1993 WL 19678
District Court of Colorado, Denver County.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Martina Navratilova, Bret Tanberg, Priscilla Inkpen, 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 and Gail Norton as Attorney General of the State of Colorado, Defendants.

No. 92 CV 7223.
|
Jan. 15, 1993.

Attorneys and Law Firms

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BAYLESS, District Judge.

AFTERNOON SESSION, FRIDAY, JANUARY 15, 1993

***1** (The following proceedings were had and entered of record:)

THE COURT: The Court calls 92 CV 7223, Richard Evans, et al, versus Roy Romer, et al.

The record will reflect the appearance of counsel who have been here throughout the week during the presentation of evidence. The matter comes on at this time for the Court to enter its ruling on the two motions for preliminary injunction which have been filed first by the individual plaintiffs in this case and then by the home rule City of Aspen.

The Court is prepared to rule and is going to rule at this time. Before I do that, I want to talk about a couple of things that aren't part of the ruling. Yesterday there was an outburst in the court which the Court felt was inappropriate to the decorum that I want to maintain. And I said so.

Now, in a minute I'm going to rule, and one side is going to perceive that they have won something, and the other side is going to perceive that they have lost something. And that might generate some emotions. And I understand that. As a matter of fact, I suspect there are strong emotions on both sides. And for those who perceive that they have won something, they may want to celebrate. For those who perceive they have lost something, they might want to express disagreement with that, and that's inappropriate in court. I didn't want it yesterday, I don't want it today. But having told everybody what I want, I'm satisfied that this group will abide by the Court's request and maintain the decorum that's appropriate for a courtroom.

Now, the second thing I want to tell you, I decided this about 2:30 this morning. Since that time, with about four hours out to sleep, I have been writing. And what I've attempted to do is to understand and have my ruling reflect that I know the audience to whom I'm speaking. And I think the audience is made up of two distinct groups. One is a group of legally trained people. That is to say, counsel who have presented this, counsel who have been perhaps inside the bar who may not have presented evidence, and they are familiar with the case law, and they are familiar with the legal concepts, and there will be catch phrases and legal expressions, code I talk in, and they'll understand that. And so a part of it is written for them.

And both sides have told me very fairly, not at this hearing but before, that they anticipate that regardless of what I do, there might be another day and in another higher appellate court that something might be reviewed. So I have written for that audience as well. But I am aware of the interests in this case and the interests in this

decision from non-legally trained folks, just the people of Colorado who voted on the Amendment. So what I have attempted to do in writing this is to write at two levels. One for the lawyers and one for the non-lawyers. And I hope not to insult either. And I hope to be clear to both. How well I have succeeded in that will be determined by someone other than me.

***2** Having said those two things, the Court rules as follows: Our form of government is a constitutional democracy, and both of those words have significance. "Constitutional" means our form of government is established by the United States Constitution and by the Colorado Constitution. "Democracy" means what most people think it means, that in most cases the majority rules. Now, let's talk a little bit about that. Historically, the United States Constitution would not have been ratified, if you remember your history classes, unless there had been included the first ten amendments, the Bill of Rights. And the states wouldn't have adopted it without that. So that's how the first ten got there.

Now, in Colorado, for those of you who aren't immediately familiar with our Constitution, it is physically different in appearance than the United States Constitution. Let me tell you about that. The Bill of Rights to the Colorado Constitution is not a set of amendments. As a matter of fact, the Bill of Rights is right in the body. It is Article II of the Colorado Constitution. Article I is a one-paragraph geographic description. It says the boundaries of the state start here, and go like this.

The first matter of substance then that is addressed after defining the boundaries is the Bill of Rights in our Constitution. Now, I take that to mean that in Colorado, rights come first. Section 1 of Article II of the Bill of Rights sets out that all political power in Colorado is vested in and derived from people. Section 2 says the people of this state have the sole and exclusive right of governing themselves as free-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.

What that says is the majority of citizens can alter the Constitution, it can change. And we have had 29 parts to that Constitution. There are 29 existing articles to Amendment 2 that are the Bill of Rights in Colorado. But in amending that and altering the form of government, even a majority vote of the Colorado citizens cannot violate the constitutional rights of other Colorado citizens.

Now, the issue in question here in this hearing relates to Article II Section 2 of the Colorado Constitution. And it relates to the amendment of that Constitution, the alteration of the State's Constitution by the addition of what was called Amendment 2. Amendment 2 is scheduled actually to become Section 30 of the Bill of Rights herein Colorado. The question raised by the lawsuit asked the courts of Colorado whether this amendment violates Article II Section 2 of the Bill of Rights by virtue of being repugnant to the Constitution of the United States. The courts of Colorado are one of the three branches of government under Article III of the Colorado Constitution and are charged with interpreting the Constitution and the laws of the state of Colorado.

***3** Now, the first part of this case is the part we have done this week. And it does not address, and the Court today is not addressing the merits of this case. What will be the final determination will be for another day after a full presentation of evidence, full briefing, and full argument. This first part deals with only asking the Court to delay the effective date of the Amendment until such time as that final determination can be made. Such a request is proper, and as a matter of fact, is provided for under the Rules of Civil Procedure, specifically Rule 65 here in Colorado which allows for preliminary injunctions.

Now, an injunction is a court order which may stop something from happening within a state. This Court is not allowed to base its ruling on a preliminary injunction on its own personal views. Rather, the oath of all Colorado Judges is to support the Constitutions of both United States and of the State of Colorado. And in dealing specifically with preliminary injunctions, the Supreme Court of Colorado has spoken very clearly as to what trial courts are to view in making their decision as to whether injunctions should issue.

I started on Monday, when I introduced this case, by making reference to that case. It's called *Rathke versus MacFarlane.* And if you were here yesterday, you saw that counsel pitched their arguments in terms of the *Rathke versus MacFarlane* standard. That case tells me several things. Let me just brief them. It says, first, that the granting or denial of a preliminary injunction rests in the discretion of the trial court. But then it talks to the trial court as to how it should exercise that discretion. It says

these injunctions should not be indiscriminately granted. It says they should only be granted sparingly and cautiously, with the full conviction on the part of the trial court that there is an urgent necessity for the injunction.

Now, the urgent necessity is described by our Colorado Supreme Court as being a threshold. That is to say, if the urgent necessity is not found, then the Court doesn't weigh the other six factors. It then says if the threshold, however, is established, then the Court has to weigh the six factors that have been discussed. First, that the side seeking the injunction has a reasonable probability of winning the case on the merits.

Now, this calls, admittedly, for some degree of forecast or prediction by the Court as to what may occur in the future. And the Supreme Court recognizes that that's a part of it. Second, it says the Court must consider whether there's a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief. Irreparable injury is defined as injury that cannot be fixed or repaired or adequately compensated perhaps by money.

Third, the Court has to weigh whether or not there is a plain, speedy, and adequate remedy at law, should the preliminary injunction not be granted. Fourth, the Court must weigh whether granting preliminary injunction will or will not disserve the public interest. Fifth, the Court is directed to address the balance of equities and see if they favor the injunction. Sixth, the Court is directed to consider whether the injunction will preserve the status quo, preserve what exists now, pending a trial on the merits of the case so that things will stay the same. And then the Supreme Court says you can't prove five or four, you have to prove all six. So that's what we are talking about here today, and that is the area in which the Court must base its ruling.

***4** The plaintiffs are individuals and three home rule cities who have asked the Court to delay the effective date. So it is they who bear the burden of proving these things established by *Rathke versus MacFarlane.* They must show the threshold of urgent necessity, and then they must show to the satisfaction of the Court these other six things that have been discussed.

In large measure, the proof which has been offered has been focused on their position that Amendment 2 is repugnant to the United States Constitution. They argue that there's a urgent necessity because of the probability of persons having their fundamental constitutional rights violated for any time period creates an urgent necessity. They argue that the violation of these fundamental constitutional rights causes irreparable harm, and so on, through the six that I have to weigh.

The first one, and perhaps the one that most of the attention has been based on is whether-has been focused on, rather, is whether there's a reasonable probability of success on the merits. Plaintiffs are attacking the part of the Constitution of the State of Colorado which was passed by a majority vote of the voters November 3, 1992. Because it is a part of the Constitution, they must prove at the final hearing in order to prevail that this Amendment is unconstitutional beyond a reasonable doubt.

Several cases have said it that that's the standard, including *Rathke versus MacFarlane.* That's the highest standard we have in Colorado. That's the same standard as a jury would be asked to consider if someone is guilty of murder in the first degree. Reasonable doubt in Colorado means a doubt based upon reason and common sense which arises from a fair and thoughtful consideration of all of the evidence or the lack of evidence in the case. It is not a vague, speculative, or imaginary doubt, but it is such a doubt as would cause reasonable persons to hesitate to act in matters of importance to themselves. And so at the hearing on the merits, they will have the burden of proving it beyond such reasonable doubt.

Plaintiffs argue that this Amendment deprives them of fundamental rights guaranteed by the U.S. Constitution. They do not argue that there is a fundamental right to be homosexual or bisexual or lesbian, which is found in the U.S. Constitution. Rather, they argue that the rights they are deprived of are found in the right to equal protection of the laws under the First and 14th Amendments to the United States Constitution.

Specifically, plaintiffs argue that they will be denied the right to vote and the right to petition the government for redress of grievances by the right to have access to the courts. What does the Amendment say? We have had the Amendment on the podium from time to time here. It says, "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 self-executing."

***5** Plaintiffs produced evidence that the Amendment was only addressed to claims of discrimination by homosexuals, lesbians, and bisexuals. They did this by the testimony of witnesses who came before this Court and announced, self-declared, if you will, that they were homosexual. And then by saying that neither they or anyone that they knew who were also homosexual are seeking to establish any minority status or quota preference or protected status.

By doing this, the plaintiffs have attempted to narrow the focus to the claim of discrimination based on homosexual, bisexual, or lesbian orientation. They therefore urge that the Amendment actually and only stands for the proposition in Colorado by Constitutional Amendment is now about to say that there will be no remedy available for acts of discrimination against homosexuals, bisexuals, and lesbians because those people alone may not go to the government to ask for laws to be enacted or existing laws to be enforced which would prevent that discrimination.

They then point out both by testimony and exhibits that there are existing laws. And they pointed specifically to Section 10-3-1104 having to do with insurance. And that says insurance companies may not discriminate in issuing insurance policies based on sexual orientation. They point out that the executive department has an existing order by virtue of the Governor's Executive Order of December 10, of 1990, which prohibits discrimination based on sexual orientation. They point out from the testimony of the representatives of the home rule cities that these cities may not enact ordinances which may grant remedies for discrimination based on these particular orientations. And they further point out that the three cities which have such ordinances at the present time will be forbidden to enforce them if Amendment 2 becomes effective.

They urge that school districts may not be allowed to remedy any discrimination as to faculty employees or students based on discrimination for homosexuality, bisexuality, or lesbians. In short, the plaintiffs urge that this Amendment, by denying the opportunity to obtain a remedy for discrimination based upon these orientations, has identified a specific group and said that any discrimination as to that group because of membership in that group may not be given relief or remedy by the agencies of the state of Colorado.

It has not said that the state will discriminate against homosexuals, bisexuals, or lesbians, but it has said if any private citizen does discriminate based on such orientation, that no remedy may be provided by the State. Plaintiffs argue this Amendment endorses and gives State-approval as to private discrimination.

Plaintiffs argue that such a State statement endorsing and approving private discrimination deprives them of the right to vote and the right to approach their government; specifically, their courts, for a redress of grievances.

Plaintiffs offer much case authority in support of their position. Many cases from the United States Supreme Court. Such law is received and followed where appropriately applicable by Colorado courts from the United States Supreme Court. Plaintiffs offer several other cases which are not controlling in Colorado. For example, they offer cases from other states. California, for instance, and from federal courts which are not Supreme Court. That's proper. There's nothing improper about that. They are not saying it is controlling here. They are saying please read this and please review this, we believe there is wisdom to be gained which Colorado might wish to adopt.

***6** Their lead case and where they began, and this was highlighted in the closing argument yesterday, is *Reitman versus Mulkey.* That case involved a question of race in the sale or leasing of rental property.

Let's turn now to the defendants. The defendants, quite rightly, point out that the majority of cases offered by the plaintiffs deal with race, as does *Reitman versus Mulkey,* and not with questions of sexual orientation. The Court notes that defendants are right. That's correct. But the Court also notes it wasn't very surprised by that. And the reason it wasn't very surprised by that is because the history of discrimination law in the United States is based on race. It started with the 14th Amendment which talked about slavery. And most, I will say, of the law has dealt then with the history of discrimination. And so most of these cases do talk about race. Race has a very special place in our legal history. And I think it may well have a small place here.

There has been a suggestion that as a part of Defendant's Exhibit C, one of the things that concerned those

proponents of Amendment 2 was that there was urged in one jurisdiction in Colorado that a certain quota preference be given to those with homosexual/bisexual orientation. It was never adopted, but they suggest that perhaps that is what is being addressed by the quota preference which is a part of Amendment 2.

Now, defendants are allowed to present evidence, and defendants are allowed to argue. And they have done both here. But *Rathke versus MacFarlane* does not place any burden of proving anything on the defendants. The burden is always with the plaintiffs who are seeking the injunction. Now, in addition to not having to prove anything here, the defendants have the benefit of something else. Legislation in this case, this is a piece of initiated legislation that will become a part of the Colorado Constitution, is entitled to something called a presumption of constitutionality, and the Court understands that and gives to that statute a presumption of constitutionality.

That is not to say that the presumption may not be overcome by the presentation of evidence, but the defendants start with that presumption. Defendants then well and fairly argue there are several things here that have been discussed that have been presented that they strongly urge are not part of the case. Mr. Dailey did this very well, really, at the upfront part of his argument yesterday. He said Coloradans for Family Values isn't a party here. He said the Religious Right isn't a party here, nor the Political Right, nor whether Colorado could be deemed a hate state. That's not here, Judge. That's not what you are to decide. And the defendants are correct, and the Court accepts that.

As a matter of fact, I looked at what was presented to the Court in terms of the efforts that have been made on the part of Coloradans for Family Values and the Religious Right and the Political Right. And what I saw was a group of Colorado citizens who wanted to present an initiative to the voters. They said we would like the voters of Colorado to look at this. So they acquired signatures. They presented things to the state government. They followed the political process, and they got it on the ballot. And they lobbied for or were part of a lobbying effort for the passage of the Amendment, and that involved spending money and presenting their views.

***7** There is absolutely nothing wrong with that. As a matter of fact, that is exactly in keeping with the political process that this country is based on. And this Court, should there be an attack on that process, would vigorously defend those persons who have been involved with that process, because they have followed exactly what democracy urges. As a matter of fact, at every election, what you hear is the voters, "Get involved. Go to your caucuses. Vote." That's exactly what they have done. There's nothing suspect about that.

The focus of the defendant's argument was that this is not unconstitutional because all the Amendment attempts to do is to make a part of Colorado law that which is existing in the federal law in terms of the treatment of homosexuals, lesbians, bisexuals. The argument goes on that the courts should not look to the limitation placed by plaintiffs just on the discrimination but rather look to the whole Amendment. And they urge that because that demonstrates the true intent of the Amendment. If you isolate on one part, you may not be viewing the true intent and that the Courts should look to the ballot analysis as a type of legislative history, if you will, to demonstrate what that intent was.

The defendants also argue, and they cite the same way, U.S. Supreme Court cases and cases from other courts. They start with *Bowers versus Hardwick,* and they urge that gay, lesbian, and bisexual conduct has been held-"conduct," now, has been held to be criminal by some states. That case involved a statute outlawing sodomy. And that statute was sustained in *Bowers versus Hardwick* by the United States Supreme Court. And they urge that this behavior which can be criminalized defines the class of people here.

They also argue that a law-making procedure that disadvantages a particular group does not always violate constitutional rights or deny equal protection, and they cite Supreme Court case law for that. The Court agrees with that general statement of the law. They say there is no necessity for the Court to intrude on the private and moral values of citizens, and that is what is the heart of Amendment 2.

They urge then that the Court distinguish between certain standards or measures or tests, if you will, as to how you-how the Court should view an attack on constitutionality. They say this should not be viewed under what is described as the strict scrutiny test but only should be described or analyzed under what's called the rational basis test.

These are the positions which have been taken in

summary form by the two sides here. The question is what is the Court to do. First, the Court is ruling on a motion for preliminary injunction only. I am not ruling on the constitutionality of Amendment 2. As a matter of fact, the Court may not at this time rule on the constitutionality of Amendment 2. I may only rule on what is before me, the motion for preliminary injunction.

Second, in ruling, I am following the guidelines that I have outlined from *Rathke versus MacFarlane.* The Court's view is this: In large measure, everything revolves around the first of the six claims. That is-first of the six elements, excuse me, as to whether plaintiffs have shown evidence and made argument that leads this Court to conclude that they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt at a hearing on the merits.

***8** Now, some of the six parts are easier to answer on that score than others. For example, the last one is the easiest. Will an injunction preserve the status quo? Yes, of course. Amendment 2 has never been a part of the law of Colorado. It is not now. An injunction will preserve exactly that status. The voters have voted on it. The Secretary of State has certified the vote totals. An injunction will preserve exactly that status.

The others tend to be related to that question that the Court has identified. Is there a danger of real, immediate, and irreparable harm if Amendment 2 becomes effective? Well, if the Court determines that this would be a denial of fundamental constitutional rights, then any denial of fundamental constitutional rights would be real, immediate, and irreparable harm.

Keep in mind where I started. Rights come first in the Colorado Constitution. Bill of Rights is first. The question relates to whether Amendment 2 amounts to a denial of a constitutional fundamental right. Is there a plain, speedy, and adequate remedy at law? Well, once again, it's related to is this probably to be shown to be unconstitutional? The only discussion of potential remedy has been that someone could pass an amendment which repeals Amendment 2. That is a plain remedy. Plain isn't enough. Is it speedy? Clearly not.

There would have to be some effort to get that sort of an amendment on a ballot by legislative action or initiative. Then there would have to be the election process. There's a plain remedy, but it is clearly not speedy. But it does relate, once again, as I have mentioned to whether or not this is a violation of fundamental constitutional rights, or that they have shown that they have a reasonable probability of succeeding on the merits.

Will the granting of a preliminary injunction serve or disserve the public interest? It's tied to whether or not they have established whether they may or may not prevail. The Court finds that the public has no interest whatsoever in having an unconstitutional amendment be added to its Constitution. By the same token, or, if you will, on the other hand, the State has every interest in having a constitutional amendment become effective if it is not unconstitutional because a majority of the voters voted for it.

Does the balance of equities favor the injunction? It goes back to the same question. Is there an urgent necessity? The urgent necessity is once again tied to whether or not they are liable to prevail. Therefore, the Court concludes that in or order to answer the question as to whether plaintiffs have established the reasonable probability of success, reasonable probability that they will prove this is unconstitutional beyond a reasonable doubt will determine the matter.

What is the state of the law in this Court's view regarding constitutionality of such an amendment? It has been mentioned that the law is not static. It has been mentioned that it evolves. It grows. It changes. And that is true. I'm going to borrow a few words from some Justices of the Supreme Court. It's not about these cases. Not about sexual orientation. It's about the law. It's about the law growing and changing, because I want to put this in a context. Quoting from Mr. Justice McKenna in a case called *Weems versus the United States* from a long time ago, 1910. He said, "The clause of the Constitution in the opinion of the learned commentators may be, therefore, progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

***9** I want to quote from Chief Justice Earl Warren in a 1958 case called *Trop versus Dulles.* He was discussing the 8th Amendment, that's cruel and unusual punishment. It says, "The words of the 8th Amendment are not precise and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

What is the law on discrimination? What has it been? As I mentioned it started with the 14th Amendment which was

for former slaves. It related to blacks. It related to race. It has been largely dominated by racial cases. The evolution has developed some legal standards, and they were argued yesterday, and I'm going to now discuss those.

One, is that a violation which involves something-violation of a fundamental right which involves something called a suspect class or a violation which involves a suspect class, even if it's not a fundamental right, calls for strict scrutiny by the Court. It's not here. Plaintiffs haven't argued it. It's not for the Court to determine. Go on to the next.

A second involves what are described as equal protection violations of fundamental rights. What are fundamental rights? There have been a lot of cases that have discussed those. Fundamental rights have been deemed to include the right to participation in elections. The right of access to the courts. Right of privacy. And even the right of interstate travel. In terms of this issue, the laws which may burden fundamental rights of an independently identifiable group are subject to what is called strict scrutiny of the courts under this equal protection analysis.

That's where the plaintiffs urge the Court ought to come down. Those two prongs. This is a fundamental freedom. This is an independently identifiable group. And therefore, the Court must view this under the strict scrutiny standard. What does that mean? That means a law which burdens any of these fundamental rights of this independently identifiable group will require the state now to show and have a burden that this measure is necessarily related to a compelling governmental interest.

So it changes. They have had all the burden here, but if it were a strict scrutiny standard at the time of hearing on the merits, there would be two standards. One on this side of the room and one on that side of the room. And plaintiffs urge that is the standard I should apply.

The third standard which has been urged in part at least by the defense is called the rational basis test. And that involves laws which may involve not fundamental rights but may be something that's deemed non-fundamental rights in the Constitution, and they are subject only to the test of rational basis. That is to say, the Court is to defer to the legislation if there is any rational relationship between a legitimate public goal to be accomplished and the lines drawn which may accomplish that, even though those lines in the legislation may amount to some degree of discrimination.

***10** The Court concludes with regard to the first that there is a fundamental freedom involved with Amendment 2. The parties themselves have struggled to identify the fundamental freedom. The reason they have struggled, I think, is because they have tried to cast it in the words of prior cases. Let me read you some of those words. I'm going to read you some quotes, and that's always a question as to whether anybody ought to do this, but you have to understand where the Court is coming from because of the law that has come before.

The first case that the plaintiffs cited is called *Reitman versus Mulkey.* And it was a California case. You haven't read it, but it involved a Section 26 that they passed out there, and it said if you own a piece of property, you can decide if you want to sell it or lease it to anybody, and it's your own decision. That's all it said. The Court said private discriminations in housing were now not only free from prior statutory enactments, but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke constitutional authority, from sensor or interference of any kind from official sources.

The Court in 1967 by a five to four vote, there are nine justices on the United States Supreme Court, said that was unconstitutional. That involved a fundamental right because what it did was it took this private discrimination and it gave state support to it. But it was five to four in 1967. That means the majority said, yes, and it was the law of the land.

But what happens if we change the members of the Supreme Court? I've told you the law evolves. So let's come forward from 1967. In 1984 there was a Supreme Court case which has been urged to the Court by both sides, as a matter of fact, called *Palmore versus Sidoti.* I don't know if that's how you pronounce it. That's how it looks. This time it was a unanimous decision, nine-zero. And it didn't involve real estate at all. It involved child custody. And the facts of that were that two people who were Anglo had been married, and they had a baby. And then they got a divorce. And in the divorce, custody of the baby was awarded to the mother. And the mother, who was an Anglo, then took up with a black man. And they

ultimately married. And the father who was Anglo went for a change of custody. And basically, the change of custody said my daughter is white, and she will be victimized because there will be bias focused on her because the two people she's living with are of a mixed marriage. One white, one black. That's the context.

The Supreme Court said the question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. Seventeen years before the vote had been five to four. This time it's unanimous. And the Supreme Court says we have little difficulty concluding we are not-and then it gives a footnote. Sometimes a lot of law is contained in the footnotes, and the footnote says, "In light of our holding based on the equal protection clause, we need not reach or resolve petitioner's claim based on the 14th Amendments of due process clause."

***11** So they are ruling on equal protection which is being raised here. The Court then goes on to say the Constitution cannot control such prejudices. That is, private prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Two years ago in 1991, there was a case which was not from the Supreme Court, it's been urged-as a matter of fact, it was urged in closing argument by defense. It's called *Pruitt versus Cheney.* Different set of facts. A lesbian was an officer in the Army Reserve. She made a statement which was printed in the Los Angeles Press that said, "I am a lesbian." Based upon that, she was thrown out of the military. They have a regulation, an Army regulation that says they can do that. She brought suit to say that's unconstitutional. And she brought it because she said it's a violation of my right to freedom of speech. The only reason I was thrown out is because I spoke and it got printed in the paper. That's why you threw me out. Not because I'm homosexual.

The Court said no, you were thrown out because of the Army regulation because you are a homosexual, and that had been her claim. But then the Court incredibly said your claim was for violation of First Amendment but you stated facts which may arise-may amount to a violation of the equal protection clause, and even though you didn't raise it by stating the theory, we are going to let you proceed on that theory which you didn't state. An incredible swing.

It cited the *Palmore* case I just read to you. In *Palmore,* the Supreme Court struck down a denial of custody of a child, based on social disapproval of the interracial marriage, of her daughter. In so ruling, the Court said the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect.

Then it went on to say, *Cleburne,* which is another case, made clear that this principle is not confined to instances of racial discrimination reviewed under strict scrutiny. *Cleburne* was a case of zoning, basically. And it was whether you could put a group home for mentally retarded people within a certain area. And in *Cleburne,* the Court said it is plain that the electorate as a whole, either by referendum or otherwise, could not order city action violative of the equal protection clause.

And then they cite a case called *Lucas versus 44th General Assembly of Colorado.* It's a Supreme Court case. And the city may not avoid the strictures of that clause by deferring to the wishes or objections of some fraction of the bodied politic, and quote *Palmore,* the same language I have quoted before.

So the first part has been established, the Court concludes. There is a fundamental right here, and it's the right not to have the State endorse and give effect to private biases.

***12** Second question, is there an identifiable class? Yes. Lot of these cases say it's real hard to find an identifiable class. Not here. The statute itself, the Amendment 2 defines the identifiable class. A lot of these cases say even though it is facially neutral; that is to say, you can sell your property to anybody you want or not sell it to anybody you don't want, this isn't facially neutral. This identifies the class right in the Amendment.

So I find that there is an identifiable class. Now, with regard to the idea that's been argued by defendants that you can't make this an identifiable class because of *Bowers versus Hardwick,* the Court concludes that this is principally, although, the term "conduct" appears in there, this is principally an Amendment which addresses status, not conduct. Conduct is what *Bowers versus Hardwick* said.

I do that based on a case which was not cited by either side. It's called *Robinson versus California.* That case is a

Supreme Court case. That case said you can't make a status a crime even though the conduct is a crime. It had to do with drugs. Can you prevent-can you say it's a crime to possess drugs? Yeah. Sell them? Yeah. Can you say it's a crime to be addicted to drugs? That's the status. And they said no.

The Court finds that this is a status. Therefore, the Court finds that the burden at the hearing on the merits is going to be twofold. One, the plaintiffs must prove the unconstitutionality of this beyond a reasonable doubt. But two, the Court will look at this under the strict scrutiny standard. And therefore, the State will have to show more than a mere rational basis. They will have to show a substantial and compelling government interest in passing this.

There will be a trial on the merits. The amendment will be reviewed as though it is one involving a fundamental right as affecting an identifiable class. That requires strict scrutiny and the two burdens. This will take place in light of what Justice Warren said, "The evolving standards of decency that mark the progress of a maturing society."

Will the plaintiffs win? The Court does not know. Do the plaintiffs have a reasonable probability, given all of this, given all of the law that the Court has examined, do they have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt? Yes.

The burdens of *Rathke* have been carried and met by the plaintiffs. The motions for preliminary injunction are granted, and the defendants-the defendants, the Governor of the State of Colorado and the Attorney General of the State of Colorado are enjoined from declaring Amendment 2 in force, and are enjoined from enforcing Amendment 2 until further order of Court.

This Court is in recess.

(The proceedings were concluded.)

All Citations

Not Reported in P.2d, 1993 WL 19678, 60 Empl. Prac. Dec. P 41,998