexual acts, not homosexual orientation.

2. The fact that the policy is directed at homosexual acts rather than orientation distinguishes this case from all cases in which heightened scrutiny has been applied. Suspect status has been accorded only to race, Loving v. Virginia, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967); national ancestry and ethnic origin, Korematsu v. United States, 323 U.S. 214, 216, 65 S. Ct. 193, 194 (1944); and alienage, Graham v. Richardson, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971). Quasi-suspect status has been accorded only to gender, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24, 102 S. Ct. 3331, 3335-36 (1982), and illegitimacy, Lalli v. Lalli, 439 U.S. 259, 265, 99 S. Ct. 518, 523 (1978). Classifications warranting heightened scrutiny have thus been defined by passive personal characteristics, not by the class's behavior. The courts of appeals have correctly relied on this fact in holding that the military's old policy was not subject to heightened scrutiny. See Steffan, 41 F.3d at 684; Meinhold, 34 F.3d at 1478; Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076.⁵

⁵ Courts have also recognized the importance of this conduct-status distinction in other areas. Thus, in the criminal context, the government may not prosecute a person for being a drug addict or an alcoholic, see Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417 (1962), but the government may prosecute such a person for conduct, such as the use of illegal drugs or public

(continued...)

3. Although plaintiffs repeatedly (and incorrectly) assert that the relevant classification is homosexual orientation, they explicitly challenge the military's authority to restrict the "broad[] range of so-called 'homosexual acts,' from touching to hand-holding to kissing, etc." Pltfs. Mem. at 3. They argue (*id.* at 11) that a classification that restricts homosexual acts warrants heightened scrutiny because these acts are irrelevant to a person's ability to "perform a job" in the military.

This argument ignores the legitimate governmental interest underlying the military's conduct-directed policy. Rather than focusing on the qualifications of individual homosexuals to perform particular tasks in isolation, the policy focuses on a broader interest of the highest magnitude. Congress determined that the presence in the Armed Forces of persons who engage in, or likely will engage in, homosexual acts "would create an unacceptable risk" to the military mission. 10 U.S.C. § 654(a)(15). Ample testimony before Congress supports that determination. For example, then-Chairman of the Joint Chiefs of Staff General Colin Powell testified that service by persons with a propensity to commit homosexual acts "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." S. Rep. No. 112, 103d Cong., 1st Sess., 278 (1993). General Norman Schwarzkopf testified, based on his

⁵(...continued)
drunkenness. See Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145 (1968). Cf. Johnson v. Robison, 415 U.S. 361, 375 n.14, 94 S. Ct. 1160, 1169 n.14 (1974) (rejecting suspect class status for conscientious objectors).

consistent experience over years of military service, that the presence in a military unit of persons with a propensity to commit homosexual acts "polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." Id. at 280. Thus, because the conduct-directed classification is relevant to a legitimate (indeed, even compelling) purpose -- promoting military readiness -- it does not raise the kind of suspicions of impermissible animus that are associated with classifications that warrant heightened scrutiny. See Ben-Shalom, 881 F.2d at 465-66; Dronenburg, 741 F.2d at 1397-98.

4. Although plaintiffs cloak their claim in equal protection terms, they effectively seek substantive due process protection for the right to engage in homosexual acts in the military. Plaintiffs assert (Pltfs. Mem. 11) that the military must treat homosexual acts and heterosexual acts the same. By asserting that the military's distinction between heterosexual and homosexual conduct is to be judged under heightened scrutiny, plaintiffs seek to obtain a fundamental right to engage in the whole range of homosexual acts, short of sodomy, in the military.

Such a proposition cannot be sustained in the military context. As the Seventh Circuit recognized in Ben-Shalom, 881 F.2d at 465, military personnel "sacrifice[] much personal privacy and liberty . . . where privacy and liberty are necessarily at a premium," and they are not entitled to heightened scrutiny over restrictions on homosexual conduct, whether their claims are expressed in substantive due process or

equal protection terms. Id. at 464-65. In support of this conclusion, the Seventh Circuit properly distinguished between the civilian context and the military context. The Seventh Circuit pointed out that Justice Blackmun's dissent in Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (1986), noted "that the homosexual act involved in Hardwick occurred in a private home and did not interfere with the rights or interests of others." 881 F.2d at 465. In contrast, the Seventh Circuit pointed out that homosexual conduct in the military "at the very least, has an impact upon other soldiers." Id. Thus, the Seventh Circuit concluded that "Justice Blackmun's comments in Hardwick, whatever their merit in the civilian world, are clearly not applicable to a lesbian in the military service. The privacy expectations of a civilian, whatever their outer limit may be, cannot be compared to the substantially more limited privacy expectations accompanying military life." Id. See also Woodward, 871 F.2d at 1074-75; Dronenburg, 741 F.2d at 1396-98.

III. THE SEARCHING JUDICIAL SCRUTINY ACCORDED TO QUASI-SUSPECT CLASSIFICATIONS IS INAPPROPRIATE HERE IN LIGHT OF THE GREAT DEFERENCE DUE TO MILITARY POLICIES PRESCRIBED BY THE POLITICAL BRANCHES.

The Supreme Court has consistently held that "judicial deference . . . is at its apogee when reviewing congressional decisionmaking in [the military context]," Weiss, 114 S. Ct. at 760-61, and that "Congress has primary responsibility for the delicate task of balancing the [constitutional] rights of servicemen against the needs of the military." Id. at 761; see Rostker v. Goldberg, 453 U.S. 57, 64-65, 101 S. Ct. 2646, 2651

(1981) (perhaps in no area outside the military context has "the Court accorded Congress greater deference"). Indeed, the Supreme Court has recognized that "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than military affairs. Rostker, 453 U.S. at 65, 101 S. Ct. at 2652.

The great deference afforded military decisions reflects fundamental concerns about the separation of powers between the three branches of government, the importance of the military, and the desire to limit potentially disruptive judicial intrusion into military affairs. These concerns can best be reconciled with the demands of equal protection by application of the rational basis standard, except in the most compelling circumstances such as when an invidious racial classification is involved. Here, where the complex and controversial issue of homosexuality is involved, it would be highly inappropriate for the courts to depart from the deference so consistently applied to military decisions and engage in the type of searching judicial scrutiny that is involved in review of suspect and quasi-suspect classes.

Searching judicial scrutiny in these circumstances would be incompatible with Congress's "broad constitutional power" to raise and regulate armies and navies (U.S. Const., art. I, § 8), and the well-established principle that "[t]he responsibility for determining how best our Armed Forces shall attend to" fighting and developing readiness for fighting wars rests with Congress,

and not with the courts. Schlesinger v. Ballard, 419 U.S. 498, 510, 95 S. Ct. 572, 578 (1975). Indeed, the restrictions required to achieve "the subordination of personal preference and identities in favor of the overall group mission" are matters entrusted to the military's "considered professional judgment," Goldman v. Weinberger, 475 U.S. 503, 508, 106 S. Ct. 1310, 1313 (1986), and "courts have traditionally shown the utmost deference" to the "[p]redictive judgment" of the Executive Branch on such issues. Department of Navy v. Egan, 484 U.S. 518, 529-30, 108 S. Ct. 818 (1988).

We do not assert that a court has no role in deciding constitutional questions in the military context; but we do contend that in deciding questions such as those presented here, rational basis review best comports with the fact that "the Constitution itself requires [great] deference to congressional choice." Rostker, 453 U.S. at 67, 101 S. Ct. at 2653; accord Falk v. Secretary of the Army, 870 F.2d 941, 945 (2d Cir. 1989).

IV. PLAINTIFFS CANNOT MAKE THE VERY DIFFICULT SHOWING REQUIRED TO JUSTIFY CREATING A NEW QUASI-SUSPECT CLASSIFICATION IN THE MILITARY CONTEXT, ESPECIALLY IN LIGHT OF THE SUPREME COURT'S EXPRESSED RELUCTANCE TO CREATE NEW PROTECTED CLASSES.

1. Because courts ordinarily presume that the democratic processes of government produce legislative classifications that are valid, classifications generally are reviewed only to determine if they are "rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440, 105 S. Ct. at 3254. But the Supreme Court has recognized a small number of classifications

where the group's characteristics "are so seldom relevant to the achievement of any legitimate state interest" (id.) that classifications based upon them will be subjected to heightened scrutiny. Suspect status has thus been accorded to classifications based on race, national ancestry and ethnic origin, and alienage; quasi-suspect status has been accorded gender and illegitimacy. See supra p. 8.

Since the late 1970's, however, the Supreme Court has expressed great "reluctan[ce]" to expand the number of classifications afforded heightened scrutiny. Cleburne, 473 U.S. at 441, 105 S. Ct. at 3255. The Supreme Court has refused to accord heightened scrutiny to the elderly, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S. Ct. 2562, 2567 (1976); the mentally retarded, Cleburne, 473 U.S. at 442, 105 S. Ct. at 3255; "close relatives," Lyng v. Castillo, 477 U.S. 635, 638, 106 S. Ct. 2727, 2729 (1986); and a statutorily-defined "family unit," Bowen v. Gilliard, 483 U.S. 587, 601-03, 107 S. Ct. 3008, 3017 (1987).

This reluctance to create new protected classes is firmly grounded on separation of powers concerns. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has authority to implement, the courts have been reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent, those interests should be pursued." Cleburne, 473

U.S. at 441-42, 105 S. Ct. at 3255. In addition, the Supreme Court has indicated that the impracticability of formulating a useful limiting principle counsels strongly against creating new suspect or quasi-suspect classes. See id. at 442, 105 S. Ct. at 3256. Thus, a group seeking suspect or quasi-suspect status must meet a very high burden to show that, notwithstanding these concerns, heightened scrutiny is warranted.

2. The context in which the classification arises may also bear on the applicable level of scrutiny. For example, the Supreme Court has recognized that the level of scrutiny may vary according to the interests of the governmental unit involved. Thus, although alienage was recognized as a suspect class when state governments placed restrictions on aliens, see Graham v. Richardson, supra, the Supreme Court applied rational basis review to federal regulation of aliens because the Court recognized that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." Mathews v. Diaz, 426 U.S. 67, 84-87, 96 S. Ct. 1883, 1893-94 (1976). See also Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977) (upholding federal statute granting preferred immigration status to children of U.S. citizens or lawful permanent aliens, but excluding illegitimate children from seeking preference by virtue of their relationship with their natural fathers on the ground that "the power to expel

or exclude aliens [is] a fundamental sovereign attribute . . . largely immune from judicial control").

The military is a classic example of a context in which the level of scrutiny is of special concern, and, accordingly, plaintiffs bear an especially high burden in seeking to create a new protected class in the military context. The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society," Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 2555 (1974), and that the courts often must apply a less stringent standard of review to constitutional challenges in the military context. For example, the First Amendment's protection of freedom of speech has a different and less stringent application in the military context than it does in civilian life. See, e.g., Brown v. Glines, 444 U.S. 348, 354-55, 100 S. Ct. 594, 599-600 (1980) (upholding restraints on service member's right to petition); Greer v. Spock, 424 U.S. 828, 838, 96 S. Ct. 1211, 1217 (1976) (upholding restrictions on political speech on military base). Similarly, restrictions on religious liberty are permitted in the military that find no constitutional counterpart in civilian society. See Goldman, 475 U.S. at 508, 106 S. Ct. at 1313 (upholding regulations precluding an Orthodox Jew and ordained rabbi from wearing his yarmulke while in military uniform).

Likewise, in Weiss v. United States, 114 S. Ct. at 760, the Supreme Court stated that "we have recognized in past cases that 'the tests and limitations [of due process] may differ because of

the military context.' Rostker, 453 U.S. at 67." Thus, in Weiss, in which the issue was whether due process required that military judges have fixed terms of office, the Supreme Court refused to apply the due process analysis established in such civilian cases as Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), and Medina v. California, 112 S. Ct. 2572 (1992), and, instead, applied the different due process standard set forth for the military context in Middendorf v. Henry, 425 U.S. 25, 44, 96 S. Ct. 1281, 1292 (1976), which asked only "whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress." 114 S. Ct. at 760-61.

3. The three factors upon which plaintiffs rely (Pltfs. Mem., pp. 8-22) as supporting heightened scrutiny -- (i) the attribute in question (in this case, plaintiffs contend, the "trait of being gay") bears no relation to ability, (ii) history of discrimination, and (iii) relative political powerlessness -- represent guidelines that courts have used in determining whether to subject governmental decisions to more searching review than equal protection ordinarily calls for. For the reasons stated above, the military context in which this case arises -- and the special constitutional authority of Congress and the President in that context -- make it clear that such searching review of the actions of the Political Branches of the United States is inappropriate here. Accordingly, there is no occasion for this

Court to apply plaintiffs' three-factor standard to determine whether heightened scrutiny is appropriate to resolve this case.

At the least, as the previous discussion establishes, plaintiffs' burden to show that a new protected class should be created in the special military context is especially difficult to satisfy. Examination of plaintiffs' first factor -- the assertion that the "trait of being gay" has no relation to a person's ability to perform military duties -- reveals that plaintiffs do not meet the very high burden placed on them in the military context and is sufficient in itself to reject their claim. The fact that the "trait of being gay" has no relation to an individual's ability does not provide a basis for applying heightened scrutiny to the challenged policy because that policy (i) is conduct-directed, supra pp. 7-11; and (ii) is not concerned with the ability of an individual to perform particular tasks in isolation, but is grounded on the congressional finding that the presence in the military of persons who engage, or are likely to engage, in homosexual acts "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).

Moreover, even if the Court were to consider the other two factors plaintiffs identify -- history of discrimination and political powerlessness -- plaintiffs have not carried their high burden of showing that, in the special military context, these factors would warrant creating a new protected class. At least

in the military context, plaintiffs' showing is insufficient to justify heightened judicial review. With respect to "history of discrimination," it bears repetition that the policy in question is directed towards conduct in the "specialized society" of the military (Parker v. Levy, 417 U.S. at 713), and conduct-based military personnel rules differ markedly from the histories of discrimination recognized in heightened-scrutiny cases.

Moreover, although homosexuals are, of course, a political minority, the test of "political[] powerless[ness]" has been stated to be whether the particular group at issue has "no ability to attract the attention of lawmakers." Cleburne, 473 U.S. at 445, 105 S. Ct. at 3257. Without addressing the issue of political powerlessness as a general matter,⁶ the evolution of the particular legislation challenged here clearly shows that homosexuals were able to attract the attention of both the Executive and Legislative Branches and resulted in substantial changes to the policy that had been in existence. See supra p. 7 n.4. As the district court stated in Dahl v. Secretary of the Navy, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993), vacated on other grounds, Nos. 93-16844 & 16898 (9th Cir. Dec. 21, 1994): "The recent Congressional and executive dialogue concerning homosexuals' ability to serve in the military demonstrates that, despite their apparent inability to assert control over Congress,

⁶This case does not require that the Court address the difficult and largely uncharted question of how these factors should be evaluated in non-military cases, and we, accordingly, do not express a view on that question here.

homosexuals have a significant ability to attract Congress' attention."

In these circumstances, it would be highly inappropriate for the Court to extend heightened scrutiny in the military context to a new group.⁷

V. THE "IMPROPER PURPOSE" DOCTRINE DOES NOT ALTER THE APPLICATION OF THE RATIONAL BASIS TEST.

In anticipation of their failure to justify heightened scrutiny, plaintiffs suggest that there are two different versions of the "rational basis" test. According to plaintiffs, the decisions in U.S. Department. of Agric. v. Moreno, 413 U.S. 528, 533-38, 93 S. Ct. 2821, 2825-27 (1973), and Cleburne, 473 U.S. at 446-50, 105 S. Ct. at 3257-59, stand for the proposition that a court will not rely on "any conceivable basis" to uphold legislation where plaintiffs produce credible evidence of an improper purpose. Pltfs Mem., p. 31.

This Court should decline plaintiffs' invitation to create a hybrid version of rational basis review. Supreme Court precedent firmly establishes a single standard of rational basis review whereby equal protection is satisfied if there is "a rational relationship between the disparity of treatment and some

⁷ That conclusion fully accords with the Supreme Court's decisions declining suspect or quasi-suspect scrutiny to a "variety of . . . groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm." Cleburne, 473 U.S. at 445-46, 105 S. Ct. at 3257.

legitimate governmental purpose." Heller, 113 S. Ct. at 2642. Indeed, Heller itself dispositively rejects plaintiffs' argument that Cleburne established a hybrid rational basis test different from Heller. In Heller, the Supreme Court -- after discussing the rational basis test at great length -- explicitly stated that it did not "purport to apply a different standard of rational-basis review [in Cleburne]." 113 S. Ct. at 2643. Thus, notwithstanding plaintiffs' arguments to the contrary, there is no escaping the conclusion that the military's policy must be evaluated under the rational basis standard of review as articulated in Heller.

For purposes of rationality review, only a statute that lacks any conceivable rational basis, or that rests only on "a bare congressional desire to harm a politically unpopular group" (Moreno, 413 U.S. at 534, 93 S. Ct. at 2826), can be said to be the kind of "invidious discrimination" or "wholly arbitrary act" that equal protection condemns. New Orleans v. Dukes, 427 U.S. 297, 304 (1976), 96 S. Ct. 2513, 2517 (per curiam). Thus, a court "will not overturn . . . a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 943 (1979). Under this test, it is "the rare case where the facts preclude[] any plausible inference that the reason for the" challenged classification is related to a legitimate government purpose.

Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992); see also Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2464 (1994) ("[i]t is a familiar principle of constitutional law that [courts] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive").

The cases relied upon by plaintiffs -- Moreno and Cleburne -- are not inconsistent with these principles. In both cases, the Supreme Court invalidated a classification under the rational basis test only after it ruled out every possible legitimate basis for the classification, thereby leaving either impermissible reasons or no reasons at all to support it. For example, in Moreno, the Court observed that it was employing "traditional equal protection analysis" (413 U.S. at 533, 538, 93 S. Ct. at 2825, 2827), and, consistent with that observation, took great pains to analyze admittedly post-hoc rationalizations about the bases for the challenged Food Stamp Act policy. Ultimately, the Court struck down a related-person requirement for household eligibility under the policy because "[t]he challenged statutory classification . . . is clearly irrelevant to the stated purposes of the Act" and was supported only by "a bare congressional desire to harm a politically unpopular group [hippies]." 413 U.S. at 534, 93 S. Ct. at 2826.

In Cleburne, the Court overturned municipal zoning requirements that were imposed on group homes for the mentally retarded but not on any other group home or multiple-dwelling building. The Court explained that, under rational basis review, plaintiffs

were protected from "invidious discrimination" by the requirement that the classification "must be rationally related to a legitimate governmental purpose," and it stressed that "'a bare . . . desire to harm a politically unpopular group' [is] not [a] legitimate state interest." 473 U.S. at 446-47, 105 S. Ct. at 3258. The Court thus made clear that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from [other group homes]." Id. at 448, 105 S. Ct. at 3259 (emphasis added). Reviewing each of the proffered rationales for the special requirements and finding none that would justify the difference in treatment, the Court held that "the record does not reveal any rational basis for believing that the [mentally-retarded group] home would pose any special threat to the city's legitimate interests." Id. at 448, 105 S. Ct. at 3258. Thus, the Court concluded that "requiring the permit in this case appears . . . to rest on an irrational prejudice against the mentally retarded." Id. at 450, 105 S. Ct. at 3260.

Accordingly, contrary to plaintiffs' contention, neither Moreno nor Cleburne created a hybrid rational basis test. Neither case announced a principle that courts will refuse to entertain "any conceivable basis" to uphold a challenged classification if there is evidence of "antipathy." The fact that the Court was unable to conceive of any rational bases in either case in no way implies that the Court would have refused

to uphold the challenged classifications if it had been able to conceive of a rational basis that was related to a legitimate governmental goal. Applying that test here, as we demonstrated in greater detail in Defendants' Memorandum of Law In Support of Motion To Dismiss, it is clear that the new policy is constitutional.⁸

⁸ Neither Moreno nor Cleburne invalidates the new policy. Neither case, of course, arose in the special military context. But beyond that, the challenged classifications were unrelated to any legitimate governmental interest and could therefore rest only on "irrational" prejudice. 473 U.S. at 450, 105 S. Ct. at 3260. By contrast, the new policy serves goals -- the prevention of prohibited homosexual acts, the promotion of unit cohesion, and the accommodation of personal privacy -- that not only are legitimate, but that Congress has concluded are of the highest order in the military context. The policy seeks to further these goals and does not impose restrictions based on "mere negative attitudes" as ends in themselves. Id. at 448, 105 S. Ct. at 3259.

Moreover, the rationales underlying the policy may be found in the statute itself and the legislative history. Congress explicitly found that the policy was based neither on "prejudice" nor "stereotypical" notions regarding homosexuals (S. Rep. 112 at 283, 284); rather, the policy was "carefully crafted to maintain the delicate balance between the individual concerns and the needs of the armed forces." Id. at 274.

CONCLUSION

For the foregoing reasons, this court should apply rational basis review to plaintiffs' equal protection challenge to the conduct-directed policy governing military service by homosexuals.

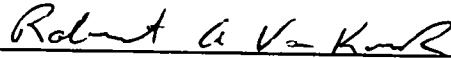
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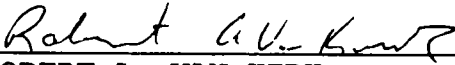
Dated: March 2, 1995

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Defendants' Memorandum of Law on the Appropriate Standard of Review on plaintiffs' counsel:

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92 cover

COMMENTS:

- B. Heightened Scrutiny For A Conduct-Based Classification
In The Military Context Is Not Appropriate
- 1. The Level Of Scrutiny Accorded The Military's
Homosexual Conduct Policy Is Not An Open Question

Plaintiff argues that "[w]hether a classification on the basis of sexual orientation alone, irrespective of conduct, is inherently and constitutionally suspect remains an open question in this and virtually every other federal jurisdiction." Pltf's Mem. at 31. Plaintiff's argument misstates the relevant issue, and ignores the substantial body of case law holding that rational basis is the appropriate level of review to apply to the military's conduct-directed policy.

In the first place, contrary to Plaintiff's assumption, the military's policy does not create a classification "on the basis of sexual orientation," but rather creates a class of persons who are likely to engage in homosexual acts that the military, and Congress, have found to be detrimental to military effectiveness. Sexual orientation "is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct," which is defined as homosexual acts, statements of homosexuality (which indicate a likelihood of engaging in homosexual acts), and homosexual marriages and attempted marriages. DOD Dir. 1332.30, Encl. 2, ¶ C, at 2-1.

Plaintiff's argument that "sexual orientation alone, irrespective of conduct," should be accorded suspect or quasi-suspect class status is therefore wholly irrelevant to this lawsuit.

Plaintiff was processed for separation because of his own statement of homosexuality, which indicated a likelihood of engaging in acts. After reading the military's new policy and its definitions and presumptions concerning homosexual statements, he wrote a letter to four admirals to tell them "I am gay." II Rec. GE7 at 188. Under the challenged policy, this statement raises a rebuttable presumption that he engages in, or is likely to engage in, homosexual acts. Though Plaintiff exercised his right to make an unsworn statement, without thereby subjecting himself to cross-examination, he declined to even attempt to rebut the presumption of homosexual acts, stating that he would "not go further in degrading [himself] by disproving a charge about sexual conduct." I Rec. Tr. at 141. Thus, Plaintiff is particularly ill-suited to seek protected status for a class of persons who have a homosexual orientation but are not likely to engage in homosexual acts. See Steffan, 41 F.3d at 693-96 (where plaintiff "never gave any explanation as to what he meant, or did not mean, when he stated that he was a homosexual," he may not challenge the alleged overbreadth of the policy "without shouldering the burden requisite to such an attack -- a demonstration that the supposedly irrationally overbroad definition had a real impact on him.")).

Plaintiff's argument also overlooks the fact that the five federal Courts of Appeals that decided the issue under the military's former policy -- the Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits -- unanimously concluded that

rational basis review was the appropriate level of scrutiny in the military context, not some heightened form of scrutiny as Plaintiff argues. See Steffan v. Perry, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc); Meinhold v. Department of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984). Moreover, the first court to address the new policy, Philips v. Aspin, No. 93-154WD (W.D. Wash. 1994), similarly held that the Act is subject to rational basis review. Slip op. at *046X11.¹

2. Plaintiff Has Not Justified Creating A New Protected Class For The First Time In The Military Context

Because courts ordinarily presume that the democratic processes of government produce legislative classifications that are valid, classifications generally are reviewed only to determine if they are "rationally related to a legitimate state interest." Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Accordingly, the Supreme Court has afforded suspect

¹ Plaintiff's citations to the district court decisions in Equality Foundation of Cincinnati v. Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994), and Jantz v. Muci, 759 F. Supp. 1543, 1546-51 (D. Kan. 1991), rev'd, Jantz v. Muci, 976 F.2d 623, 626 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993), see Pltf's Mem. at 32 n.37, in which the courts applied heightened scrutiny, are inapposite. Those cases did not involve conduct-based rules for the military and forces adopted by Congress and the military.

status only to race, national origin, and alienage, and quasi-suspect status to gender and illegitimacy. See id. at 439-41.²

This approach is based on separation of powers concerns.

"[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has authority to implement, the courts have been reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent, those interests should be pursued." Cleburne, 473 U.S. at 441-42. The Supreme Court also has expressed concern about the difficulty of formulating a useful limiting principle on suspect or quasi-suspect classes. See id. at 442.

The context in which the classification arises may also bear on the applicable level of scrutiny. The military is a classic example of a context in which the level of scrutiny is of special concern and, accordingly, Plaintiff bears an especially high burden in seeking to create a new protected class in the military context. As discussed above, the courts often apply a less stringent standard of review to constitutional challenges in the military context. For example, the First Amendment and the Due Process Clause have different and less stringent application in

² The Court has refused to accord heightened scrutiny to the elderly, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); the mentally retarded, Cleburne, 473 U.S. at 442; "close relatives," Lyng v. Castillo, 477 U.S. 635, 638 (1986); and a statutorily-defined "family unit," Bowen v. Gil-liard, 483 U.S. 587, 601-03 (1987).

the military context than in civilian life. See, e.g., Brown v. Glines, 444 U.S. 348, 354-55 (1980) (upholding restraints on service member's right to petition); Greer v. Spock, 424 U.S. 828, 838 (1976) (upholding restrictions on political speech on military base); Goldman, 475 U.S. at 508 (upholding regulations precluding an Orthodox Jew and ordained rabbi from wearing his yarmulke while in military uniform); see also Weiss v. United States, 114 S. Ct. 752, 760-61 (1994) (refusing to apply due process standard established in civilian cases).

In these circumstances, and even without considering the five factors Plaintiff argues counsel in favor of protected class status, it would be inappropriate for the Court to extend heightened scrutiny in the military context to a new group.

3. The Five Factors Plaintiff Relies Upon Do Not, In The Military Context, Justify Heightened Scrutiny

For the reasons stated above, the military context in which this case arises -- and the special constitutional authority of Congress and the President in that context -- make it clear that a searching, "heightened" review of the actions of the Political Branches of the United States is inappropriate here. Accordingly, there is no occasion for this Court to apply plaintiffs' five-factor standard to determine whether heightened scrutiny is appropriate to resolve this case.³ In any event, as we show

³ This case does not require that the Court address the difficult and largely uncharted question of how these factors should be evaluated in non-military cases, and accordingly, Defendants express no view on that question here. Cf. S. Rep. 112, at 287 ("The committee makes no judgment as to whether the
(continued...)")

below, the factors Plaintiff relies upon -- a history of purposeful unequal treatment, ability of class members to perform or contribute, immutability of the class, disadvantages on the basis of prejudice and stereotype, and political powerlessness, see Pltf's Mem. at 34 -- do not, in the unique environment of the military, justify creation of a new protected class.⁴

a. History Of Discrimination, Prejudice and Stereotype:
Plaintiff's arguments with respect to his first and fourth factors, "history of purposeful unequal treatment," Pltf's Mem. at 34, and "disadvantage on the basis of prejudice and stereotype," Pltf's Mem. at 37, are irrelevant to this case. The policy in question is directed towards conduct that may be validly proscribed in the "specialized society" of the military, Parker v. Levy, 417 U.S. at 713, and conduct-based military

³(...continued)
protection of the civil rights laws should be extended to sexual orientation. The committee's review and its recommendations have focused on the impact of homosexual conduct in the unique setting of military service.").

⁴ The appropriate level of scrutiny is a question of law, albeit one which may require "legislative facts" for its determination. As the Advisory Committee Notes to Federal Rule of Evidence 201 explains, "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Whereas Rule 201 establishes the standard and process by which adjudicative facts are to be judicially noticed, no such rigid boundaries limit a court's consideration of extra-record legislative facts. See Fed. R. Evid. 201. Therefore, while Defendants have cited a few easily available sources for their arguments in this section, they do not present declarations in response to those proffered by Plaintiff, nor respond point-by-point to the allegations in Plaintiff's declarations.

personnel rules differ markedly from the histories of discrimination recognized in heightened-scrutiny cases. In enacting the challenged policy, Congress recognized that "there is prejudice based upon stereotypes against gays and lesbians in American society." S. Rep. 112, at 282. But far from resting on prejudice, stereotypes, or any "implicit premise that homosexuals are 'inherently promiscuous,'" see Pltf's Mem. at 38 n.46, Congress emphasized that its "position on the service of gays and lesbians is not based upon stereotypes, but upon the impact in the military setting of the conduct that is an integral element of homosexuality." S. Rep. 122, at 282.

b. Alleged Inability To Contribute: The fact that "sexual orientation bears no relation" to an individual's ability, see Pltf's Mem. at 35, does not provide a basis for reviewing the challenged military conduct-directed policy under anything other than the rational basis test. Indeed, as stated supra, the policy explicitly provides that sexual orientation is "a personal and private matter." DOD Dir. 1332.30, Encl. 2, ¶ C, at 2-1. Moreover, Congress clearly has authority to set standards for service in the military with reference to overall military effectiveness, and is not limited to consideration of whether individuals could perform military tasks adequately in isolation. See, e.g., Goldman, 475 U.S. 503. Here, Congress determined that the service in the Armed Forces of persons who engage in, or likely will engage in, homosexual acts "would create an unacceptable risk to the high standards of morale, good order and

discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15). Ample testimony before Congress supports that determination. See Defs' Mem. at 27-47.

c. Immutability: Plaintiff's third factor, the "immutability of sexual orientation," is not relevant to the classification at issue here. As discussed above, the policy at issue is directed towards homosexual conduct in the military setting, not "sexual orientation," and Defendants do not understand Plaintiff to assert that a person's engaging in sexual conduct is an immutable characteristic. Plaintiff has not, for example, argued that behavior is wholly immutable in the same sense as characteristics such as race and gender. Indeed, thus far under the new policy, three out of twenty servicemembers processed for separation based on their statements that they are gay were able to "rebut the presumption" by showing that they are not likely to engage in conduct. See Defs' Ex. 1 (Declaration of Lt. Col. David Hayden). See High Tech Gays, 895 F.2d at 573-74; Woodward, 871 F.2d at 1076; Rich, 735 F.2d at 1229; Steffan v. Cheney, 780 F. Supp. 1, 7 (D.D.C. 1991), aff'd, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

d. Political Powerlessness: Plaintiff relies heavily on the declaration of Prof. Kenneth Sherrill, PSJ Ex. P, arguing that "gays and lesbians are a 'politically powerless' minority." Id. ¶ 2. Prof. Sherrill uses the criterion of whether or not they have "the resources necessary to achieve [their] goals through the political process." Id. ¶ 22. But according to

Supreme Court authority, this is not the correct inquiry. The test of "political powerlessness" is whether the particular group at issue has "no ability to attract the attention of lawmakers." Cleburne, 473 U.S. at 445. Cleburne made it clear that this criteria is not satisfied simply because the group in question has not achieved its legislative agenda. 473 U.S. at 445.

Without addressing the issue of political powerlessness as a general matter, the evolution of the particular legislation challenged here clearly shows that homosexuals were able to attract the attention of both the Executive and Legislative Branches. As the district court stated in Dahl v. Secretary of the Navy, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993), vacated on other grounds, Nos. 93-16844 & 16898 (9th Cir. Dec. 21, 1994): "The recent Congressional and executive dialogue concerning homosexuals' ability to serve in the military demonstrates that, despite their apparent inability to assert control over Congress, homosexuals have a significant ability to attract Congress' attention." See also High Tech Gays, 895 F.2d at 574; Ben-Shalom, 881 F.2d at 466; Steffan, 780 F. Supp. at 8-9.



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James Costello
Fr: Geor S.

FYI.
Can we discuss
again this week
Especially
ENDA!

FAX COVER MEMORANDUM

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TO: George Stephanopoulos

FAX NUMBER: 456-2883

FROM: Chai Feldblum

COMMENT: _____



Human Rights CAMPAIGN FUND

TO: George Stephanopoulos

FROM: Chai Feldblum *CF*

RE: The Colorado case (Evans); Employment Non-Discrimination Act; Military Ban

DATE: April 10, 1995

BY FAX AND MAIL

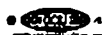
As you know, various representatives from the Human Rights Campaign Fund have contacted you and others in the White House about several pressing issues of concern to the gay community. Daniel Zingale from HRCF asked me, as legal counsel for HRCF, to set forth a brief description of these issues and the response HRCF is seeking from the Administration.

1) ***Evans v. Roemer***: *This is our most pressing concern.* The Supreme Court has agreed to hear this case, which challenges the constitutionality of Amendment 2, a provision which makes it a violation of the Colorado state constitution for the legislature to pass any law prohibiting discrimination against gay people. The Colorado Supreme Court ruled this provision was unconstitutional under the federal constitution.

It is critical that the Supreme Court uphold the Colorado Supreme Court decision and invalidate Amendment 2.

On a purely **practical** level, the need for a positive ruling from the Supreme Court is obvious. If Amendment 2 is struck down by the U.S. Supreme Court, the gay community will be saved from spending time, money and resources fighting other initiatives on a state by state basis -- and will be saved from the initiatives themselves. Conversely, if the Supreme Court upholds Amendment 2, conservative groups will be energized to push these harmful initiatives in yet more states. (And when these initiatives are on the ballot, they unfortunately get out the conservative vote overall -- thus affecting other issues and people in these elections.)

As a symbolic matter, this case is also key. This is the first **real** case concerning



gay rights to reach the Supreme Court since Bowers v. Hardwick in 1986. Everyone in the gay community will be watching this case and an adverse ruling from the Supreme Court will be devastating.

Action Requested: *An amicus brief on behalf of the plaintiffs in the Supreme Court filed by the Department of Justice.* The brief would be due on May 20, 1995.

Lawyers for the plaintiffs met with Solicitor General Drew Days a few weeks ago. They discussed with him directly the legal arguments in the case and why filing an amicus brief will not adversely affect the Department's efforts to defend the military ban. I believe those arguments are persuasive and will not repeat them here. (I am happy, however, to send you a brief memo summarizing those arguments, if you feel that would be useful.)

What I would like to stress here, on behalf of HRCF, is how critical lawyers knowledgeable about this case feel a brief from the Department will be in the Supreme Court. As one respected lawyer said to me, "A DOJ brief could make or break this case at the Supreme Court." I agree. The legal theory in this case is complicated and nuanced. **It will not be easy to win this case at the Supreme Court.** I believe we triple our chances of winning if there is a DOJ amicus brief that lays out clearly and succinctly the legal theory on which the plaintiffs appropriately win, without causing havoc to the general democratic system. As a former Blackmun clerk, I cannot emphasize to you enough the **difference** a DOJ amicus brief would make in this type of case at the Supreme Court level.

2) ***The Employment Non-Discrimination Act of 1995 (ENDA):*** *We anticipate that ENDA 1995 will be introduced sometime in May with Republican and Democratic lead sponsors.* We anticipate that Members of Congress and the press will ask at that time whether President Clinton supports the bill.

Action Requested: *Endorsement by the President of ENDA 1995.* Last Congress, Deval Patrick's written testimony to the Senate strongly endorsed the concept of a law prohibiting employment discrimination on the basis of sexual orientation. However, there were some difficulties in getting an actual Administration endorsement of the Senate bill itself. At the time, we were informed by Administration lawyers that the problem stemmed from findings in the Senate bill, which some Administration lawyers felt might adversely affect DOJ's defense of the military ban.

The LCCR Steering Committee and Congressional staff have agreed to five changes in ENDA -- all of which tighten the bill. One proposed change is to **drop all the findings** in the bill. This is being done for the purpose of accommodating the concerns of the Administration.

HRCF requests that lawyers and others in the White House review ENDA now, as

modified, and let the LCCR Steering Committee know whether the bill would now garner support from the President along the lines of Governor Whitman's explicit endorsement (attached). (The full text of the bill, as modified, is being sent by mail, with this memo.)

3) ***The Military Ban:*** Action on your part on this issue will obviously depend on what additional action (if any) Congress chooses to take subsequent to the decision in the Able case.

An FYI point for you to mull, however, on the judicial front: DOJ lawyers filed a motion four weeks before the Able trial began in New York, arguing that **the plaintiffs did not have standing to challenge the aspect of the military ban discharging people for engaging in private gay sex -- but could challenge only the part of the ban discharging people for saying they are gay.**

The district court judge granted this motion -- and so his ruling (which was issued last week) applies only to **statements**, not to private conduct. What this means, in **practical terms**, is that ACLU and Lambda (the two big gay legal groups bringing the challenge) will now have to **bring yet another case** -- in which they ensure the plaintiffs say explicitly, from the beginning, that they are challenging all aspects of the ban.

The **only reason** I can fathom for why DOJ made this motion is a narrow litigation reason: perhaps DOJ figured it would lose the Able case (as it did), and by forcing ACLU and Lambda to file yet another case, perhaps DOJ felt it might win the second one.

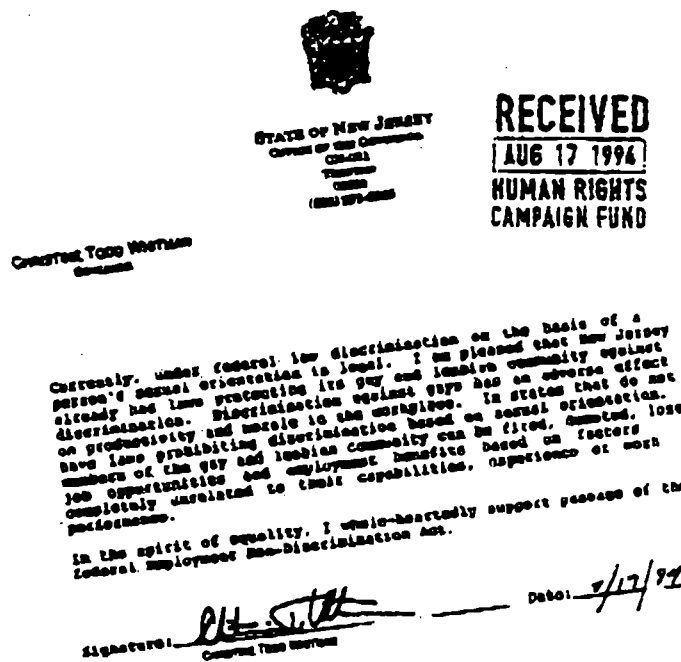
From a **political** perspective, however, this motion appears to be a disaster. You will now have not one, **but two** high-profile cases (brought by the two top gay legal groups) going through the courts challenging the military ban.

In addition, this motion felt to me like a **gratuitous, unnecessary slap** to the gay community. As you know, I have always argued that DOJ's defense of the ban would inevitably have adverse, negative legal consequences for gay people **outside of the military context**. This motion is a striking example of that.

The result of DOJ's motion was a ruling by a judge that reinforced what I call the "status-conduct distinction." This distinction is harmful and degrading for gay people. The lawyers for the plaintiffs in Able were finally ready **not** to hide behind the status-conduct distinction, as other gay rights lawyers have done -- and thus were poised to finally make some **good law** on this issue. The motion by the DOJ lawyers effectively destroyed that chance. This seems to be a bad political choice and I would be curious about your reaction to it.

cc: Elizabeth Birch, Executive Director
Daniel Zingale, Director of Public Policy

Fairness is Non-Partisan.



Last year, the Human Rights Campaign Fund and New Jersey NOW asked **Republican Governor Christine Todd Whitman** of New Jersey to endorse a federal bill prohibiting job discrimination against lesbian and gay Americans. Governor Whitman joined 167 Congressional cosponsors of the Employment Non-Discrimination Act—Democrat, Republican, and Independent—in stating that fairness in the workplace is not a partisan issue, but a fundamental American value.

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Nation

Gingrich retreats from ban on gays

Little GOP or military support

By Chris Black
GLOBE STAFF

WASHINGTON - House Speaker Newt Gingrich pulled back yesterday from his call for Congress to reinstate the ban on homosexuals in the military after he learned that ranking Republicans had no interest in revisiting the contentious issue.

Gingrich's reversal is another sign that the Clinton administration's "don't ask, don't tell, don't pursue" compromise, adopted a year ago, will remain in place unless the courts rule it unconstitutional.

Several lawsuits have been filed, under both the old ban and the new compromise, and preliminary court rulings have generally found both policies discriminatory and unconstitutional.

Gingrich apparently surprised ranking Republicans on the defense committees when he said Sunday that the ban should be restored. Gingrich has found little support from either the military or fellow Republicans.

Sen. Strom Thurmond, Republican from South Carolina and the chairman of the Senate Armed Services Committee, said that Congress should wait. "We should allow time for the judicial system to confirm the constitutionality of the policy," he said.

Yesterday during an interview on CBS, Gingrich said, "Frankly, nothing will change at the present time." On Friday, a federal judge in New York ruled the policy unconstitutional because it discriminates against homosexuals in the military. Gingrich said Republicans will take legislative action only if the courts throw out the policy.

Elsewhere yesterday, a federal appeals court refused to block a gay sailor's Navy discharge while the man continues to appeal his case. The ruling by the 9th US Circuit Court of Appeals in San Francisco means Machinist's Mate 2nd Class Mark Phillips could be discharged as early as today, said his lawyer, Jett Whitmer.

In Denver, the 10th US Circuit Court of Appeals ruled that the Army can discharge an officer whose lesbian lover turned her in. In a 3-0 ruling, the appeals court refused a request by Joyce Walmer for an injunction to block her honorable discharge from the Army.

Critics said that Gingrich had not lost his habit of speaking precipitously without first consulting ranking Republicans.

"He seems to be backpedaling and going sideways to get out of it," said Rep. Martin Meehan, a Democrat from Lowell who sponsored the amendment to lift the ban in 1993.

"I'm outraged," Meehan said at a news conference with the Human Rights Campaign Fund, a lobby for homosexual civil rights. "He is an individual without a moral compass. He clearly is doing it just for political purposes to raise as much hate as he can and negative feelings within the institution and around the country."

Daniel Zingale, public policy director for the Human Rights Campaign Fund, called Gingrich's statement "gratuitous." Lawyers for gay and lesbian service members said the policy is inconsistently applied and gives individual commanders too much leeway to pursue homosexuals.

Rep. Gerry Studds, Democrat of Cohasset, dismissed Gingrich's suggestion that the ban be reinstated as "a crass demagogic political judgment."

Rep. Peter Torkildsen, Republican of Danvers, said, "If someone is serving his country with honor, he should not be penalized for what he does in his private life."

This report was supplemented with material from the Associated Press and Reuters.



Rep. Martin Meehan of Lowell holds a news conference yesterday in Washington with lobbyists for homosexual rights.



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ROMER V. EVANS

OLC Draft Argument
April 24, 1995

INTRODUCTION

This case presents an important yet quite narrow issue: is the Equal Protection Clause of the Fourteenth Amendment violated when a state determines that no agency of state or local government may take any action to protect the rights of an identifiable group against any form of private or public discrimination directed against that group. The resolution of this case does not require the Court to consider whether to expand the set of classifications that this Court has determined to be "suspect" and subject to heightened scrutiny under the Equal Protection Clause. Nor does it require the Court to rule on the existence or scope of a general constitutional right of "equal participation" in the political process. This case concerns instead the literal meaning of the Fourteenth Amendment's express command that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

In defending the constitutionality of Amendment 2, the State of Colorado necessarily asserts the power of a state to decide, in as sweeping and unlimited a fashion as possible, that neither it nor any of its agencies will protect in the future an identifiable group against harmful discrimination regardless of the nature, source, form or justification of that discrimination. The language and history of the Equal Protection Clause as well as this Court's cases interpreting the Clause, we submit, demonstrate the untenability of the State's position. By disabling entirely the ordinary political processes and institutions of the State from protecting a particular, specified group against discrimination, Amendment 2 contradicts the Fourteenth Amendment's central prohibition on state decisions to exclude individuals or groups from the protections of the law.

ARGUMENT

- I. **A state constitutional provision forbidding any state or local response to public or private discrimination against an identifiable group implicates the core requirement of the Equal Protection Clause that the state extend the protection of the laws to all persons within its jurisdiction.**

This Court's equal protection decisions frequently have referred to the Fourteenth Amendment's historical roots in the national effort to protect African Americans against state involvement in hostile discrimination. [cites] As is well known, the framers of the Amendment were concerned not only with state laws that affirmatively discriminated on the basis of race, but also with state laws or policies that permitted private racial discrimination by deliberately failing to extend to African Americans the protection of the laws. See e.g., Slaughterhouse Cases, 83 U.S. 36, 70 (1873) (tracing origin of Fourteenth Amendment to concern about public discrimination against African Americans and to the perception that "laws for their protection

[that] were insufficient or were not enforced"); [cite to Hyman and Wiecek]. The Fourteenth Amendment addressed the concerns of its framers by placing on the states primary responsibility for guaranteeing to all persons the protection of the laws.¹

One theme in the early history of the interpretation of the Fourteenth Amendment is of special relevance for the present case.² From the beginning, the courts asserted that the negative wording of the Equal Protection Clause ("No State shall deny") imposed an affirmative obligation on the states, and that the Clause would be violated by a deliberate state refusal to provide equal protection to "persons and classes of persons." Missouri v. Lewis, 101 U.S. 22, 30, 31 (1879); Barbier v. Connolly, 113 U.S. 27, 31 (1884) (Amendment requires that "equal protection and security should be given to all under like circumstances"); Civil Rights Cases, [cite to discussion of failure of state common law to protect African Americans].

Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of laws for the protection of his fundamental rights, as well as the enactment of such laws.

United States v. Hall, 26 Fed.Cas. 79, 81 (C.C.S.D.Ala. 1871) (Woods, J.). Whatever the outer limits of this principle, it is clear that a deliberate state decision to deny or withdraw the protection of the laws from a specified person or class of persons is directly contrary to the Fourteenth Amendment's fundamental purpose of requiring the states to ensure that all persons receive the protection of the laws.

Amendment 2 directly infringes this principle. Its language is as sweeping as possible: under it, no agency or entity whatever of the State of Colorado or its subdivisions may "enact, adopt, or enforce any statute, regulation, ordinance or policy" addressing "any ... claim of discrimination" based on homosexual orientation or conduct.³ By adopting Amendment 2, the

¹ Section 5 of the Amendment, of course, empowered Congress to enact legislation to enforce the requirements of the other sections of the Amendment. In doing so, however, section 5 in no way lessened the states' obligation to obey those requirements.

² Although the Fourteenth Amendment was adopted in response to discrimination against African Americans, from its earliest cases applying the Fourteenth Amendment, this Court has recognized that guarantees of section 1 of the Fourteenth Amendment, including the Equal Protection Clause, are not limited to African Americans or to racial groups. See Barbier, 113 U.S. at 359; Slaughterhouse Cases, 83 U.S. at 72. The Court's modern equal protection decisions, of course, regularly apply the Equal Protection Clause to cases unrelated to race (or related issues such as ethnic origin). See [1985 insurance case; WVa taxation case]. In doing so, the Court has sought to implement the original and historical understanding that the Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." Missouri v. Lewis, 101 U.S. at 31.

³ Amendment 2 is of course limited by United States Constitution and by applicable federal statutes. With that caveat, however, it is as absolute and as perpetual a prohibition as the State could adopt.

State has decided, in advance and in the abstract, that it will permit no public consideration to be given nor any public remedy provided to a claim that persons within its jurisdiction are being treated unfairly because of their perceived homosexual orientation or conduct. As such, we believe that it is almost literally unprecedented in American history.

Amendment 2 is not, as Colorado portrays it, a simple decision to withdraw a particular area of potential governmental action from the power of state or local legislators; it indeed forbids the extension of general civil rights protections to include discrimination against homosexual persons, but it goes far beyond a decision to limit the interference of public law with private choice. Under Amendment 2, "no statute, regulation, ordinance or policy" can be adopted or implemented in response to differential, harmful treatment accorded someone because of his or her homosexual orientation or conduct, no matter how arbitrary the discrimination or egregious the mistreatment.⁴

Amendment 2's implications are sweeping. Not even the most detailed and specific evidence that public officials, acting without authorization by law and out of private motives, are using their discretionary authority to harm homosexual persons or to deny them generally available privileges can authorize the adoption of a regulation or the issuance of a policy to rectify such actions. State and local officials are similarly powerless to adopt any policy in response to private, discriminatory denials of the common law privileges of the law-abiding citizen if the denials are based on the citizen's homosexual orientation. Under Amendment 2, state courts would be closed to arguments that public officials were intentionally and systematically administering the laws to the disadvantage of persons because of homosexual orientation or conduct, because to accept such an argument would be in effect to "enforce [a judicial] policy whereby homosexual ... orientation [or] conduct [would] be the basis of [a] claim of discrimination."⁵ Indeed, if upheld, Amendment 2 would prevent the enactment of a statute

⁴ We note in particular that Amendment 2 cannot be justified on the basis of other, valid state policies such as criminal law prohibitions on conduct. Under the Amendment, victims of discrimination based on homosexual orientation whose conduct is and is known to be entirely lawful cannot obtain protection against that discrimination in the form of a statute, ordinance, regulation, or policy. Whatever room Amendment 2 may leave for the ad hoc protection of an individual against, for example, a denial of the common law privileges of daily business, is, we believe, insufficient to change the conclusion that the Amendment withdraws the protection of the laws from an identifiable group to a constitutionally cognizable degree.

⁵ In this respect, Amendment 2 contravenes this Court's early and repeated insistence that the Equal Protection Clause guarantees that "all persons ... should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts." Yick Wo, 118 U.S. 356 at 367, quoting Barbier, 113 U.S. at 31. Accord, Lewis, 101 U.S. at 30 (no person may be denied "the equal right to resort to the appropriate courts for redress").

On its face, Amendment 2 would not prevent a state court from holding that a particular official action was arbitrary and capricious or otherwise unlawful under the relevant state laws governing the action. However, it seems implausible to argue that the Equal Protection Clause's demand that "no ... class of persons shall be denied the same protection of the laws which is enjoyed by ... other classes," Lewis, 101 U.S. at 31, can be met by the observation that an individual member of a class can perhaps be given a remedy for class-based discrimination as long as he or she does not describe her injury in class-based terms.

or ordinance, or the announcement of a rule of common law, forbidding discrimination as egregious as that ruled unconstitutional in this Court's seminal decision of Yick Wo v. Hopkins, 118 U.S. 356 (1886), as long as the arbitrary exercise of governmental power was directed against the victims because of their homosexual status.⁶

This case does not require the Court to decide what limitations, if any, the Equal Protection Clause places on state decisions regarding the organization of state government, the distribution of governmental power, or the particular processes necessary to enact laws dealing with a given subject. Colorado has announced in advance and as a general matter that no form of harmful discrimination against a specified group may be addressed by any organ of state or local government. The specified group is stripped of state law protection against kinds of discrimination as yet unknown, and wholly without regard to whether such discriminations, whatever they may be, would have any legitimating purposes. By this action, the State of Colorado has flatly contradicted the Equal Protection Clause's essential mandate that the State exclude no one from the protection of its laws.

⁶ In Yick Wo, the Court held unconstitutional the racially discriminatory application of a city ordinance under which many Chinese launderers had been denied an exemption granted virtually all white applicants. The Court stated that

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration ... with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment.

118 U.S. at 373.

2/17

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No. 94 - OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado,
and the STATE OF COLORADO,
Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA
FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN
MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-
2, the CITY AND COUNTY OF DENVER, the CITY OF
BOULDER, the CITY OF ASPEN, and the CITY COUNCIL
OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case Nos. 94SA48 and 94SA128

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STEPHEN K. ERKENBRACK
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QUESTION PRESENTED

Whether a popularly enacted state constitutional amendment precluding special state or local legal protections for homosexuals and bisexuals violates a fundamental right of independently identifiable, yet non-suspect, classes to seek such special protections.

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No. 94 -

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROY ROMER, as Governor of the State of Colorado,
and the STATE OF COLORADO,
Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI

to the Supreme Court of the State of Colorado
Case Nos. 94SA48 and 94SA128

The Governor of the State of Colorado, and the State of Colorado petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The opinions of the Colorado Supreme Court (Pet. App. B and D) are reported at ____ P.2d ____ (Colo. 1994) and 854 P.2d 1270 (Colo. 1993), respectively. The opinions of the trial court (Pet. App. C and E) are not reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The opinion of the Colorado Supreme Court was issued on October 11, 1994, and modified on November 7, 1994. The mandate of the Colorado Supreme Court (Pet. App. A) was entered on November 14, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, § 30b of the Colorado Constitution provides:

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

A. Course of Proceedings

This case involves the validity of a state constitutional amendment prohibiting state and local governmental entities from enacting, adopting or enforcing any law or policy providing special legal protections for homosexuals and bisexuals. This provision, popularly known in Colorado as "Amendment 2,"¹ was passed at the general election held November 3, 1992. On November 12, 1992, the Respondents instituted an action in state district court under 42 U.S.C. § 1983, claiming that Amendment 2 facially violated several provisions of the federal constitution. Upon motions filed by the Respondents, the trial court on January 15, 1993 preliminarily enjoined the Petitioners from enforcing Amendment 2.

On July 19, 1993, the Colorado Supreme Court affirmed the issuance of the preliminary injunction. *Evans v. Romer*, 93SA17, reported at 854 P.2d 1270, 1286 (Colo. 1993) ("*Evans I*") (Pet. App. D). The Colorado Supreme Court held that Amendment 2 presumptively violated "an independently identifiable group's" "right to participate equally in the political process," protected by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Accordingly, the court below remanded the matter for a trial on whether the provision was narrowly tailored to achieve a compelling governmental interest.²

¹The Colorado Revisor of Statutes renumbered this provision as art. II, § 30b for "ease of location." Colo. Rev. Stat., Vol. 1A (1994 Supp.).

²The Petitioners sought certiorari after the Colorado Supreme Court's initial decision. No. 93-453 (U.S. S. Ct. filed Sept. 17, 1993). The Respondents then argued that the matter was not final, and this Court denied review on November 1, 1993. *Romer v. Evans*, 114 S. Ct. 419 (1993). There is no question that the judgment of the Colorado Supreme Court is now final.

Trial was held on October 12-22, 1993. At trial, the Petitioners presented evidence and argument concerning several compelling state interests supporting Amendment 2.³ On December 14, 1993, the trial court ruled that although Amendment 2 promoted two compelling interests -- religious freedom and familial privacy -- it was nonetheless infirm because it was not narrowly drawn to achieve those purposes in the least restrictive manner possible. Pet. App. C-14.⁴

The Colorado Supreme Court reaffirmed its holding that Amendment 2 is subject to strict scrutiny review, and affirmed the trial court's determination that Amendment 2 violated the federal constitution. *Evans v. Romer*, 94SA48 and 94SA128, (Colo. Oct. 11, 1994) ("*Evans II*") (Pet. App. B). Accordingly, it entered final judgment permanently enjoining the enforcement of Amendment 2.

B. Statement of Facts

At the time Amendment 2 was proposed, a number of governmental entities in Colorado had granted or were actively considering granting special legal protections to homosexuals and bisexuals: three cities (Denver, Boulder, and Aspen) had enacted ordinances prohibiting discrimination based on sexual orientation in

³These interests included (1) deterrence of factionalism through preempting local laws; (2) preventing governmental interference with personal, familial, and religious privacy; (3) preserving the integrity of the State's political functions; (4) preserving the ability of the State to remedy discrimination against suspect classes; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) preserving individual autonomy on issues of moral concern.

⁴On February 4, 1994, the Petitioners filed a Notice of Appeal with the Colorado Supreme Court. On February 9, 1994, the trial court certified its December 14 order as appealable under Colo. R. Civ. Pro. 54(b). On March 25, the Petitioners filed an additional Notice of Appeal regarding the February 9 order, and the two appeals were consolidated.

jobs, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the Colorado General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation.⁵

The sponsors of Amendment 2 -- a Colorado Springs-based group known as Colorado for Family Values ("CFV") -- were concerned that special legal protections for homosexuals and bisexuals diminished the privacy, associational, religious, and economic liberty interests of others. Moreover, granting special protections for homosexuals and bisexuals also would raise serious questions about, among other things, the future of educational policy in the state and, ultimately, the State's official approval of homosexuality as a legitimate, alternative lifestyle. Thus, Amendment 2 was intended to prevent homosexuals and bisexuals from receiving preferred legal status; it was not intended to eliminate all legal rights for homosexuals and bisexuals, much less to protect those who broke the law by threatening or harming homosexuals and bisexuals. (v. 15, pp. 722, 837, 846, 853, 868).

The political campaign over Amendment 2 was characterized by competing claims of "equal rights" versus "special rights." CFV claimed that the extension of antidiscrimination laws to include sexual orientation would be tantamount to granting special rights, which are not enjoyed by the public at large. Amendment 2 faced significant opposition, including many prominent political figures, the Colorado

⁵Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals*, Research Publ. No. 369 (1992) (Pet. App. F).

Civil Rights Commission, the American Civil Liberties Union, the League of Women Voters, at least 300 Denver area religious leaders, and most of the newspapers in the State. Denver area newspapers and television stations refused to run some of CFV's advertisements, and Amendment 2's opponents out-spent its supporters by a nearly 2-1 margin. Nonetheless, the people approved Amendment 2 by a margin of 813,966 to 710,151 votes (53.4% - 46.6%).

C. Colorado Supreme Court Opinions

The Colorado Supreme Court determined that Amendment 2 not only repealed existing special protections for homosexuals and bisexuals, but also prohibited "any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Evans I* (Pet. App. D-25). Consequently, the court found, both initially and ultimately, that Amendment 2 infringed upon a "fundamental right to participate equally in the political process." *Evans II* (Pet. App. B-3) (quoting *Evans I*, Pet. App. D-21).

The essence of this "fundamental right," the court below determined, was that "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process, absent a compelling state interest." Pet. App. D-14. That "right" was infringed here, the court concluded, because (1) "[p]rior to the passage of this amendment, gay men, lesbians, and bisexuals were, of course, free to appeal to state and local government for protection against discrimination based on their sexual orientation," *id.* at D-27; and (2) Amendment 2 "bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." *Id.* at D-25.

The trial court rejected the Respondents' contention that homosexuals and bisexuals are a suspect or quasi-suspect class. Pet. App. C-19. The Respondents did not appeal that holding to the Colorado Supreme Court. Accordingly, the question of the legal status of homosexuals and bisexuals *as a class* under the Equal Protection Clause is not before this Court. Rather, the only issue is the validity of the "independently identifiable group" theory adopted by the court below.

The court below rested its decision upon three separate lines of authority concerning (1) the people's ability to restructure political processes (*e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969)), (2) the right to vote, (*e.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gordon v. Lance*, 403 U.S. 1 (1971)), and (3) candidate eligibility (*e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)).

In dissent, Justice William H. Erickson argued that the majority had blurred "fundamental rights" cases with "suspect class" cases to create a heretofore unknown federally-mandated group-based fundamental right. Justice Erickson found that this Court's decisions refute the existence of a fundamental right of any independently identifiable group to participate equally in the political process. Rather, he said, this Court's cases support strict scrutiny review only where a suspect class is adversely affected by a restructuring of the political process. Pet. App. D-55. Justice Erickson took the majority to task because it had "crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on *Evans I*. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent -- the

majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals." Pet. App. B-36.⁶

REASONS FOR GRANTING THE PETITION

There are few issues as divisive as the standing of homosexuals and bisexuals in American society. However, the creation of new constitutional "rights" in response to socially worrisome issues necessarily leads to unforeseen collateral problems when they are applied to other settings. The Colorado Supreme Court's holding places into constitutional doubt any attempt by state or federal governments to preempt countervailing social policies favored by lesser political units. This profound departure from existing constitutional theory, coupled with its dramatic potential impact upon self-government, provide a compelling basis for this Court to review the decision of the Colorado Supreme Court.

I. THE COLORADO SUPREME COURT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS IN *HUNTER v. ERICKSON*, *JAMES v. VALTIERRA*, AND *WASHINGTON v. SEATTLE SCHOOL DISTRICT*, AND WILL REVOLUTIONIZE EQUAL PROTECTION JURISPRUDENCE

As the basis for its conclusion that "any identifiable group" possesses a fundamental right to seek enactment of local legislation benefitting it, the Colorado Supreme Court disavowed reliance upon sexual orientation as the basis for a "suspect class" and instead purported to apply a line of cases commencing with *Hunter v.*

⁶Justice Erickson found that the appropriate standard of review under the Equal Protection Clause is the rational basis test, and further concluded that Amendment 2 easily satisfies this test. Pet. App. at B-53.

Erickson, 393 U.S. 385 (1969). The court's holding, however, conflicts with *Hunter* and the cases of this Court that authoritatively construe it: Under those cases, the Equal Protection Clause prohibits only efforts to realign the political process in a manner designed to harm a suspect class. Decisions of other courts have also held that *Hunter* and related cases are limited in this manner.

In *Hunter*, this Court reviewed an amendment to a city charter which repealed a racial anti-discrimination ordinance, and required voter approval before that type of ordinance could be put into effect. The Court made quite clear that the amendment was struck down because the city council alone could no longer enact such measures on behalf of racial minorities. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," 393 U.S. at 391, this Court observed:

Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).

Two years later, this Court unequivocally refused to extend *Hunter* to non-suspect classes. *James v. Valtierra*, 402 U.S. 137 (1971), concerned the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of *Hunter*, that the California measure unconstitutionally discriminated against poor people in the exercise of their right to seek redress from governmental authorities. This Court disagreed, finding that, unlike in *Hunter*,

it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . *The present case could be affirmed only by extending Hunter, and this we decline to do.* [Respondents] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective, when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But, of course, a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably, a State would not be able to require referendums on any subject, unless referendums were required on all, because they would always disadvantage some group.

Id. at 141-42 (1971) (emphasis supplied).

Eleven years after *Valtierra*, this Court invalidated a voter-initiated statute which removed the power of school boards to order busing to desegregate schools in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). However, this Court acknowledged that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." It is only "when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process" that a different analysis is required. *Id.* at 470 (emphasis in original). Indeed, the majority underscored that the core of this line of cases is:

[W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental

action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

Id. at 486 (citations omitted).

Thus, *Hunter*, *Valtierra*, and *Seattle School District* call for strict scrutiny *only* when the political process has been restructured to place unusual burdens upon racial groups or other suspect classes -- "those groups . . . relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle School District*, 458 U.S. at 486; *see also Valtierra*, 402 U.S. at 141-42. The case is, therefore, this simple: the *Hunter* rule comes into play *only* to protect members of a suspect class. And the Colorado Supreme Court did not conclude, nor do the Respondents contend, that Amendment 2 affects members of a suspect class. In conflict with the Colorado Supreme Court, various other courts have confirmed that *Hunter*, *Valtierra*, and *Seattle School District* are confined in this manner.⁷

⁷*See, e.g., Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (characterizing *Hunter* as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race"); *Lee v. Nyquist*, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."); *cf. Arthur v. City of Toledo*, 782 F.2d 565, 571-74 (6th Cir. 1986) (*Hunter*, *Valtierra*, and *Seattle School Dist.* reflect prohibition of racial discrimination); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991)

The Colorado Supreme Court claimed support for its decision from cases such as *Reynolds v. Sims*, 377 U.S. 533 (1964), *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), and *Gordon v. Lance*, 403 U.S. 1 (1971). Each of these cases concerns the fundamental right to vote, not the "right" identified by the court below. *Reynolds v. Sims* stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. *Kramer v. Union Free School Dist.* held that the right to vote may not be voided on the basis of whether one is a property owner or a parent. *Gordon v. Lance* upheld a supermajoritarian vote requirement at all levels of government, with respect to a particular issue (bonded indebtedness), because no "independently identifiable group," much less a discrete and insular minority, was adversely affected. 403 U.S. at 5.

At root, these cases hold that each person's vote must be exercised with equal weight and freedom. These cases do not concern the *range of issues* that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process. Amendment 2 does not, after all, present a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections,⁸ or where reapportionment or other state

("Hunter was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"). See also Note, *The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy*, 38 Vand. L. Rev. 397, 421-26 (1985) (hereafter, "*Hunter Doctrine*") (*Hunter* doctrine limited to state action embodying a racial classification).

⁸By definition, however, a referendum, affords all similarly situated people an equal opportunity to vote. The referendum requirements in *Hunter* and *Seattle School Dist.* did not threaten to disenfranchise certain voters by placing special procedural burdens on their right to vote." *Hunter Doctrine*, 30 Vand. L. Rev. at 429. Compare *Hill v. Stone*, 421 U.S. 289 (1975) (invalidating provision limiting voters in city bond elections to persons who

action has diluted the value of their individual votes;⁹ likewise, no supermajoritarian requirement has been imposed upon homosexuals and bisexuals.

The court below further attempted to justify its ruling on the basis of this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). However, these cases are wholly inapposite. In *Williams*, this Court held that a complex state statutory structure violated the rights to vote and to associate, because it had the effect of excluding from the ballot all but the candidates of the two major political parties. In *Illinois State Bd. of Elections*, this Court reviewed a scheme which placed higher burdens on new or third-party candidates for local offices than for statewide offices. As in *Williams*, this Court struck down the scheme because it placed an unacceptable burden upon the rights to vote and to associate, both of which are recognized fundamental rights. Neither case stands for anything more than that the Constitution will not permit burdens on access to the ballot which are designed to protect the established parties.

Amendment 2, of course, presents no obstacles whatsoever to particular candidates or political parties. Indeed, homosexuals and bisexuals have the same access to the ballot, including the initiative process through which Amendment 2 was adopted, as all other Colorado citizens have. Rather than burdening any person's rights to

have listed property for taxation); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating provision limiting voters in school district elections to persons owning or leasing taxable real property, or parents or custodians of children enrolled in schools).

⁹See *Reynolds v. Sims*, 377 U.S. 533 (1964). See also *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes").

vote or associate, all Amendment 2 does is raise a certain issue to a constitutional level. Neither the fundamental right to vote, nor that to petition government, encompasses a right to require the state legislature or a local government to entertain matters that are beyond its authority to address. See *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979).

Moreover, even if the right to vote cases could be said to support respondents' position, that would merely reinforce the need to resolve precisely how *Hunter* should be interpreted. However, in light of *Valtierra* and *Seattle School Dist.*, it is manifest that the Colorado Supreme Court's extension of *Hunter* is foreclosed by the decisions of this Court, and also conflicts with decisions of other courts. Accordingly, review by this Court of the issue presented is clearly warranted.

II. THE COLORADO SUPREME COURT'S DETERMINATION THAT SEXUAL ORIENTATION TRIGGERS HEIGHTENED PROTECTION UNDER THE EQUAL PROTECTION CLAUSE CONFLICTS WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS

Under the Colorado Supreme Court's decision, sexual orientation defines an "identifiable group" that warrants special constitutional protection under the Fourteenth Amendment. The Colorado Supreme Court acknowledged that other courts have held that sexual orientation does not define a "suspect class" or "quasi-suspect class" for purposes of the Equal Protection Clause, and the court below was not asked to, and did not rely upon that analysis. Pet. App. B-6 n.3, D-7-8. Nonetheless, without using the term "suspect class or quasi-suspect class," the court below created equivalent protection and achieved the same result. It is the legal analysis used to achieve that result that is presented for review.

The court below held that Amendment 2 triggered strict scrutiny under the Equal Protection Clause "because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs, insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation." Pet. App. at D-25. State legislation routinely makes distinctions between, and imposes burdens on, "identifiable groups" defined by characteristics such as income, occupation, property ownership, residence, or receipt of services, but the opinion does not hint whether statewide regulation on those bases would be subjected to anything but rationality review.

In contrast to the Colorado Supreme Court's determination, every federal court of appeals that has considered the issue has concluded that some form of rational relationship review applies to governmental measures that draw distinctions based upon sexual orientation. See, e.g., *Steffan v. Perry*, No. 91-5409 (D.C. Cir. Nov. 22, 1994); *High Tech Gays v. Defense Investigations Security Clearance Office*, 895 F.2d 563, reh'g denied, 909 F.2d 375 (9th Cir. 1990) (rejecting strict scrutiny); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1988), aff'd, 470 U.S. 903 (1985). There is, however, continuing dispute within the Circuits regarding the proper standard of review under that general rubric. Compare *Steffan v. Perry* (subjecting government classification based upon sexual orientation to traditional, deferential rational basis review) with *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) (subjecting government classification based upon sexual orientation to "'active' rational basis review" that requires scrutiny of record support for challenged classification).

In addition, the Colorado Supreme Court's extension of heightened protection based upon sexual orientation conflicts with this

Court's ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986). There, this Court upheld, on a showing of only a rational basis, a statute criminalizing homosexual activity. If homosexual activity may be criminalized outright, it is assuredly nonsensical to say that restricting special legal protections to those professing a desire to engage in such activity requires a compelling interest. The court's decision leads to the absurd result that the only way the people of Colorado can obviate special protections for homosexuals is to criminalize homosexuality. Cf. *Richardson v. Ramirez*, 418 U.S. 24 (1974) (criminals can be denied right to vote, even after they have completed their sentences); *Woodward v. United States*, 871 F.2d at 1076 ("After *Hardwick*, it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"). See also *Steffan v. Perry*, slip op. at 18 (characterizing dissenting opinion's disapproval of the military's ban on homosexuals as "an undisciplined rebellion against the governing constitutional doctrine.")

Further review is, therefore, warranted to resolve these conflicts regarding the appropriate standard of review to be applied to governmental classifications predicated upon sexual orientation.

III. THE DECISION BELOW PRESENTS AN ISSUE OF EXCEPTIONAL PUBLIC IMPORTANCE TO THE RIGHT OF SELF-GOVERNMENT

By finding an equal protection right of any "independently identifiable group" to pursue beneficial legislation at the local level, the Colorado Supreme Court has created widespread uncertainty and has potentially injected the judiciary into a broad range of issues heretofore reserved to state legislatures or to Congress.

Because the right identified by the Colorado Supreme Court is essentially unqualified, it will provide the basis to attack a wide range of routine federal and state legislation. For example, a vast array of federal tax, regulatory, and social legislation affects groups

that are "independently identifiable" based upon citizens' income, occupation, residence, health, age, or any number of other factors.¹⁰ State regulation that might provide greater benefits or protections to any of these groups is preempted if in direct conflict with such federal legislation or if state law interferes with the goals and operation of federal law. U.S. Const. art. VI. Under the Colorado Supreme Court's reasoning, however, every such assertion of pre-emption may be challenged by a contrary constitutional claim that the Equal Protection Clause guarantees the right of the affected group to seek additional benefits at the state or local level.

Similarly, every state measure, including those contained in state constitutions, which are designed to achieve uniformity or to allocate benefits and burdens, may now be challenged on federal constitutional grounds as interfering with an identifiable group's ability to secure benefits from local governments. Colorado, like other States, has, through legislation, imposed tax, safety, environmental, and other requirements upon "independently identifiable" groups. The Colorado Constitution, likewise, burdens identifiable groups that desire public abortion funding,¹¹ the re-

¹⁰Several members of this Court have indicated that the term, "independently identifiable group" can have an extremely expansive meaning. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests," including those with "competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups"); *Karcher v. Daggett*, 462 U.S. 725, 754 n.12 (1983) (Stevens, J., concurring) ("Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context.").

¹¹By virtue of Colo. Const. art. V, § 50, the State is prohibited from spending public funds to assist, financially or otherwise, in the inducement of abortion, except in very narrow circumstances. Abortion advocates must seek a constitutional amendment to fund this particular medical procedure; advocates for any other medical procedure need only seek a statute. These

election of incumbent officials,¹² reorganization of certain school districts,¹³ certain municipal annexations,¹⁴ and limited gaming.¹⁵ These measures, as well as the allocation of power to make these determinations, are "intimately related to the process of democratic self-government" committed to the States. *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991); *see also* U.S. Const. amend. X.¹⁶ Colorado, like other States,

permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the

types of provisions are patently constitutional. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980).

¹²Colo. Const. art. XVIII, § 9a limits the terms of state elected officials, thereby preventing the identifiable group of supporters of particular incumbents from voting for the candidate of their choice. *See also* Colo. Const. art. IV, § 1; *id.* art. V, § 3.

¹³Colo. Const. art. XX, § 7 establishes a single school district for the City and County of Denver. Although the residents of any other school district may divide or reorganize their district simply by obtaining a statute to that effect, residents of Denver must obtain a constitutional amendment.

¹⁴Colo. Const. art. XX, § 1 and art. XIV, § 3, prevent the City and County of Denver from annexing land in any manner other than as a county. The citizens of Denver bear a greater burden than citizens of other Colorado cities, but this presents no cognizable constitutional question. *Cf. City of Glendale v. Buchanan*, 195 Colo. 267, 578 P.2d 221 (1978); *Board of County Comm'rs v. City & County of Denver*, 150 Colo. 198, 372 P.2d 152 (1962), *appeal dismissed*, 372 U.S. 679 (1963).

¹⁵Colo. Const. art. XVIII, § 9 allows limited gaming only in Central City, Black Hawk, and Cripple Creek. All other Colorado communities must obtain a constitutional amendment.

¹⁶Indeed, in every State in the country, the people themselves retain the power to approve or disapprove amendments to their respective constitutions. Council of State Governments, *The Book of the States* at 42-43 (1990).

State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

Seattle School Dist. 458 U.S. at 496 (Powell, J., dissenting).¹⁷ The Colorado Supreme Court's decision bars efforts to determine these matters at the state level and resurrects the "vested constitutional right to local decision-making" specifically rejected in *Seattle School Dist.*, 458 U.S. at 480 n.23.

Already, the federal district court in Cincinnati, Ohio has seized upon the Colorado Supreme Court's rationale to invalidate a voter-enacted anti-special rights amendment to the municipal charter based upon what it termed the "thorough analysis of the Colorado Supreme Court in *Evans v. Romer*." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993), *injunction made permanent*, 860 F. Supp. 417 (S.D. Ohio 1994), *appeal filed*, Nos. 94-3855 and 94-3973 (6th Cir. 1994) (decision based upon both "identifiable group" and "suspect class" grounds). Like the Colorado Supreme Court, the federal district court in Ohio concluded that this Court's rulings "stand for the broader proposition that States may not disadvantage any identifiable

¹⁷It is important to note that Justice Powell was joined by three other Justices in dissenting from the majority's invalidation of a statewide referendum found to "impose substantial and unique burdens on racial minorities . . ." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982). In the absence of any such burden, the people of a State are free to amend their constitution through democratic processes.

group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf." 838 F. Supp. at 1241 (emphasis in original).

Even if the Colorado Supreme Court's decision were or could be limited to determinations regarding rights based upon sexual orientation, it represents a dramatic and unwarranted interference in the political process that necessitates this Court's review. The political battle surrounds competing claims of rights. On one side, there are those who support measures such as Amendment 2 as a means of protecting their right to be free from intrusive special protection laws.¹⁸ Eighteen months ago, citizens' groups in at least fourteen other States were considering sponsoring measures similar to Amendment 2;¹⁹ now, however, the doctrine applied below is being used not only to discourage popular support for these measures, but to legally block them from the ballot.²⁰

¹⁸R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?* 9 Notre Dame J. of Law, Ethics & Pub. Pol'y ___, __ (1994) ("the plaintiffs in *Evans* seek not the vote, but the right to regulate the lives and property of others free of constitutional limitations designed to protect the liberties of those whom they seek to regulate.") (Article is to be published shortly and will be lodged with the Court upon publication).

¹⁹Those States are Arizona, California, Florida, Georgia, Idaho, Iowa, Maine, Michigan, Minnesota, Missouri, Montana, Ohio, Oregon, and Washington. See *Anti-Gay-Rights Drive Spreads*, Denver Post, Mar. 5, 1993, at 1.

²⁰See *Amendment 2: Gay Rights Gain New Momentum*, Denver Post, Oct. 12, 1994, at 11A (*Evans* doctrine used to oppose ballot measures in Florida, Idaho, and Oregon).

On the other side of the debate, there are those who support special protections for homosexuals and bisexuals. Presumably, then, those statewide measures *extending* special protections to homosexuals and bisexuals²¹ also infringe upon the "fundamental right" of identifiable groups, such as CFV, which oppose special protections. To rule otherwise would mean that only those favoring special protections could appeal to the state legislature or the people if they lost at the local level.²² In truth, whichever side wins the public policy debate at the statewide level, the losers face a greater burden with respect to their right to participate at the local level. This is no violation of the Constitution; it is, rather, a basic fact of political life in this Nation since its inception.

Rather than permitting the range of issues associated with sexuality to be widely debated and determined through the political process at a variety of levels, the Colorado Supreme Court has determined that the federal Constitution dictates the terms of political debate, insulating that debate from the state legislature or even the people themselves. The decision below strikes at the heart of voter

²¹Eight States have enacted special protections for homosexuals and bisexuals at a statewide level. See Cal. Civ. Code § 51.7 (West 1982); Cal. Labor Code § 1102.1 (West 1989); Conn. Gen. Stat. Ann. § 46a-81a to 46a-81r (West 1986); Haw. Rev. Stat. §§ 378-1, 378-3 (1992 Supp.); Mass. Gen. L. ch. 1518 §§ 3, 4 (1982); Act of Apr. 2, 1993, 1993 Minn. Sess. Law Serv. 81 (West) (amending Minn. Stat. 1992 § 363); N.J. Stat. Ann. §§ 10:5-5, 10:5-12 (West 1993); Vt. Stat. Ann. tit. 1, § 143 (1985), tit. 9, §§ 4503-4504 (1984), tit. 21, § 495 (1987); Wis. Stat. Ann. §§ 101.22, 111.32 (West 1988). See also D.C. Code Ann. §§ 1-2502, 1-2503 (1991).

²²In Oregon, where a statewide anti-homosexual rights proposal was defeated in 1992, communities have attempted to enact local anti-homosexual rights measures. In marked contrast to the instant case, homosexual rights advocates are arguing there that new state legislation bars such measures, because "[t]he issue of discrimination based on sexual orientation is a statewide concern, and [opponents'] divide and conquer mentality will not be tolerated." See *Oregon Lawmakers Ban Local Votes on Gay Bias*, N.Y. Times, July 30, 1993, at A-10.

sovereignty, and of federalism itself, because any distinction made by government in the establishment of its political structure becomes vulnerable to constitutional attack.²³ Any individual voter whose cause is unsuccessful in a referendum would be entitled to overturn that referendum, simply because the majority imposed its will on a minority concern. If that were the law, major public policy issues could not be decisively settled through the political process; government would be obliged continually to reconsider every policy choice.

This issue in this case is neither isolated nor inconsequential; if unchecked, the doctrine adopted by the court below threatens completely to reshape our political processes, the highest expression of which is the power of the people to establish and amend their state constitutions as they deem appropriate. In setting aside Amendment 2, the Colorado Supreme Court nullified the will of the people of Colorado, solely because it believed the decisions of this Court compelled such a result. The uncertainty of the future of popular self-government not only in Colorado, but indeed every state and local government in the entire Nation, warrants the grant of certiorari.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted. Alternatively, the Court should reverse summarily on the basis of *James v. Valtierra*.

²³"The potential scope of the right recognized by the Colorado court in *Evans* is breathtaking. If the court means what it says, it has discovered a constitutional right of any 'independently identifiable class of persons' to have its political agenda insulated against the constitutional rights of others." R. Duncan and G. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 Notre Dame J. of Law, Ethics & Pub. Pol'y at ____.

Respectfully submitted this 9th day of December, 1994.

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APPENDIX A

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SA48

Appeal from the District Court, City and County of Denver,
92CV7223

MANDATE

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER,
PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE
BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND
COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY
OF ASPEN, AND THE CITY COUNSEL OF ASPEN,

Plaintiff-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado and the STATE
OF COLORADO,

Defendants-Appellants.

This cause having been brought to this court as an appeal from
the District Court of the City and County of Denver, and having been
heretofore argued by counsel and submitted to the consideration and
judgment of the court, and now being sufficiently advised in the
premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of
the District Court of the City and County of Denver shall be, and the
same hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the cost of \$260.00 is awarded
for the Plaintiffs-Appellees and against the Defendants-Appellants,
pursuant to C.A.R. 39.

NOW THEREFORE, jurisdiction of this cause is returned to the District Court of the City and County of Denver.

WITNESS, the HONORABLE LUIS D. ROVIRA, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City and County of Denver, this 14th day of November, 1994.

MAC V. DANFORD
Clerk of the Supreme Court

Deputy Clerk

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APPENDIX B

SUPREME COURT, STATE OF COLORADO
NOS. 94SA48 & 94SA128

October 11, 1994

RICHARD G. EVANS, ANGELA ROMERO,
LINDA FOWLER, PAUL BROWN, PRISCILLA
INKPEN, JOHN MILLER, THE BOULDER
VALLEY SCHOOL DISTRICT RE-2, THE CITY
AND COUNTY OF DENVER, THE CITY OF
BOULDER, THE CITY OF ASPEN, AND THE
CITY COUNCIL OF ASPEN, Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, and
the STATE OF COLORADO, Defendants-Appellants.

Appeal from the District Court, City and County of Denver
Honorable H. Jeffrey Bayless, Judge

EN BANC

JUDGMENT AFFIRMED

Defendants, Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado (defendants) appeal the trial court's entry of a permanent injunction enjoining them from enforcing a voter-initiated amendment to the Colorado Constitution ("Amendment 2"). We affirm.

I

In May 1992, petitions which would amend the Colorado Constitution by adding a new section 30 to article II were filed with

the secretary of state. The proposed amendment was put to the voters as Amendment 2 on November 3, 1992, and passed by a vote of 813,966 to 710,151 (53.4% to 46.6%). The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution.

Amendment 2 provides:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, Richard G. Evans, along with eight other persons, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen (plaintiffs) filed suit in Denver District Court to enjoin the enforcement of Amendment 2 claiming that the amendment was unconstitutional.

The trial court conducted an evidentiary hearing to consider plaintiffs' motion for a preliminary injunction. Subsequently, the court granted the motion and prohibited the defendants from enforcing Amendment 2 pending the outcome of a trial on the merits.¹

¹The trial court concluded that plaintiffs had met the threshold requirement of *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), by demonstrating that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution. The trial court then determined that because Amendment 2 may burden a fundamental constitutional right, its constitutionality must be assessed by reference to the "strict scrutiny" standard of review. The court concluded that under this standard, plaintiffs had shown to a reasonable

The defendants appealed pursuant to C.A.R. 1(a)(3), and we granted review. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*). In *Evans I*, we first addressed the question of the legal standard to be applied in reviewing the trial court's entry of the preliminary injunction. Following the precedent of the United States Supreme Court, we held that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process," and "that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." *Id.* at 1282.

After recognizing that "[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation" and that the "'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures," we held:

[T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.

probability that Amendment 2 would be demonstrated to be unconstitutional beyond a reasonable doubt at a trial on the merits.

Id. at 1285. We concluded that the trial court did not err in granting the preliminary injunction enjoining defendants from enforcing Amendment 2.

After our decision in *Evans I*, the case was remanded to the trial court to determine whether Amendment 2 was supported by a compelling state interest and narrowly tailored to serve that interest. *Id.* at 1286. At trial the defendants offered six "compelling" state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of Colorado children.²

The trial court concluded that the interest in deterring "factionalism" was in truth, nothing more than an attempt to impede the expression of "a difference of opinion on a controversial political question" It concluded that the first governmental interest was not a compelling state interest but rather, that "the *opposite* of defendants' claimed compelling interest is most probably compelling," i.e., encouraging the competition of ideas with uninhibited, robust, and wide-open political debate.

The trial court found that the interest of preserving the State's political functions, premised on the Tenth Amendment right of the states to amend state constitutions, was not a compelling interest since "[d]efendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution."

With respect to the interest in preserving the ability of the state to remedy discrimination against groups which have been held to be suspect classes, the trial court stated its doubt as to whether fiscal concerns of the state rise to the level of a compelling state interest. The court held that Amendment 2 could not be understood to further this interest because,

[d]efendants' evidence was principally in the form of opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what *has happened* over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinances.

Thus, the trial court concluded that "defendants' offered evidence of lack of fiscal ability [is] unpersuasive in all respects."

The trial court held that preventing the government from interfering with personal, familial, and religious privacy was, in part, a compelling state interest. Although the court acknowledged promotion of family privacy is a compelling state interest, it held that defendants never established what they meant by the term "family." Moreover, defendants failed to "tie-in . . . the interest of protecting the family and denying gays and bisexuals the right to political participation"

The trial court also found that preserving religious liberty was a compelling state interest. However, it held that Amendment 2 was not narrowly tailored to serve this interest. "The narrowly focused way of addressing [antidiscrimination protections for gay men, lesbians, and bisexuals] is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process."

The trial court rejected the personal privacy component of the argument on the grounds that "[t]he general issue of whether personal privacy is a compelling state interest was not adequately established. The court can only speculate as to what defendants mean by personal privacy and how Amendment 2 protects such a right."

The interest in preventing government from subsidizing the political objectives of a special interest group was rejected on the grounds that "[t]his claimed compelling interest was not supported by

²The state has not reasserted the sixth interest on appeal.

any credible evidence or any cogent argument, and the court concludes that it is not a compelling state interest."

Similarly, the trial court rejected the argument that the protection of children is a compelling state interest served by Amendment 2 because "[d]efendants have failed to present sufficient evidence to support this claimed compelling interest."

Accordingly, because the trial court concluded that Amendment 2 was not necessary to support any compelling state interest and narrowly tailored to meet that interest, it permanently enjoined the enforcement of Amendment 2.³

³The court rejected plaintiffs' argument that gay men, lesbians, and bisexuals should be found to be either a "suspect class" or a "quasi-suspect class." The trial court rejected this argument because it concluded that "[h]omosexuals fail to meet the element of political powerlessness and therefore fail to meet the elements [necessary] to be found a suspect class." This ruling has not been appealed and thus, we do not address it.

The trial court also declined plaintiffs' request to analyze the constitutionality of Amendment 2 under the "rational basis test." In so doing, it stated:

The Colorado Supreme Court has ruled that Amendment 2 invades a fundamental right of an identifiable group and that the test to be applied is the strict scrutiny test. The rational basis test is to be used when there is no fundamental right or suspect class involved. Therefore this court declines to apply a legally inappropriate test to this case.

Plaintiffs have again argued to this court that Amendment 2 does not pass constitutional muster under the less stringent rational basis test. They argue that each of the state's purported compelling interests are not rationally related to the enactment of Amendment 2. Because we decline to revisit our holding in *Evans I*, see *infra* Part II, and again conclude that Amendment 2 affects a fundamental right, its constitutionality must be analyzed under the strict scrutiny standard of review. See *Plyler v. Doe*, 457 U.S. 202, 217 (1982) ("laws that impinge upon the exercise of a 'fundamental right' [require] the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest").

On appeal the defendants argue that: (1) the legal standard set forth by this Court in *Evans I* for assessing the constitutionality of Amendment 2 should be reconsidered; (2) Amendment 2 is supported by several compelling state interests and is narrowly tailored to meet those interests; (3) that the unconstitutional provisions of Amendment 2 are severable from the remainder; and (4) Amendment 2 is a valid exercise of state power under the Tenth Amendment to the United States Constitution.

II

Defendants first ask that we reconsider the constitutional principles articulated in *Evans I*, but they offer no arguments that were not then considered and rejected by this court. We see no reason to revisit that decision. We reaffirm our holding that the constitutionality of Amendment 2 must be determined with reference to the strict scrutiny standard of review.⁴

⁴After this court decided *Evans I*, a Federal District Court enjoined the enforcement of a voter enacted amendment to the Cincinnati, Ohio city charter almost identical to Amendment 2, which prohibited the city from enacting any ordinance, regulation, rule or policy which entitled gay men, lesbian or bisexual individuals to minority or protected status. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) (*Equality II*). The court found it highly likely that the right to participate equally in the political process is a fundamental right, protected by the Equal Protection Clause and requires strict judicial scrutiny on review. The court concluded relevant Supreme Court precedent supported the proposition that "[s]tates may not disadvantage any identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf." *Id.* at 1241 (citing *Evans I*, 854 P.2d 1270, 1281, 1283 (Colo. 1993); *Gordon v. Lance*, 403 U.S. 1, 7 (1971); *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)). After a trial on the merits, the court made the injunction permanent holding *inter alia* that the amendment violated the plaintiffs' fundamental right to equal access to the political process. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, Slip op. at 26, 1994 WL 442746 at *11 (S.D. Ohio 1994). The court explained "any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, 'fences' that group out of the political process, and thereby violates

III

A legislative enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is "necessary to promote a compelling state interest," *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), and does so in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 (1982). The question of what constitutes a compelling state interest is one of law and thus, we review the trial court's ruling *de novo*. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 772 n.30 (5th Cir. 1993); *Scott v. Rosenberg*, 702 F.2d 1263, 1274 (9th Cir. 1983). Defendants argue that Amendment 2 is supported by a number of compelling state interests and is narrowly tailored to serve those interests.⁵

A

Defendants' first asserted governmental interest is in protecting the sanctity of religious, familial, and personal privacy. Freedom of religion is expressly guaranteed by both the First Amendment to the United States Constitution and article II, section 4 of the Colorado Constitution and stands at the core of our Nation's history and tradition. It is among the highest values of our society. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943). There can be little doubt that ensuring religious freedom is a compelling governmental interest.

their fundamental rights." *Id.* (citing *Equality I*, 838 F. Supp. at 1238-42; *Evans I*, 854 P.2d at 1282.).

⁵We note at the outset that defendants argue that all of the asserted compelling interests which support Amendment 2 are narrowly tailored on the grounds that "there is absolutely no other way that the people could further the common elements of the various compelling interests but through the enactment of Amendment 2." We do not specifically address this argument for two reasons. First, as will be made clear below, none of the interests identified by defendants are compelling. Second, defendants never articulate what the "common elements of the various compelling interests" are, and we are simply unable to ascertain any specific "common elements" which all of those interests share.

Defendants argue that Amendment 2 is necessary to serve this interest because "[u]nder the ordinances preempted by Amendment 2, individual landlords or employers who have deep-seated and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions, under threat of government sanctions." In support of this proposition, defendants rely on *Smith v. Commission of Fair Employment & Hous.*, 30 Cal. Rptr.2d 395 (Cal. App. 3 Dist. 1994), *pet. for review granted and opinion superseded by Smith v. Fair Employment & Hous. Comm'n*, 33 Cal. Rptr.2d 567, 880 P.2d 111 (Cal. Sept. 8, 1994). (*See* Cal. Ct. Rules 976(d) opinion withdrawn from publication pending review).

In *Smith*, the plaintiff challenged the ruling of the California Commission of Fair Employment and Housing which found that she had impermissibly discriminated, based on their marital status, against a couple who sought to rent housing. The couple was unmarried and the plaintiff refused to rent to them on the grounds that doing so would violate her deeply-held religious beliefs. Plaintiff was ordered to cease and desist marital discrimination; post a notice announcing her violation of California law for ninety days; permanently post a notice to rental applicants of their rights and remedies under California antidiscrimination laws; and sign both notices and provide copies to each person who subsequently expressed an interest in renting her property. *Id.* at 397-98.

The California court of appeals concluded that the commission's order substantially burdened plaintiff's free exercise rights because she "cannot remain faithful to her religious convictions and beliefs and yet rent to unmarried couples." *Id.* at 399.⁶

⁶Nevertheless, the court held, "it is clear that free exercise of religion as protected by the First Amendment is not actionably infringed by applying to plaintiff a facially neutral statute which merely proscribes marital status discrimination, notwithstanding plaintiff's religious scruples against renting to unmarried couples." *Id.* at 401. This conclusion was reached based on the fact that "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 400 (quoting *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. at 878 (1990)).

Assuming *arguendo* that ordinances such as that in effect in Boulder, which prohibit discrimination against gay men, lesbians, and bisexuals in housing and employment but which contain no exception for religiously-based objections, substantially burden the religious liberty of those who object to renting or employing gay men, lesbians, or bisexuals on religious grounds, the enactment of Amendment 2 clearly is not narrowly tailored to serve the interest of ensuring religious liberty. To the contrary, an equally effective, and substantially less onerous way of accomplishing that purpose simply would be to require that antidiscrimination laws which include provisions for sexual orientation also include exceptions for religiously-based objections. This is precisely what the Denver antidiscrimination laws provide. Denver, Colo., Rev. Mun. Code art. IV, §§ 28-92, 28-93, 28-95 to 28-97 (1992 Supp.). Similar exemptions for religious organizations are found in federal antidiscrimination statutes. *See, e.g.*, 42 U.S.C. § 2000e-1 (1994 Supp.) (exempting religious organizations from the prohibition against employment discrimination); 42 U.S.C. § 3607 (1994 Supp.) (exemption for religious organizations in housing and public accommodation).⁷ Defendants do not, and we doubt that they could, argue that the Denver ordinance impairs religious freedom. Indeed, Joseph Broadus, who testified as an expert witness on behalf of the defendants, testified that imposing a religiously-based exemption on antidiscrimination laws intended to protect gay men, lesbians, and bisexuals would be less restrictive than Amendment 2 and would adequately address any concerns about religious liberty.

⁷We do not rule today on the adequacy of any religious exemptions contained in existing antidiscrimination laws. The question whether antidiscrimination laws violate the free exercise clause of the First Amendment by prohibiting discrimination based on marital status has recently been addressed by two state supreme courts with mixed results. *See Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (Statutory mandate that landlords cannot discriminate against cohabitating unmarried couples substantially burdened landlords' sincerely held religious belief protected by the Massachusetts state constitution. Case remanded to decide whether a compelling governmental interest in eliminating such discrimination justified the infringement); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (enforcement of facially neutral fair housing laws did not violate a landlord's right to free exercise of religion under either the state or federal constitution).

It is clear that Amendment 2, which affects the fundamental right of gay men, lesbians, and bisexuals to participate equally in the political process, is not the least restrictive means of ensuring religious liberty, and is not narrowly tailored to serve the compelling governmental interest in ensuring the free exercise of religion.

Defendants also argue that Amendment 2 serves the compelling interest of preserving "familial privacy." Family privacy is characterized by defendants as the right "of some parents to teach traditional moral values" to their children. As support, defendants cite authority recognizing the sanctity of the family and the central role the family plays in society. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental role is "basic in the structure of our society").

Defendants contend that the "right of familial privacy" is "severely undermine[d]" by the enactment of antidiscrimination laws protecting gay men, lesbians, and bisexuals because "[i]f a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined." This argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government *endorse* certain values as moral or immoral. While it is true that parents have a constitutionally protected interest in inculcating their children with their own values, *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), defendants point to no authority, and we are aware of none, holding that parents have the corresponding right of insuring that government endorse those values.

The United States Supreme Court has repeatedly held that the individual's right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("Never to our knowledge has the Court . . . require[d] the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."). Furthermore, it is clear that the government does not burden an individual's constitutional rights merely because it endorses views with which that individual may disagree. *See Block v. Meese*,

793 F.2d 1303, 1312-14 (D.C. Cir. 1986) (then Judge Scalia concluding that "[a] rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family . . ."). *Id.* at 1313.

Consequently, fully recognizing that parents have a "privacy" right to instruct their children that homosexuality is immoral, we find that nothing in the laws or policies which Amendment 2 is intended to prohibit interferes with that right. With or without Amendment 2, parents retain full authority to express their views about homosexuality to their children. We believe that Amendment 2 is neither necessary nor narrowly tailored to preserve familial privacy because that right is not implicated by the laws and policies which Amendment 2 proscribes.

Defendants also argue that Amendment 2 serves the compelling state interest in preserving "personal privacy." While it is not entirely clear what is meant by the phrase, it appears that the defendants are referring to the right of "associational privacy" which will be impaired in the absence of Amendment 2 because individuals may be forced to associate with gay men, lesbians, and bisexuals in the rental of housing.⁹

⁹The defendants' entire argument addressing the issue of personal privacy constitutes a single paragraph. It reads:

The court below found that both religious liberty and familial privacy are indeed compelling interests. However, the court rejected the notion that personal privacy could be a compelling interest, finding that the Defendants had addressed it only "tangentially." This finding ignores testimony such as that offered by Ann Ready of Madison, Wisconsin, who shared a house with four other women, but refused to share it with a lesbian. She stated that she "had rejected several heterosexual males for the same reason, namely the potential for [unwanted] physical, sexual attraction." Ms. Ready was subsequently found to have violated both municipal and state sexual orientation laws. That preventing this sort of intrusion into personal matters of the utmost privacy is a compelling interest,

As the Supreme Court has explained, the right of associational privacy protects associations involving,

deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in the decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984).

While preserving associational privacy may rise to the level of a compelling state interest, Amendment 2 is not narrowly tailored to serve that interest. Amendment 2 would forbid governmental entities from prohibiting discrimination against gay men, lesbians, and bisexuals (because they are gay, lesbian, or bisexual) in *all* aspects of commercial and public life, no matter how impersonal. Amendment 2 affects a vast array of affiliations which in no way implicate associational privacy. None of the criteria needed to precipitate associational privacy rights exists: there is no "special community" distinguished by "selectivity," "relative smallness," or any concern with "distinctively personal aspects of one's life." *Id.*

[A]n association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

should be obvious.

(citations to the record omitted).

Id. (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)).

To the extent that antidiscrimination laws protecting gay men, lesbians, and bisexuals have the potential to implicate associational privacy rights, a narrower way of avoiding this conflict would be to exempt the sort of intimate associations identified in *Roberts* from the scope of such laws. For instance, landlords could be allowed to discriminate against homosexuals in the rental of owner-occupied housing -- the so-called "Mrs. Murphy's Boarding House" exception. *See, e.g., Fair Housing Act*, 42 U.S.C. § 3603(b) (1988 & 1994 Supp.) (exempting certain owner-occupied housing from the Fair Housing Act); *Statutory History of the United States: Civil Rights, Part II* 1741-52, 1805-06 (B. Schwartz ed. 1970) (detailing legislative history and policies underlying "Mrs. Murphy's Boarding House" exemption in Fair Housing Act). Similar exemptions already exist under Colorado law. For instance, Denver's antidiscrimination ordinance exempts from its housing and public accommodation provisions multiple unit dwellings of not more than two units where one of the units is owner occupied. Denver, Colo., Rev. Mun. Code art. IV, §§ 28-95(b)(2) & 28-96(b)(2) (1991). Similarly, the Colorado Civil Rights statute exempts from the definition of "housing" any room offered for rent or lease in a single-family dwelling occupied in part by the owner. § 24-34-501(2), 10A C.R.S. (1988).

Amendment 2, however, does no such thing. Rather, it prohibits governmental entities from enacting laws barring discrimination against gay men, lesbians, and bisexuals in all contexts, regardless of the nature of the relationship involved and the extent of intimacy inherent in those relationships. Amendment 2 sweeps more broadly than necessary and is not narrowly tailored to serve the governmental interest in preserving associational privacy.

B

Defendants next assert that because "laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes. . . . Amendment 2 is an appropriate means whereby the people sought to focus government's limited resources upon those

officer for Denver's antidiscrimination ordinance testified that Denver's protection of gay men, lesbians, and bisexuals has not prevented Denver from protecting other groups or had any significant fiscal impact on Denver. The chief of Wisconsin's Civil Rights Bureau testified, based on twelve years experience with Wisconsin's enforcement of its antidiscrimination laws, that protection of gay, lesbian, and bisexual persons has not limited enforcement of other parts of the Wisconsin statutes. The trial court found that protecting gay men, lesbians, and bisexuals from discrimination "has not increased costs or impaired the enforcement of other civil rights statutes or ordinances."¹⁰ This finding is supported by the record and substantiates the conclusion that Amendment 2 is not necessary to serve the governmental interest asserted.

Even if protecting gay men, lesbians, and bisexuals from discrimination has some fiscal impact on the state, Amendment 2 is not narrowly tailored to serve that interest. Ensuring that certain racial, gender, or ethnic groups receive undiminished funds for civil rights enforcement could easily be accomplished by ear-marking funds to cover the costs of such enforcement. Under such an arrangement, any protection for gay men, lesbians, and bisexuals would have to be funded from sources other than funds reserved for the protection of the specified suspect classes. The governmental interest in insuring adequate resources for the enforcement of civil rights laws designed to protect suspect classes from discrimination need not be accomplished by denying the right of gay men, lesbians, and bisexuals from participating equally in the political process. Rather, this interest can be served in such way that no persons' fundamental rights need be denied.

legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals.

¹⁰The trial court rejected the testimony of the defendants' witnesses who, while having no experience in the enforcement of civil rights laws intended to protect gays, lesbians, and bisexuals, speculated that doing so would create increased costs and limit the ability to enforce laws intended to protect suspect classes.

The defendants' second asserted governmental interest in support of Amendment 2 is neither necessary nor narrowly tailored to serve that interest.

C

Defendants next argue that Amendment 2 "promotes the compelling governmental interest of allowing the people themselves to establish public social and moral norms."¹¹ In support of this proposition, defendants define two related norms which are promoted by Amendment 2: Amendment 2 preserves heterosexual families and heterosexual marriage and, more generally, it sends the societal message condemning gay men, lesbians, and bisexuals as immoral.

The only authority relied on to support the view that the protection of morality constitutes a compelling governmental interest is *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). Defendants cite the plurality opinion in *Barnes* for the proposition that "the State's interest in protecting order and morality is compelling; substantial; subordinating; paramount; cogent; strong." *Barnes* does not support defendants' contention that protecting public morality constitutes a compelling governmental interest.

In *Barnes*, four Justices held that "the public indecency statute . . . furthers a *substantial* government interest in protecting

¹¹There is some dispute as to whether consideration of this asserted interest is properly before this court. Plaintiffs point out that in contrast to the six governmental interests addressed by the trial court, morality was not listed in the state's disclosure certificate or the state's opening statement at trial as a separate interest supporting Amendment 2.

Defendants argue that it presented the interest in public morality to the district court and as support, cites an introductory paragraph contained in its brief to that court which stated that "the issue of public morality . . . permeates the discussion of compelling interests and indeed, can be regarded as a compelling interest in its own right." In our judgment, this is sufficient to conclude that the interest of public morality was presented to the trial court as a rationale for Amendment 2 and thus, this asserted interest is properly before this court.

order and morality." *Barnes*, 501 U.S. at 567 (emphasis added). Justice Souter provided the fifth vote in *Barnes*, however he did not rely "on the possible sufficiency of society's moral views to justify the limitations at issue." *Id.* at 582 (Souter, J., concurring). Rather, he was of the opinion that the Indiana law at issue (which prohibited completely nude dancing) was permissible due to the "State's substantial interest in combating the secondary effects of adult entertainment establishments" *Id.* None of the justices in *Barnes* concluded that furthering public morality constitutes a compelling state interest.

Consequently, defendants have cited no authority to support the proposition that the promotion of public morality constitutes a compelling governmental interest, and we are aware of none. At the most, this interest is substantial. However, a substantial governmental interest is not sufficient to render constitutional a law which infringes on a fundamental right -- the interest must be compelling. See *Phyllis v. Doe*, 457 U.S. 202, 217 (1982).

Furthermore, even recognizing the legitimacy of promoting public morals as a governmental interest, it is clear to us that Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals. First, we reject defendants' suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will "choose" to "become homosexual" if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates. For example, Wisconsin, the state with the oldest "gay rights" law in the nation, enacted in 1982, reports that the divorce rate in Wisconsin declined after the enactment of its antidiscrimination statute. See Center for Health Statistics, Division of Health, Wisconsin Dep't of Health & Social Services, *1990 Wisconsin Vital Statistics Report*, at p. 93, Figure 13 (divorce rates in Wisconsin peak at 3.9 divorces per 1,000 population in 1981 and decline thereafter to 3.6 divorces per 1,000 population in 1990).

Defendants also argue that the "endorsement" of homosexuality undermines marriage and heterosexual families because antidiscrimination laws implicitly endorse that conduct which is deemed an improper basis for discrimination. We are of the opinion,

above, however, we do not believe that antidiscrimination laws constitute an endorsement of the characteristics that are deemed an unlawful basis upon which to discriminate against individuals. See *infra* pp. 25-26.

More significantly, defendants offer no authority to support the rather remarkable proposition that the government has a compelling interest in seeing that the state does not support the political objectives of a "special interest group." The state exists for the very purpose of implementing the political objectives of the governed so long as that can be done consistently with the constitution. The fact that some political objectives are promoted by "special interest groups" is utterly inconsequential. Indeed, virtually any law could be regarded as a benefit to a "special interest group." If defendants' argument had any merit at all, the compelling state interest defined would justify striking down almost any legislative enactment imaginable. This is clearly not the law. No citation of authority is needed to make the point.

We reject defendants' assertion that Amendment 2 is justified by the compelling governmental interest in not having the state endorse the political objectives of a special interest group.

E

Defendants claim that Amendment 2 "serves to deter factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government." More specifically, they argue that "Amendment 2 is intended, not to restrain the competition of ideas," but "seeks to ensure that the deeply divisive issue of homosexuality's place in our society does not serve to fragment Colorado's body politic." Amendment 2 accomplishes this end by eliminating "city-by-city and county-by-county battles over this issue."

We reject the argument that the interest in deterring factionalism, as defined by defendants, is compelling. Political debate, even if characterized as "factionalism," is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy. "[T]here is no significant state or public interest in curtailing debate or discussion of a ballot measure." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). See also

Williams v. Rhodes, 393 U.S. 23, 32 (1968). We fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism." See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

In support of the asserted compelling interest in deterring factionalism, defendants rely on *Storer v. Brown*, 415 U.S. 724 (1974). *Storer* involved a state requirement that proponents of *any* viewpoint resign from political parties and not run in those parties' primaries if the proponents intend to run as independent candidates. The purpose of this neutral election procedure was to insure that independent candidates were more than merely sore losers who, having lost one primary, ran as "independents" to satisfy "short-range political goals, pique, or personal quarrel." *Id.* at 735.

Neither *Storer*, nor any other case we are aware of supports the proposition that there is a compelling governmental interest in preventing divisive issues from being debated at all levels of government by prohibiting one side of the debate from seeking desirable legislation in those fora. We conclude that the interest in deterring "factionalism" is not a compelling state interest.

F

Defendants argue that each of the governmental interests, while individually adequate to validate Amendment 2, "are especially so when considered in the aggregate." None of the interests identified by the state is a necessary, compelling governmental interest which Amendment 2 is narrowly tailored to advance. Lumping them together as one grandiose (and rather ill-defined) interest makes them no more necessary, compelling, or narrowly tailored. In this context, the whole *is* equal, and is as equally deficient as the sum of its parts.

IV

Defendants next argue that the provisions of Amendment 2 are severable and that only those provisions pertaining to "sexual orientation" should be stricken as unconstitutional: "Plaintiffs have only challenged . . . the question of sexual orientation. They have not claimed or made any suggestion that Amendment 2's restrictions concerning homosexual or bisexual conduct, practices, and relationships are in any way constitutionally suspect."

In so arguing, defendants not only mischaracterize plaintiffs' position, but fundamentally misconstrue the intent of Amendment 2. In *Evans I*, we held that Amendment 2 had been shown to a reasonable probability to be unconstitutional on the grounds that it affected "the fundamental right to participate equally in the political process . . . by 'fencing out' an independently identifiable class of persons . . ." *Id.* at 1282. The constitutional infirmity of Amendment 2 recognized in *Evans I* was not limited to sexual orientation as opposed to restrictions concerning homosexual or bisexual conduct, practices, and relationships. To the contrary, it was based on the fact that Amendment 2 sought to deny an independently identifiable group's right to participate equally in the political process.

"Whether unconstitutional provisions are excised from an otherwise sound law depends on two factors: (1) the autonomy of the portions remaining after the defective provisions have been deleted and (2) the intent of the enacting legislative body." *Robertson v. City and County of Denver*, 874 P.2d 325, 335 (Colo. 1994) (quoting *City of Lakewood v. Colfax Unlimited Ass'n, Inc.*, 634 P.2d 52, 70 (Colo. 1981)).

We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable. In addition to denying the right of equal participation in the political process to a group based on sexual orientation, Amendment 2 also is intended to deny that same right to persons based on "homosexual, lesbian or bisexual . . . conduct, practices or relationships . . ."

Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices, and relationships. Each characteristic provides a potentially different way

of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.

The fact that there is no constitutionally recognized right to engage in homosexual sodomy, *see Bowers v. Hardwick*, 478 U.S. 186 (1986), is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true that such a law could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible. The government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

V

Last, defendants argue that even if Amendment 2 is in conflict with the Fourteenth Amendment to the United States Constitution, it is nevertheless a constitutionally valid exercise of the people's reserved powers under the Tenth Amendment.¹² In short, the argument is that the power to amend the state constitution is reserved to Colorado's voters under the Tenth Amendment, and even if the voters amend the state constitution in such a way as to violate the federal constitution, such an amendment is *per se* valid.

In support of this argument, defendants rely on *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Gregory*, the Supreme Court held that the Age Discrimination in Employment Act does not apply to state court judges. In reaching this conclusion, the Court noted that decisions concerning the necessary qualification of state court judges "is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government and the character of those who exercise government authority, a state defines itself as a

¹²The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

sovereign." *Id.* at 460. The court concluded that "Congressional interference with *this* decision of the people of Missouri, *defining their constitutional officers*, would upset the usual constitutional balance of federal and state powers." *Id.* (emphasis added).

Gregory applies only to cases involving federal interference with the qualification of constitutional officers. See, e.g., *Equal Employment Opportunity Comm'n v. Massachusetts*, 987 F.2d 64, 68-69 (1st Cir. 1993) (*Gregory* applies only when federal law interferes with state's definition of policy-making officials' qualifications); *Tranello v. Frey*, 962 F.2d 244, 249 (2d Cir. 1992) (same); *May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 635-36 (8th Cir. 1993) (same); *Associated Builders & Contractors v. Perry*, 817 F. Supp. 49, 53 n.3 (E.D. Mich. 1992) (same).

States have no compelling interest in amending their constitution in ways that violate fundamental federal rights. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (no reserved power to make right to discriminate a part of the state's basic charter); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.").

We reject defendants' argument that Amendment 2 is a constitutionally valid exercise of state power under the Tenth Amendment.

VI

The state has failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way. Amendment 2 is not severable and not a valid exercise of state power under the Tenth Amendment. Accordingly, we affirm the trial court's entry of a permanent injunction barring its enforcement.

JUSTICE SCOTT concurs.
JUSTICE ERICKSON dissents.

Evans v. Romer, Nos. 94SA48 and 94SA128
JUSTICE SCOTT concurring:

I agree with the majority and join in its opinion and judgment. Amendment 2 is unconstitutional because it offends the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. I write separately, nevertheless, to suggest that Amendment 2 impermissibly burdens the right "peaceably to assemble and petition the government for redress of grievances," a right guaranteed to *every* citizen. Hence, the district court's permanent injunction should be upheld under the Privileges or Immunities Clause of the Fourteenth Amendment.

I

Citizenship, not the good graces of the electorate, is the currency of our republican form of government. Over 130 years ago, this nation was engaged in a great Civil War which tested our constitutional form of government as has no other time in our history. That great battle, joined to address issues of slavery and race, actually resolved much more. History teaches us that, in fact, our nation addressed a question of paramount importance: whether any state may, by legislative enactment or popular referendum, deny or refute the Union of the several states and render asunder the bonds of our constitutional form of government. Although answered at Appomatox, today we are called upon to answer, if not resolve, that question once more.

The federal Constitution, as submitted to the various states, created certain rights which the states cannot diminish. By joining the Union, Colorado "cannot be viewed as a single, unconnected, sovereign power, on [which] . . . no other restrictions are imposed than may be found in its own Constitution." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 85, 135 (1810). Writing for the court in *Fletcher*, Chief Justice Marshall opined that each state "is a part of a large empire, . . . is a member of the American Union; and that Union has a constitution, the supremacy of which all acknowledge, and which imposes limits to . . . the several states, which none claim a right to pass." *Id.* Thus, within the limits of state sovereignty, most important questions are decided by the electorate. However, those matters in

which the result intrudes upon a protected liberty or fundamental right cannot be determined in the voting booth.

The framers originally recognized this potential for harm and understood that not every issue can be resolved by the vote of a majority. In *The Federalist Papers*, James Madison identified the covenant of "a well constructed Union" as its promise to protect and preserve inviolate certain rights of all citizens. *The Federalist* No. 10, at 42 (J. Madison) (Wills 1982). Madison noted that under other forms of government, "measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority." *Id.* at 43. Madison further stated:

The interest of the man must be connected with the constitutional rights of the place If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to controul itself.

. . . .

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.

Id., No. 51, at 262 & 264. Appropriately, Madison suggested, the "cure" rests in a republican form of government -- a Union in which there is a "tendency to break and control the violence of faction." *Id.*, No. 10 at 42. The obligation to "guard one part of the society against the injustice of the other part" exists whether the oppressive act is the result of referendum or other state action. Hence, every individual is promised full citizenship under a written Constitution which, as Justice Harlan opined, "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1895) (Harlan, J., dissenting).

Judge Robert Bork, addressing the same covenant, wrote of what he referred to as the "Madisonian dilemma," stating:

The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or the other would risk either tyranny by the majority or tyranny by the minority.

Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 139 (1990) (hereinafter "Bork"). Such a dilemma can only be resolved by resort to a neutral written principal, the Constitution. We should look first to the text and to the understanding manifested in the words used by the framers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (let the end be "within the scope of the constitution, and all means which are appropriate . . . which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional"); *Colorado Ass'n of Public Employees v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984) ("Where the language of the constitution is plain and its meaning clear, that language must be declared and enforced as written."); see also Bork at 145 ("If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives."). Where the words of the Constitution are unambiguous, we need not look further.

II

A

Section 1 of the Fourteenth Amendment of the United States Constitution declares: "All persons born or naturalized in the United

States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" U.S. Const. amend XIV, section 1.¹ The Fourteenth Amendment, in section 1, made state citizenship derivative of national citizenship and transferred to the federal government a portion of each state's control over civil and political rights.²

By the force of an unfortunate history and a refusal to rely upon the plain text of the constitution, our Fourteenth Amendment jurisprudence has resulted in a Privileges or Immunities Clause that has been eclipsed by the Equal Protection and Due Process Clauses. As a consequence, no important line of decision rests solely on the Privileges or Immunities Clause. Early on, in fact, the original understanding was virtually written out of the Constitution by the United States Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

¹The words "privileges" and "immunities" first appear in the Constitution in article IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). By virtue of Article IV, state citizenship carries with it the right to nondiscriminatory treatment within each state of citizens of all the states.

Consistent with the text and for purposes of distinction, the Article IV clause will be referred to as the "Privileges and Immunities Clause," and the Fourteenth Amendment clause will be referred to as the "Privileges or Immunities Clause."

²It is widely agreed that section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 104 (1988) ("Section one was added to the amendment at least in part to remove doubts about the constitutionality of the 1866 act."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1389 (1992). Many commentators have suggested that the amendment actually writes the substance of the 1866 Act into the Constitution. See *id.*

In the *Slaughter-House Cases*, decided in 1873, a majority of the Court acknowledged the Privileges or Immunities Clause of the Fourteenth Amendment, but limited its effects to those rights earlier existing under Article IV, without recognizing the creation of a new national citizenship. In his opinion for the Court in *Slaughter-House Cases*, Justice Miller declared that the rights conferred by national citizenship were those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."³ 83 U.S. (16 Wall.) at 79. A review of the legislative history, however, will not permit such an ambivalent view.⁴ The statements of the framers of the Fourteenth Amendment, Senator Howard and Representative Bingham, confirm that the Privileges or Immunities Clause was originally intended to confer and make inviolate certain minimal rights embodied in national citizenship.⁵

³Subsequent cases suggested an even narrower definition of the rights of national citizenship, but in *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court in dictum finally settled on the *Slaughter-House* definition as correct.

⁴As Justice Field observed in dissent, and it is not really possible to deny:

If this inhibition . . . only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.

Slaughter-House Cases, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

⁵As Senator Howard stated: "it is certain the clause was inserted in the Constitution for some good purpose." Cong. Globe. 39th Cong., 1st Sess., part 3, p. 2765 (1866); see generally John H. Ely, *Democracy and Distrust* 22 (1980).

The Fourteenth Amendment Privileges or Immunities Clause was patterned after a similar clause in Article IV, Section 2.⁶ The Fourteenth Amendment Clause was thought by its framers to be one of the central elements of section 1. Cong. Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866) ("This is the first clause, and I regard it as very important.") (statement of Senator Howard); see generally John H. Ely, *Democracy and Distrust* 22 (1980) (hereinafter "Ely"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

The Article IV Privileges and Immunities Clause imposes substantive limits upon the states. *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825). In *Corfield*, Justice Washington held that this clause protected against state action the privileges "which are, in their very nature, fundamental; which belong, of right, to the citizens of all free governments."⁷ *Corfield*, 6 F. Cas. at 551. Washington went on to state:

What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire

⁶Representative Bingham, the Congressperson who framed the Privileges or Immunities Clause of the Fourteenth Amendment, pointed to the Privileges and Immunities Clause of Article IV as his model. Cong. Globe, 39th Cong., 1st Sess., part 2, pp. 1033-34 (1866).

⁷As Ely has observed, the drafters of the Fourteenth Amendment "repeatedly adverted to the *Corfield* discussion as the key to what they were writing." See Ely at 29; Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 555-56 (1991). *Corfield* was invoked by both Senator Trumbull and Representative Wilson, the managers of the Civil Rights Act, to explain the fundamental rights of citizenship secured by the Act. Similarly, Senator Howard quoted from *Corfield* during the Congressional debates regarding adoption of the fourteenth amendment. Cong. Globe, 39th Cong., 1st Sess., part 3, p. 2765 (1866).

and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 551-52.

It was this opinion which became the pole star for Representative Bingham and Senator Howard, the framers of the Fourteenth Amendment. Presenting the Fourteenth Amendment to the Senate, Senator Howard disclosed "the views and the motives which influenced that committee," stating:

To [the privileges and immunities listed in *Corfield*], whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; *the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people*; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search and seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

... it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. . . . *The great objective of the first section of this amendment is, therefore, to restrain the power of the States and compel*

them at all times to respect these great fundamental guarantees.

Cong. Globe, 39th Cong., 1st Sess., part 3, pp. 2765-66 (1866) (emphasis added).

Senator Howard's list of privileges or immunities, which incorporated *Corfield*, was representative rather than exhaustive. No case has ever attempted to identify the totality of implied federal rights guaranteed by the Privileges or Immunities clause. However, in *Twining v. New Jersey*, 211 U.S. 78 (1908), the Supreme Court did provide a list of privileges or immunities which it recognized: (1) the right to pass freely from state to state;⁸ (2) *the right to petition Congress for redress of grievances*; (3) the right to vote for national officers; (4) the right to enter the public lands; (5) the right to be protected against violence while in the lawful custody of a United States Marshal; and (6) the right to inform United States authorities of violation of its laws. *Twining*, 211 U.S. at 97. These rights of national citizenship receive absolute protection in the sense that the states never could have a legitimate interest in terminating completely any of these rights. Rotunda & Nowak, *Treatise on Constitutional Law* 351 (2d ed. 1992).

III

The United States Supreme Court has repeatedly held that the right to vote is fundamental to the rights of citizenship and to a free and democratic society. *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1963); *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886). In *Evans I*, we held the right to participate equally in the political process to be a fundamental right. *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993).⁹ By

⁸See *Edwards v. California*, 314 U.S. 160, 178 (1941), (the right of interstate travel is an essential "incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment . . .").

⁹See also *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gordon v. Lance*, 403 U.S. 1, 5 (1971); Frank I. Michelman, *Conceptions*

"participate equally," although not assuring any political result, we did contemplate the right of the people peaceably to assemble and petition the government for a redress of grievances. This right to participate, an attribute of the new national citizenship, was meant by the framers of the Fourteenth Amendment to be a personal right guaranteed and secured by the Privileges or Immunities Clause. See Cong. Globe, 39th Cong., 1st Sess., part 3, pp. 2765-66 (1866).

It should be axiomatic that the right peaceably to assemble and petition government implies the ability of the duly elected representatives to respond, if so persuaded or predisposed. Yet, if enforced, Amendment 2 provides that the state, acting "through any of its branches or departments, or any of its agencies, political subdivisions, municipalities or school districts," shall not "enact, adopt or enforce any statute, regulation, ordinance or policy" granting to citizens a "claim of discrimination" based on homosexual or lesbian status or sexual orientation. Because it would prevent the General Assembly or other legislative bodies from enacting or adopting certain new laws and bar the executive department and its agencies from enforcing existing laws, Amendment 2 effectively denies the right to petition or participate in the political process by voiding, *ab initio*, redress from discrimination. Like the right to vote which assumes the right to have one's vote counted, the right peaceably to assemble and petition is meaningless if by law government is powerless to act.

IV

Courts have been reluctant to develop a working constitutional analysis under the Privileges or Immunities Clause since the *Slaughter-House Cases*, and, unfortunately, have instead built upon the Equal Protection Clause and Due Process Clause. The Equal Protection Clause, burdened by a history and analysis beyond this context,¹⁰ is not the most appropriate of the Fourteenth Amendment

of Democracy in American Constitutional Argument: Voting Rights, 41 Fla. L. Rev. 443, 459 n. 63 (1989).

¹⁰Historically, the Equal Protection Clause was called upon to protect insular minorities. Similarities undoubtedly exist between unlawful discrimination based on sexual orientation and that based on race or national

provisions for securing the right to participate equally in the political process and yet it is the primary mode of analysis relied upon by the majority in this case.¹¹

Certainly all must now agree that the Fourteenth Amendment sought to protect citizens from oppression by state government. The Equal Protection Clause of that amendment mandates that rights afforded to some are granted equally to all. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991). From time to time the acts of government intervene in the lives of its citizens.¹² Under the Equal Protection Doctrine, such government intervention is subjected to review, applying at least one of three standards: strict scrutiny, intermediate review, or rational basis analysis. The applicable standard of review to be applied depends upon the characteristics or

origin. However, the record is uncertain as to whether, as a general matter, victims of discrimination based on sexual orientation share the same history or are subjected to a similar experience or condition as victims of racial or ethnic discrimination.

¹¹The defendants argue that the participation in the political process plaintiffs seek is a particular end or the successful adoption of plaintiffs' views. I note, however, that the right to participate in the political process does not guarantee plaintiffs or any other qualified electors the success of any candidate or cause nor the state's embracement of particular ideas. This right simply guarantees access to the political process. Citizens may vote, petition or amend as a matter of right, but they cannot necessarily win as a matter of right.

Moreover, I am not unmindful that the state may deny the right to vote or participate in the political process as an operation of due process. See, e.g., *Moran v. Carlstrom*, 775 P.2d 1176, 1179 (Colo. 1989) (the General Assembly may place reasonable restrictions on the right to vote); see also *People v. Russo*, 713 P.2d 356, 360 (Colo. 1986) (jurors disqualified if they do not have the right to vote by reason of criminal conviction).

¹²Government intervention may take the form of agency action, legislation, constitutional amendment, or other conduct which has the effect of law.

attributes of the citizens involved. Under the Equal Protection Doctrine, when such governmental intervention occurs, such as with the enactment of Amendment 2 in this case, regardless of the standard applied, it is contemplated that certain abridgements of even fundamental rights are acceptable. For example, under the strict scrutiny test, the most exacting standard and that applied by the majority, state action is "constitutionally permissible [] if it is 'necessary to promote a compelling state interest,' and [the state] does so in the least restrictive manner possible." Maj. op. at 10 (citations omitted) (emphasis in original).

Unlike the Equal Protection Clause, the Privileges or Immunities Clause guarantees citizens that certain fundamental rights of national citizenship are inviolate, absent due process.¹³ The syntax of the Fourteenth Amendment Clause seems inescapably that of substantive entitlement. According to Ely, "the slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements." Ely at 24. The importance of the Privileges or Immunities Clause is that it does not require varying standards of review and that its protections are extended to every citizen.

V

Under Amendment 2, the rights of citizens "peaceably to assemble and petition the government for a redress of grievances" so as to participate freely and equally in the political process are compromised in a manner prohibited by the Fourteenth Amendment. Because these political rights are fundamental and inherent in national citizenship they are protected by the Privileges or Immunities Clause. Accordingly, I concur.

¹³See *supra*, n.11.

Evans v. Romer, No. 94SA48
JUSTICE ERICKSON dissenting:

I respectfully dissent. In *Evans v. Romer*, 854 P.2d 1270 (Colo.) (*Evans I*), cert. denied, 114 S. Ct. 419 (1993), the majority crafted a new fundamental right that had never been recognized by the United States Supreme Court or by any court other than a federal district court in Ohio that relied on *Evans I*. Ironically, judicial review of Amendment 2 has accomplished exactly what the voters who passed Amendment 2 sought to prevent—the majority has effectively created a heightened protection for homosexuals, lesbians, and bisexuals.

In establishing what is essentially a new substantive due process right disguised as a previously unrecognized "fundamental right," the majority disregarded the warnings of Chief Justice Burger, who stated in his dissent to *Phyllis v. Doe*, 457 U.S. 202, 244 (1982): "If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example." Chief Justice Burger stated:

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. . . . However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

Id. at 242 (citations omitted).

The majority opinion has overlooked a crucial aspect of the case before us: we are not evaluating an act of the legislature or pronouncement of the executive—we are reviewing a constitutional amendment adopted by the people of the State of Colorado. While there are certainly some initiated constitutional amendments that a majority of the electorate may attempt to visit on a minority that will not pass constitutional scrutiny, we must not ignore the fact that we are reviewing the expressed will of the citizens of this state.

In *Evans I*, we remanded the case to the district court to determine whether the preliminary injunction sustained by a majority of this court should be made permanent. The district court, following *Evans I* with great precision, made extensive findings and made the preliminary injunction permanent. Nevertheless, people of homosexual, lesbian, or bisexual orientation have never been adjudicated to be a protected class and the right to participate equally in the political process has never been determined, apart from *Evans I*, to be a fundamental right. Accordingly, I would employ a rational relation standard to Amendment 2 and vacate the permanent injunction. For the reasons set forth in my dissent to *Evans I*, and for the reasons set forth below, I respectfully dissent.

I

The majority relies on *Evans I* and applies the strict scrutiny standard of review to Amendment 2 because it holds that the Equal Protection Clause of the United States Constitution guarantees the fundamental right to participate equally in the political process. Maj. op. at 4; *Evans I*, 854 P.2d at 1276. *Evans I* established this standard of review by assembling several United States Supreme Court decisions and interpreting their collective teachings as implying a new fundamental right. See *Evans I*, 854 P.2d at 1276 (citing voting cases, ballot access cases, and "cases involving attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes"). In my view, no fundamental right or suspect class is implicated by Amendment 2, and therefore the standard of judicial scrutiny applied by the majority is erroneous.

A

The majority in *Evans I* extensively reviewed many United States Supreme Court decisions to reach its conclusion, and emphasized a line of cases relating to citizen participation in the political process. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969). The majority in *Evans I* interpreted these cases to create the fundamental right to participate equally in the political process. Properly understood, however, these cases involve suspect

classifications and not the alleged fundamental right to participate equally in the political process.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the United States Supreme Court addressed a violation of the Equal Protection Clause of the federal constitution. *Hunter* involved a city charter amendment that repealed a racial anti-discrimination ordinance and required voter action before such an ordinance could be enacted. *Id.* at 387. Although *Hunter* involved the political process, the Court invalidated the amendment because it created an unjustified distinction *based on race*. The Court held:

Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are "constitutionally suspect," and subject to the "most rigid scrutiny." They "bear a far heavier burden of justification" than other classifications.

Id. at 391-92 (citations omitted). Courts and scholars reviewing *Hunter* have recognized that the holding was predicated on an unconstitutional racial classification. See *Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975) (stating that *Hunter* struck down an amendment that was based on a racial classification), *cert. denied*, 426 U.S. 940 (1976); *Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) ("The principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."), *aff'd*, 402 U.S. 935 (1971); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4 Dist. 1991) (stating that "*Hunter* was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics"); Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 314 (1991) (noting that in place of a political process theory of equal protection review, racial classifications are and should be considered presumptively unconstitutional because they should be irrelevant to decision-making); Robert H. Beinfeld, Note, *The Hunter Doctrine: An Equal Protection Theory that Threatens Democracy*, 38 Vand. L. Rev. 397, 405 (1985) (suggesting that the decision in *Hunter* is based on racial classifications).

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court applied *Hunter* and struck down a state-wide initiative to terminate the use of busing to achieve racial integration in the public schools. In finding that the initiative violated the Equal Protection Clause, the Supreme Court held:

[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," thereby "making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest."

Id. at 470 (emphasis in original) (citations omitted). The Court thus did not approve of "distinctions based on race" and struck down the initiative because it would have created additional burdens for a class of citizens who have had historical difficulty in changing the political process. *Id.* at 486. See *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 563-65 (1990) (holding that members of a traditionally suspect class merit special protection); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (same); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (noting that special protection may be offered for "discrete and insular" minority groups).

A similar issue was addressed in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which was announced on the same day as *Washington*. In *Crawford*, the Court upheld a state constitutional amendment that prohibited state courts from ordering mandatory student assignment or transportation. The Court stated that if the constitutional amendment employed a racial classification such as the classification in *Hunter*, the Court would apply the strict scrutiny standard of review, but found *Hunter* inapplicable because the amendment at issue did not "embody a racial classification." *Crawford*, 458 U.S. at 536-37.

The fact that the fundamental right created by the majority in *Evans I* has never been recognized by the Supreme Court is evident in two cases, *James v. Valtierra*, 402 U.S. 137 (1971), and *Gordon v. Lance*, 403 U.S. 1 (1971). In *James* and *Gordon*, the Court could have used the fundamental right found in *Evans I* and applied strict scrutiny review to strike down constitutional measures. Instead, in both cases, the Court upheld the provisions and refused to apply the strict scrutiny standard enunciated in *Hunter*.

In *James*, the Supreme Court upheld the validity of a California constitutional measure that prohibited state public bodies from developing, constructing, or acquiring low-income housing projects until voters approved of the project in a referendum. Thus, the citizens singled out in *James* were low-income people who would qualify for low-rent housing and therefore the Court did not apply strict scrutiny. The Supreme Court said:

Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." . . . Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . The present case could be affirmed only by extending *Hunter*, and this we decline to do.

James, 402 U.S. at 140-41.

Similarly, in *Gordon*, the plaintiffs challenged West Virginia's constitutional provision that required a sixty-percent approval for any bonded indebtedness incurred by the political subdivisions of the state. As in *James*, the Supreme Court did not apply the strict scrutiny standard of review because:

Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. . . . We are not, therefore, presented with a case like *Hunter*, . . . in which fair housing legislation alone was subject to an automatic referendum requirement. The class singled out in *Hunter* was clear—"those who would benefit from laws barring racial, religious, or ancestral discriminations."

Gordon, 403 U.S. at 5. *James* and *Gordon* demonstrate that strict scrutiny should not be applied to review a restriction on the political process unless the restriction singles out a discrete and insular minority.¹ The Supreme Court of the United States has never held, however, that the right to participate equally in the political process is a fundamental right.

B

The development of fundamental rights in our jurisprudence has never been a matter for ad hoc determination. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating that fundamental rights are those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed"); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (noting that fundamental rights are liberties that are "deeply rooted in this Nation's history and tradition"); see also *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986); *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965). Fundamental rights must be explicitly or implicitly guaranteed by the United States Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). Among the fundamental rights delineated by the Supreme Court are the right to vote, the right to interstate travel, the right to privacy, and the guarantees contained in the First Amendment. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (First Amendment); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (interstate travel); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (voting); *Griswold*, 381 U.S. at 484 (privacy).

The Court has been reluctant to recognize new rights as fundamental. See *Bowers*, 478 U.S. at 195 ("There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses], particularly if it requires redefining the category of rights deemed to be fundamental."); Geoffrey Stone, et al.,

¹Homosexuals, lesbians, and bisexuals have never been adjudicated to be a discrete and insular minority by the Supreme Court. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Dahl v. Secretary of the United States Navy*, 830 F. Supp 1319, 1323-25 (E.D. Cal. 1993).

Constitutional Law, at 831 (1986) (stating that the Court "has essentially frozen the list of 'fundamental' interests"). The Court has refused to declare education, housing, the right to refuse medical treatment, welfare payments, or governmental employment to be fundamental rights worthy of heightened constitutional protection. See *Cruzan by Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990) (right to refuse medical treatment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (employment); *Rodriguez*, 411 U.S. at 35 (education); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (welfare). Never before has any court recognized the right to participate equally in the political process as a fundamental right, the curtailing of which warrants strict judicial scrutiny.² "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Rodriguez*, 397 U.S. at 33.

It is crucial to note, however, that even though equal participation in the political process does not merit strict scrutiny analysis, the United States Constitution offers protection for those who may be adversely affected by legislation. When individuals or groups are singled out, as they have been here, they may still be protected by the Due Process Clauses or the Equal Protection Clause.³ In this case, the class of citizens is protected by the Equal Protection Clause. Accordingly, Amendment 2 must be struck down only if its challengers can demonstrate that the legislation is not rationally related to a legitimate state interest.

²Recently, however, a federal district judge, relying on *Evans I*, struck down an anti-gay-rights measure approved by Cincinnati voters. In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, slip op. at 26 (S.D. Ohio Aug. 9, 1994), the federal district court declared that a City Charter Amendment was unconstitutionally vague and violated the First Amendment right of homosexuals to participate in the political process. See also *Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993).

³When fundamental rights are denied to everyone, it raises due process concerns. When fundamental rights are denied to some individuals only, it raises equal protection concerns. The applicable standard in either case, however, is strict scrutiny.

II

During oral argument before this court, counsel for the plaintiffs-appellees asserted that even if strict scrutiny review were inappropriate, we should analyze Amendment 2 under a rational basis standard of review. Counsel noted that in *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993), the Supreme Court did not engage in strict scrutiny review because it was not properly preserved at the lower levels and therefore urged this court not to preclude rational basis review by ruling merely under strict scrutiny standards. I find counsel's contention persuasive and therefore address Amendment 2 under a rational relation standard.

A

In reviewing an act of the legislature or a voter-mandated constitutional amendment that creates a classification involving neither a fundamental right nor suspect classes, a court will review the classification under the "rational basis" standard of review. See *Heller*, 113 S. Ct. at 2642; *Kadrmas v. Dickinson Public Sch.*, 487 U.S. 450, 462 (1988). Under the rational basis standard of review, the classification will be "upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communication, Inc.*, 113 S. Ct. 2096, 2101 (1993); see also *Sullivan v. Stroup*, 496 U.S. 478, 485 (1990); *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Dandridge*, 397 U.S. at 484-85. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 113 S. Ct. at 2642; see also *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2331-32 (1992).

The inquiry into whether there is a rational basis for the classification, however, does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). Instead, a classification that involves neither suspect classes nor fundamental rights is accorded a strong presumption of validity. *Beach Communication*, 113 S. Ct. at 2098; *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981); *Murgia*, 427 U.S. at 314.

Because of the strong presumption of validity, the purpose or rationale behind the legislation need not be articulated at any time. *Heller*, 113 S. Ct. at 2642; *Nordlinger*, 112 S. Ct. at 2334; *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959). Additionally, the party challenging the classification bears the burden of "negat[ing] every conceivable basis which might support it" whether or not it is supported by the record. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); see also *Heller*, 113 S. Ct. at 2643.

In an effort to ensure that rational basis review does not become a "license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach Communication*, 113 S. Ct. at 2101, the reasons articulated are given great deference. See *Id.* at 2098 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) ("In cases where a classification burdens neither a suspect group nor a fundamental interest, 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'") (citation omitted); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 62 (1973) ("The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional."); *Dandridge*, 397 U.S. at 485 (noting that a classification does not fail because "in practice it results in some inequality") (citation omitted); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."); see also Laurence Tribe, *American Constitutional Law* 1440 (2d ed. 1988) ("Within very broad limits, courts have traditionally exhibited extreme deference to the legislative definition of 'the general good,' either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint generally."); John Nowak, Ronald Rotunda, Nelson Young, *Constitutional Law* 596 (2d ed. 1983) ("A majority of the justices today will uphold governmental classifications under this standard unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government."); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 Temp. L. Rev. 937,

941 (1991) ("The rational basis test is notoriously weak. When applied, there is 'little doubt about the outcome; the challenged legislation is always upheld.'") (quoting *Murgia*, 427 U.S. at 319 (Marshall, J. dissenting)); but see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985) (striking down on rational basis review a zoning law that prohibited mentally retarded individuals from residing in certain areas of town because the law was based on the "bare . . . desire to harm a politically unpopular group") (citation omitted). This is so because:

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance, 440 U.S. at 97 (footnote omitted). Although the purposes and rationale of a voter initiative are even more difficult to assess than legislative pronouncements, initiatives passed by the citizens of the state which contain classifications not related to fundamental rights or suspect classes are also given deference. See *Gregory*, 501 U.S. at 470 (applying the rational basis standard to a constitutional restriction enacted by the people); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (applying a rational basis test to measures adopted through a referendum).

It is the prerogative of the people of the State of Colorado, and not this or any other court, to weigh the evidence and determine the wisdom and utility of the purposes behind a measure adopted through the initiative process. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (stating that the Minnesota Supreme Court erred in substituting its judgment for that of the legislature). Thus, whether in fact Amendment 2 will meet its objectives is not the relevant question: the Equal Protection Clause is satisfied if the people of Colorado could have rationally decided that prohibiting homosexuals, lesbians, and bisexuals from enacting certain legislation

might further a legitimate interest. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984); *Clover Leaf Creamery*, 449 U.S. at 466.

Amendment 2 was put to a plebiscite by initiative petitions and eventually won voter approval by 813,966 votes to 710,151 votes. Because Amendment 2 was a product of a vote of the citizens of Colorado, no purpose or rationale for Amendment 2 was explicitly set forth. See *MSM Farms*, 927 F.2d at 332 ("Because the law was adopted through the initiative and referendum process, there is little traditional legislative history regarding its purpose."). However, the state has articulated several rationales in this court and in the district court to establish that the interest behind Amendment 2 is not only a rational interest but also a compelling state interest.⁴

III

Although only one legitimate state interest rationally related to the state's goals for a constitutional amendment is necessary, the state has set forth several. The district court found that two rationales—the promotion of religious freedom and the promotion of family privacy—demonstrated compelling state interests, although it found that the means for achieving the interests were not narrowly tailored to achieve the objectives.⁵ In my view, there are at least three

⁴The district court found that the state alleged six compelling state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial and religious privacy; (5) preventing the government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being of children.

⁵The district court applied the strict scrutiny standard of review which requires the state to prove that classifications affecting fundamental rights were necessary to promote a compelling or overriding interest which is narrowly tailored. See *Plyler v. Doe*, 457 U.S. 202, 217 (1982) (noting that the classification must be "precisely tailored"); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (stating a classification involving a fundamental right must be a compelling state interest); *Shapiro v. Thompson*, 394 U.S. 618, 634

interests that satisfy the constitutional standard and those asserting the invalidity of Amendment 2 have not met their burden of demonstrating that there is no rational basis for the constitutional amendment.

A

The state asserts that the rational basis of Amendment 2 is that it prevents the government from interfering with religious privacy. The root of the state's contention is that under ordinances preempted by Amendment 2, individual landlords or employers, including churches, who have profound religious objections to homosexuality, would nonetheless be compelled to compromise those convictions under threat of government sanctions. Thus, Amendment 2 prevents any political body from enacting legislation that would hinder the right of individuals to choose who to rent to or who to employ on religious grounds. The district court found that "[p]reserving religious freedom is a compelling state interest" but that Amendment 2 was "not narrowly drawn to achieve that purpose in the least restrictive manner possible."

Freedom of individuals to practice and hold particular religious beliefs is among the highest values in our society. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115-17 (1943); *Jones v. Opelika*, 319 U.S. 103, 104 (1943); see also *Martin v. Struthers*, 319 U.S. 141, 149-50 (1943) (Murphy, J., concurring). It is not within the discretion of this or any court to determine which beliefs are valid because "courts are not the arbiters of scriptural interpretation." *United States v. Lee*, 455 U.S. 252, 257 (1982). In fact, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [free exercise] protection." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). Not only is it impermissible for courts to determine the validity of religious practices and beliefs, but no government official or body may delineate what is a "proper" form of faith and require citizens to act in accordance with government-mandated religious standards. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any

(1969) (noting that there needed to be a compelling reason for the government to restrict interstate travel).

fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein.").

Nevertheless, not all burdens on religion are unconstitutional. *Lee*, 455 U.S. at 257; *Thomas*, 450 U.S. at 718 (stating that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion"). Even the highest values, including religious freedom, must sometimes give way to the greater public good. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Thus, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990).

In this case, the state asserts that Amendment 2 is an attempt to protect religious freedom by precluding legislation that would threaten sanctions against those who would refuse to employ or rent to homosexuals, lesbians, and bisexuals. The state indicates several examples of instances in which individuals or groups were forced to set aside their religious beliefs based on legislative enactments protecting homosexuals. In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to open their facilities to homosexual organizations if the facilities were opened to any community organization. Churches apparently could not refuse to hire employees, including pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder Municipal Code did not allow a church or religious organization with deeply held moral and religious views on the subject of homosexuality to refuse to hire someone based on his or her sexual orientation.

In my view, the state has a legitimate interest in protecting religious freedoms and Amendment 2 bears a rational relationship to that interest.

B

Although the district court found that the state did not have a compelling interest in deterring "factionalism," or "political fragmentation," the state does have a legitimate interest in promoting

state-wide uniformity and Amendment 2 is rationally related to that interest.

Prohibiting local action on matters affecting the entire state is advantageous inasmuch as the state has an interest in uniformity of regulation:

The central inquiry implicit in the concept of pre-emption is whether there should be statewide uniformity in the regulation of specific conduct. If there is no need for statewide uniformity, there is no need for state law to preempt local power to regulate. . . . This is the core of the preemption question—to consider, on the one hand, the need for statewide uniformity of regulation of a specific type of conduct, and, on the other hand, the need of local governments to be able to respond to local, as distinguished from statewide problems.

Daniel R. Mandelker & Dawn C. Netsch, *State and Local Government in a Federal System* 237 (1977); see also Osborne M. Reynolds, *Local Government Law* 120 (1982) (stating that the critical inquiry in the context of state preemption of local law is: "[I]s this an area where it is desirable to have a single, all-encompassing scheme of regulation, so that local laws—not just local laws that conflict with the state's, but any local laws—would unduly complicate the picture?"); Charles S. Rhyne, *The Law of Local Government Operations* § 19.11 (recognizing that preemption is rooted in the necessity of statewide uniformity of regulation).

In determining what is a matter of statewide concern, this court has not set forth a strict legal standard. Instead, we have determined the nature of the concern on an ad hoc basis. See *Denver & Rio Grande Western R.R. Co. v. City & County of Denver*, 673 P.2d 354, 358 (Colo. 1983). In *City & County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990), we stated:

Although we have found it useful to employ the "local," "mixed," and "state-wide" categories in resolving conflicts between local and state legislation, these legal categories should not be mistaken for mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments. Those affairs which

are municipal, mixed or of statewide concern often imperceptibly merge.

State regulation is a matter of statewide concern in a broad variety of contexts. See *Robertson v. City & County of Denver*, 874 P.2d 325, 350 (Colo. 1994) (Erickson, J., dissenting).

In this case, the state has a legitimate interest in promoting Amendment 2 because it is a matter of statewide concern. Amendment 2 involves a matter of statewide concern because the public is deeply divided over the issue of homosexuality.⁶ In fact, civil rights has never been the type of concern reserved exclusively for local governments.⁷ By adopting Amendment 2, the people of the state have sought to ensure that the government will act on a uniform basis. Several local governments, such as Denver, Aspen, and Boulder enacted sexual orientation laws, while others did not. By voting to approve Amendment 2, the voters of Colorado indicated that they wanted a statewide resolution of the issue that had formerly only been locally regulated and subject to great debate. The citizens of the state have a right to the initiative process which resolves conflicts between municipal and local governments when the issue is a matter of statewide concern and the process is not repugnant to the constitution.⁸ The Supreme Court has noted that "referendums

⁶The issue of homosexuality and bisexuality is deeply controversial and divisive. Unlike race and sex, there is no national consensus that sexual orientation is an inappropriate basis for governmental, much less private, decisionmaking. A series of constitutional amendments and acts of Congress have authoritatively settled the place of race and sex in American life. The same simply cannot be said of non-traditional sexual orientation.

⁷For example, in 1989, the General Assembly passed a law prohibiting insurance companies from inquiring about or making coverage decisions on the basis of sexual orientation. See § 10-3-1104(1)(f), 4A C.R.S. (1993 Supp.). In 1992, the Colorado Civil Rights Commission went on record recommending legislation adding sexual orientation to the list of protected classes.

⁸Testimony of Harvard Government Professor Harvey Mansfield indicated that the use of the initiative process to enact Amendment 2 supported stability and respect for the political process, by giving "the people

demonstrate devotion to democracy, not to bias, discrimination, or prejudice."⁹ *James*, 402 U.S. at 141.

In my view, the state has a legitimate interest in promoting statewide uniformity in matters of statewide concern and Amendment 2 bears a rational relationship to that interest.

C

The state also contends that it has a legitimate interest in allocating its resources. Specifically, the state suggests that laws prohibited by Amendment 2 would drain the state's financial and labor resources set aside and budgeted for the protection of traditionally suspect classes and diminish respect for traditional civil rights categories.

In this case, the testimony reflected that, although there was no current statute that required the state to enforce civil rights legislation on behalf of homosexuals, lesbians, and bisexuals, any such statute would decrease the funding available to enforce existing laws

a sense that . . . government is not alien to them, and that they can get together by their own initiative . . . to produce a result that gives them a sense of satisfaction and accomplishment."

⁹The Court in *James* went on to cogently state:

But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

James v. Valtierra, 402 U.S. 137, 142 (1971).

protecting traditionally suspect classes.¹⁰ For example, the investigative arm of the Civil Rights Commission has experienced steadily increasing demands upon a shrinking budget. Two out of the last three years, the Division has been unable to fulfill its part of a federally funded work-share agreement.¹¹ The Division received complaints from the black community that claims were not being thoroughly investigated and prosecuted. The state, therefore, reasonably postulates that a law requiring the protection of an additional group would further stretch scarce resources, and Amendment 2 protects the civil rights enforcement for traditionally suspect groups.¹² Thus, the decision of the people of the State of Colorado to allocate government resources in a particular manner is

¹⁰In *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), the Supreme Court announced its standard for reviewing legislative enactments in the economic sphere:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

¹¹Under the agreement, the Division works on a certain number of cases involving only federally-protected classes which, of course, does not include sexual orientation. The Division only met the goals last year because the Equal Employment Opportunities Commission reduced the number of cases necessary to satisfy the agreement.

¹²The United States Supreme Court has addressed the issue of fiscal concerns impacting certain rights. In *Plyler*, 457 U.S. at 222-24, the Court held that whatever savings might be achieved by the state by denying public education to undocumented aliens were insubstantial compared to the costs to the children, the state, and the nation of not educating them. In *Shapiro*, 394 U.S. at 618, and in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court found fiscal integrity not to be a compelling interest balanced against the right to interstate travel and the right to welfare assistance to aliens. These cases are distinguishable as either fundamental rights cases or cases in which the object was saving money not a basic allocation of funds.

a legitimate state interest in this case. See *Dukes*, 427 U.S. at 303 (upholding a New Orleans ordinance noting that states have wide latitude in regulating their local economies); *James*, 402 U.S. at 143 (noting that a referendum procedure "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds" and therefore found that a referendum measure did not violate the Equal Protection Clause).

Additionally, the state has a legitimate interest in ensuring that the traditionally suspect classes remain respected. See *Crawford*, 458 U.S. at 539 ("And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities."). Professor Joseph Broadus testified that the addition of homosexuals to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. Testimony also indicated that, unlike the traditionally suspect classes, homosexuals, lesbians, and bisexuals are a relatively politically powerful and privileged special interest group. Indeed, former Civil Rights Commission Chairman Ignacio Rodriguez testified that the inclusion of homosexuals as a suspect class would represent a "drastic departure" from the historical aims of the civil rights laws.

The State of Colorado, through entities such as the Colorado Civil Rights Division, has attempted to further the interest in remedying specific instances of sexual and racial discrimination through existing civil rights laws and enforcement programs. However, owing to the fiscal constraints which are inevitably a part of public administration, unlimited funds are not available for this purpose. Therefore, it is incumbent upon the state to set priorities for its enforcement efforts. In this case, the setting of priorities is a legitimate state interest and Amendment 2 is rationally related to that interest.

IV

In my view, the correct standard of judicial review of Amendment 2 is a rational basis standard of review. Additionally, the plaintiffs have not shown that Amendment 2 is not rationally related to the state's legitimate interest in protecting religious freedom, encouraging statewide uniformity in the law, and allocating resources.

Accordingly, I would reverse the decision of the district court and vacate the injunction. Therefore, I dissent.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE
OF COLORADO

Civil Action No. 92 CV 7223, Courtroom 19

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER,
PAUL BROWN, JANE DOE, MARINA NAVRATLOVA, BRET
TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE
BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND
COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY
OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE
NORTON, as Attorney General of the State of Colorado, and the
STATE OF COLORADO,

Defendants.

INTRODUCTION

On November 3, 1993, by a vote of 53.4% to 46.6%, the voters of the State of Colorado passed an initiated amendment to the Colorado Constitution referred to as Amendment 2. That amendment provides:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Nine days after the amendment was passed, plaintiffs, individuals, three home rule cities, and a school district, filed the instant action seeking to have Amendment 2 declared unconstitutional. Plaintiffs also sought and obtained a preliminary injunction prohibiting the amendment from becoming effective prior to court review. That injunction was upheld by the Colorado Supreme Court July 19, 1993 in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

In its ruling, the Colorado Supreme Court did more than merely affirm the granting of the preliminary injunction. By the terms of its ruling that court set the guidelines this court must apply in making its present decision. Certain parts of the Supreme Court opinion must be noted for they form the basis for the present ruling. The Colorado Supreme Court held:

We conclude that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny. (Footnote omitted)

Evans, 854 P.2d at 1282.

Further, the Supreme Court ruled:

Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*, which singled out the class of persons "who would benefit from laws barring racial, religious, or ancestral discriminations," *Hunter*, 393 U.S. at 391, 89 S.Ct. at 560, Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden — no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S.Ct. 801, 808, 9L.Ed.2d 821 (1963).

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627, 89 S.Ct. at 1889. Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. By constitutionalizing the prescription that no branch or department, nor any agency or political subdivision of the state "shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . [a] claim of discrimination," Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from

participating equally in the political process.
(Footnote omitted)

Id. at 1285.

By stating that "strict scrutiny is required," the Supreme Court established the burden of proof at the trial.

Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that purpose in the least restrictive manner possible. *Plyler v. Doe*, 457 U.S. 202, 217 102 S. Ct. 2382, 2395, 72 L.Ed. 2d 786 (1982).

Id. at 1275.

FINDING OF FACT AND CONCLUSIONS OF LAW REGARDING OFFERED COMPELLING STATE INTERESTS

By virtue of the Supreme Court ruling, the burden at trial was upon defendants to show at least one compelling state interest and to show that Amendment 2 was narrowly drawn to support that interest. This is an unusual placement of the burden of proof. Defendants presented six alleged "compelling state interests": 1) deterring factionalism; 2) preserving the integrity of the state's political functions; 3) preserving the ability of the State to remedy discrimination against suspect classes; 4) preventing the government from interfering with personal, familial and religious privacy; 5) preventing government from subsidizing the political objectives of a special interest group; and 6) promoting the physical and psychological well-being of our children. (Defendants' Trial Brief pp 3-4). The court will address each claimed compelling interest separately.

The first claimed compelling state interest is that Amendment 2 deters factionalism. In their trial brief Defendants describe what they mean by factionalism as follows:

Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality

does not serve to fragment Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue.

(Defendants' Trial Brief, pp 60-61.)

As defined by defendants, "factionalism" means "political fragmentation" over a controversial political issue. Defendants therefore define a difference of opinion on a controversial political question as factionalism.

In support of this position defendants urge two cases, *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, (1974), and *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed. 2d 547(1983). The word "factionalism" appears in both of those cases. The word "factionalism" is not used in either *Storer* or *Anderson* in the same way as defendants here seek to use it. Additionally, neither case is even critical of "factionalism" as it is used in those cases. Finally, deterring factionalism was not the compelling state interest urged in those two cases.

Both *Storer* and *Anderson* address state rules and regulations for placing the name of independent, meaning not Republican or Democratic, candidates on election ballots. The states in each case sought to justify their regulations by urging the compelling state interest of "political stability." The ruling in each case addresses the stability of political processes for established parties and independents to place candidates names on election ballots.

In both cases it is only "splintered parties and *unrestrained* factionalism" (emphasis supplied) which is criticized by the Supreme Court. Defendants here do not seek to deter "unrestrained" factionalism. The "factionalism" which defendants here argue about found to be a great strength of the American political process in the cases cited. In *Anderson* the Supreme Court endorses that which the defendants here seek to deter:

By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the market place of ideas In short, the primary values protected by the First Amendment -- "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (citation omitted) -- are served when election campaigns are not monopolized by the existing political parties.

Anderson, 460 U.S. at 794, 75 L.Ed.2d at 561.

The *Anderson* court made reference to its earlier decision in *Williams v. Rhodes*, 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5, (1968), another case dealing with state limitations on parties other than Republicans or Democrats in placing candidates names on election ballots, by repeating: "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Anderson*, 460 U.S. at 802, 75 L.Ed.2d at 566.

Defendants' own authorities encourage the "competition of ideas" with "uninhibited, robust and wide-open" political debate. Defendant seek to deter those very things as being "factionalism". The history and policy of this country has been to encourage that which defendants seek to deter.

Defendants first claimed compelling state interest is *not* a compelling state interest. The *opposite* of defendants' first claimed compelling interest is most probably compelling.

Defendants' second suggested compelling state interest is the preservation of the State's political functions. Witnesses were offered who testified about the "homosexual agenda" and the homosexual push for "protected status" and urged that this Amendment protected Colorado's political functions from being overrun by such groups. These witnesses included Will Perkins, Tony Marco, and Kevin Tebedo.

Mr. Perkins identified himself as a Chrysler dealer in Colorado Springs and Chairman of the Board of Colorado for Family Values (hereafter CFV), the organization that spearheaded the campaign for

Amendment 2. He indicated that CFV intended Amendment 2 to deny protected status to homosexuals and bisexuals. Mr. Marco identified himself as a free lance writer of mixed political heritage. He testified that at one time he was a Marxist-Leninist, that he had attended a number of colleges, ultimately earning a masters degree in creative writing, that in a sense he was the founder of CFV, and that Amendment 2 was his idea. He testified that Amendment 2 was a defensive measure to fend off state-wide militant gay aggression. The court's notes contain his term "militant gay aggression" no less than six times in his direct testimony alone. Mr. Tebedo identified himself as the paid executive director of CFV and one of its founders. He testified that the purpose of Amendment 2 was to prevent the government from declaring that homosexuals are entitled to protected class status. He made clear his belief that absent Amendment 2, affirmative action programs for homosexuals would somehow be implemented in Colorado.

Defendants' argument as to this claimed interest was based on the Tenth Amendment to the U.S. Constitution which grants the power to amend state constitutions to the states. Defendants argue that the people through their votes have decided to amend the Colorado constitution and that vote should end the discussion.

Both this court in its ruling granting the preliminary injunction and the Supreme Court in affirming that injunction made specific reference to the constitutional provisions granting the right and power of the people of Colorado to amend their Constitution. The very first footnote in the Supreme Court opinion reads:

'Art. II, §1, of the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people; all government of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Art. II, §2, provides that "[t]he people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, *provided, such change be not repugnant to the constitution of the United States.*" (Emphasis supplied)

Evans, 854 P.2d at 1272.

Also, the very last section of the majority opinion the Supreme Court once again acknowledged the significance of the election, *but* put that election in perspective:

That Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943), and that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that is be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1474, 12 L.Ed.2d 632 (1964).

Evans, at 1286.

The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions. Similarly the evidence does not persuade the court that absent Amendment 2, homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on those classifications. Finally, Defendants' legal argument is not supported by federal or state case law, nor is it supported by the Colorado Constitution. Defendants' argument seems little more than a begging of the ultimate question to be answered. The second alleged compelling interest is not a compelling state interest.

The third interest claimed to be compelling is the preservation of the ability of the state to remedy discrimination against groups which have been held to be suspect classes. This claim is basically that there are insufficient fiscal resources available to the state to add another group to the rolls of those protected by existing civil rights laws or ordinances. Although not totally clear from defendants' presentation, this claim may relate in some way to Amendment 1 passed in the same election.

Mr. Thomas Duran, formerly of the Colorado City Rights Division, and Mr. Ignacio Rodriguez, formerly of the Colorado Civil Rights Commission, were both called to testify that without Amendment 2 there would be a dilution of protections afforded to existing suspect classes. This testimony was unclear because the absence of this amendment does not mean that gays have been added as a protected class to any statute. Similarly, Professor Joseph Broadus from the George Mason University School of Law testified that in his view the addition of gays to civil rights statutes or ordinances would lessen the public's respect for historic civil rights categories. He further testified that enforcement of civil rights protections for gays could result in a dilution of governmental resources allocated to protect those traditional civil rights.

Contrasted against this testimony was the testimony of Denver Mayor Wellington Webb and Brenda Tolliver-Locke, a Compliance officer charged with enforcing the Denver Anti-discrimination ordinance. Both testified that enforcing Denver's ordinance, which does not contain a sexual orientation provision, does not detract from enforcing other aspects of the same ordinance. The inclusion of sexual orientation in the Denver ordinance has not necessitated an increase of enforcement staff nor has it resulted in an increase in costs.

Plaintiffs also presented the testimony of Leanna Ware from the Civil Right Bureau of the State of Wisconsin. In 1982 Wisconsin became the first state to enact statutory prohibitions against discrimination based on sexual orientation. Ms. Ware testified that the sexual orientation cases under those Wisconsin statutes are a very small percentage of the total case load and have not limited enforcement of other parts of the Wisconsin statutes in any way.

The facts don't support defendants' position. Defendants' evidence was principally in the form of opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute. There is no such statute, nor is one proposed. Plaintiffs' evidence was based on what *has happened* over the course of eleven years in Wisconsin, and during the time in which the Denver ordinance has included a sexual orientation provision. Those actual experiences show that the presence of a sexual orientation provision has *not* increased costs or impaired the enforcement of other civil rights statutes or ordinance.