No. 94 - 1039

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.

On Writ of Certiorari to the Supreme Court of the State of Colorado

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 12, 1994
CERTIORARI GRANTED FEBRUARY 21, 1995

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That portion of the 1992 Ballot Proposal Analysis pertinent to Colorado's Amendment 2 has been omitted in printing this joint appendix, becuase it appears on and following page F-1 of the appendix to the printed Petition for Certiorari.

Similarly, the following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

RELEVANT DOCKET ENTRIES

Date	Action
November 12, 1992	Complaint Filed
December 23, 1992	Motion for Preliminary Injunction Filed
December 23, 1992	Amended Complaint Filed
December 29, 1992	City of Aspen's and City Council for City of Aspen's Motion for a Preliminary Injunction Filed
January 8, 1993	Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction Filed
January 11-14, 1993	Preliminary Injunction Hearing
January 15, 1993	Preliminary Injunction Issued
October 12-22, 1993	Trial
December 14, 1993	Order Finding Amendment 2 Unconstitutional and Making Preliminary Injunction Permanent
December 22, 1993	Motion for Reconsideration and to Alter or Amend Judgment
January 7, 1994	Order Denying Defendants' Motion for Reconsideration
February 9, 1994	Order Granting Request for Colo. R. Civ. P. 54(b) Certification: Court Determines There is no Just Reason for Delay on the Judgment Finding Amendment 2 Unconstitutional on the Grounds Stated

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

AMENDED COMPLAINT

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, 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.

Plaintiffs Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Jane Doe, Martina Navratilova, 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 Aspen City Council, through counsel, in Complaint against the defendants, state as follows:

INTRODUCTION

This is an action seeking a declaration that Amendment 2, approved by the Colorado electorate in the general election of November 3, 1992, violates the constitutions of the United States and the State of Colorado. Amendment 2 relegates gay men, lesbians and bisexuals to a second class citizenship contravening the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as other state and federal constitutional provisions.

Plaintiffs seek to enjoin defendants from proclaiming, declaring, or acknowledging Amendment 2 to be part of the Constitution of Colorado, and from enforcing or implementing it in any way.

JURISDICTION AND VENUE

This action for declaratory and injunctive relief is brought under the Uniform Declaratory Judgments Act, Colo. Rev. Stat. §§ 13-51-101, *et seq.*, Rules 57 and 65 of the Colorado Rules of Civil Procedure, and 42 U.S.C. § 1983.

State courts have jurisdiction over claims arising under 42 U.S.C. § 1983 by virtue of the Supremacy Clause of Article IV of the United States Constitution.

Venue is proper in this Court under Rule 98(c) of the Colorado Rules of Civil Procedure.

GENERAL ALLEGATIONS

Background

1. On November 3, 1992, the following proposed amendment to Article II of the Colorado Constitution was submitted to the voters as Amendment 2:

> 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.

2. On November 5, 1992, the Denver Post reported that 811,479 electors had voted for Amendment 2 and 707,525 electors had voted against it.

3. On information and belief, a proclamation giving effect to Amendment 2 will take place on or before January 16, 1993.

Plaintiffs

4. Plaintiff Richard G. Evans is a citizen of the United States and a resident of Denver, Colorado. He is employed by the City and County of Denver. Plaintiff Evans is a gay man.

5. Plaintiff Angela Romero is a citizen of the United States and a resident of Denver, Colorado. She is employed by the City and County of Denver as a police officer. Plaintiff Romero is a lesbian.

6. Plaintiff Paul Brown is a citizen of the United States and a resident of Denver, Colorado. He is employed by the State of Colorado. Plaintiff Brown is a gay man.

7. Plaintiff Linda Fowler is a citizen of the United States and a resident of Denver, Colorado. She is employed as a contract administrator by a private employer. Plaintiff Fowler is a lesbian.

8. "Jane Doe" is the assumed name of a citizen of the United States and a resident of Denver, Colorado. She is employed by a public entity in Jefferson County. Plaintiff Doe is a lesbian.

9. Plaintiff Martina Navratilova is a citizen of the United States and a resident of Aspen, Colorado. She is a professional tennis player. Plaintiff Navratilova is a lesbian.

10. Plaintiff Priscilla Inkpen is a citizen of the United States and a resident of Boulder, Colorado. Plaintiff Inkpen is an ordained minister. Plaintiff Inkpen is a lesbian.

11. Plaintiff John Miller is a citizen of the United States and a resident of Colorado Springs, Colorado. Plaintiff Miller is a Professor of Spanish at the University of Colorado - Colorado Springs (UCCS), Chair of the UCCS Department of Language and Culture and Chair of the University of Colorado's system-wide University Faculty Council. Plaintiff Miller is a gay man.

12. Plaintiff Boulder Valley School District RE-2 ("the School District"), as a Colorado public school district duly

constituted pursuant to the laws of Colorado, is a political subdivision of the State of Colorado and a quasi-municipal corporation with its administrative offices located in Boulder County, Colorado. The School District acts by and through its duly qualified and elected Board of Education.

13. Plaintiff Bret Tanberg is a citizen of the United States and a resident of Evans, Colorado. He is currently infected with the Human Immunodeficiency Virus ("HIV"), and has been diagnosed as having Acquired Immune Deficiency Syndrome ("AIDS"). Plaintiff Tanberg is heterosexual, but suffers discrimination based on a perception that he is gay.

14. Plaintiffs City of Boulder and City of Aspen are duly established and constituted home rule municipal corporations under Section 6 of Article XX of the Constitution of Colorado. Plaintiff City and County of Denver is a duly established and constituted home rule municipal corporation under Sections 4 and 5 of Article XX of the Constitution of Colorado.

15. Plaintiff City Council of the City of Aspen is the duly authorized legislative and governing body for the City of Aspen pursuant to Article III of the Home Rule Charter for the City of Aspen.

Defendants

16. Defendant Roy Romer is Governor of the State of Colorado. Defendant Romer is required by Article IV, Section 2 of the Colorado Constitution to "take care that the laws be faithfully executed." Defendant Romer is also required by Article V, Section 1, Paragraph (4) of the Colorado Constitution to make a proclamation, the effect of which will be to enact Amendment 2, not later than thirty days after the vote has been canvassed. The vote is to be

canvassed by the Secretary of State within 21 days after the election.

17. Defendant Gale Norton is Attorney General of the State of Colorado and required by Colo. Rev. Stat. § 24-31-101(1)(a) to "prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor."

18. Defendant State of Colorado was created under the authority of the Enabling Act, Act of March 3, 1875, ch. 139, 18 Stat. 474, and encompasses the branches, departments, agencies, and political subdivisions subject to the proscriptions of Amendment 2.

Factual Allegations

19. Sections 28-93 through 28-97 of the Denver Municipal Code currently protect plaintiffs Evans, Romero, Brown, Fowler and Doe from discrimination in employment, educational institutions, real estate transactions, public accommodations, and health and welfare service on the basis of their sexual orientation. If Amendment 2 repeals these sections as they apply to gay men, lesbians and bisexuals, plaintiffs Evans, Romero, Brown, Fowler and Doe will face the real, immediate and substantial risk of discrimination on the basis of their sexual orientation in employment, educational institutions, real estate transactions, public accommodations, and health and welfare services.

20. Rules and Regulations of the Denver Police Department, RR-122, and § 117.01 ("Officer's Bill of Rights") in the Police Department Operations Manual currently protect plaintiff Romero from discrimination on the basis of her sexual orientation. Following enactment of Amendment 2, Plaintiff Romero will lose these protections and face the real,

immediate and substantial risk of discrimination in her employment on the basis of sexual orientation.

21. An executive order issued by Governor Roy Romer and dated December 10, 1990, and policy 11-1 of the Code of Colorado Regulations currently protects plaintiff Brown from discrimination in his employment. Following enactment of Amendment 2, Plaintiff Brown will lose these protections and face the real, immediate and substantial risk of discrimination in his employment on the basis of his sexual orientation.

22. On November 28, 1977, the City of Aspen, by and through the City Council for the City of Aspen, adopted Ordinance No. 60 (Series of 1977) prohibiting discrimination in employment, housing, public services and public accommodations within the City of Aspen on the bases of race, color, creed, religion, ancestry, national origin. sex, age, marital status, physical handicap, affectional or sexual orientation, family responsibility, or political affiliation. The ordinance has been codified in section 13-98 of the Aspen Municipal Code.

23. Section 13-98 of the Aspen Municipal Code prohibits discrimination on the basis of sexual orientation in housing, employment, public services and accommodations. Amendment 2 purports to repeal these provisions as they apply to gay men, lesbians and bisexuals. If Amendment 2 repeals this section as it applies to lesbians Plaintiff Navratilova will face the real, immediate and substantial risk of discrimination on the basis of her sexual orientation in housing, public services and accommodations.

24. Following enactment of Amendment 2, local government bodies will not be able to adopt or enforce ordinances or regulations prohibiting discrimination against gay, lesbian or bisexual citizens.

25. Sections 12-1-2 through 4 of the Boulder Revised Code prohibit discrimination on the basis of sexual orientation in housing, employment and public accommodations. Amendment 2 purports to repeal these provisions as they apply to gay men, lesbians and bisexuals. If Amendment 2 so repeals these sections, plaintiff Inkpen will face the real, immediate and substantial risk of discrimination on the basis of her sexual orientation in housing, employment and public accommodations.

26. Policy JFH, Student Complaints and Grievances, was adopted by the School District's Board of Education on June 18, 1992. Its implementing regulation was issued on the same date. Together, Policy JFH and its implementing regulation declare that no student shall be subjected to discrimination. They establish a procedure which, in pertinent part, affords aggrieved students the right to seek redress for alleged discrimination expressly including discrimination based on sexual orientation. Amendment 2 will prevent the School District from enforcing Policy JFH and its implementing regulation.

27. Following enactment of Amendment 2, heterosexual persons will be able to avail themselves of the above stated protections against discrimination on the basis of sexual orientation provided that the discrimination is not based on a perception that such persons are gay, lesbian or bisexual, but gay men, lesbians and bisexuals or persons so perceived will not be able to avail themselves of the protections.

28. The defendants are state officials acting under the color of state law within the meaning of 42 U.S.C. § 1983.

29. Following enactment of Amendment 2, plaintiffs will be deterred from associating in ways consistent with their sexual orientation.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Equal Protection Clause

30. Plaintiffs incorporate by reference paragraphs 1 through 29.

31. Amendment 2 purports to forbid the courts of the State of Colorado from enforcing local ordinances, federal or state statutes or constitutional provisions that recognize or protect gay men, lesbians or bisexuals.

32. Amendment 2 affirmatively authorizes, encourages and may require public and private discrimination on the basis of actual or perceived gay, lesbian and bisexual orientation and establishes the right to discriminate against gay men, lesbians and bisexuals as one of the basic policies of the State of Colorado.

33. Amendment 2 places substantial and unique burdens on gay men, lesbians and bisexuals to obtain legislation, executive policies and judicial determinations in their interest in state, municipal or school district forums regardless of the merits or, or need for, such legislation, policies or determinations and creates classifications that impinge upon the fundamental rights to vote and to participate equally in the political process. This diminished status and resulting stigma does not extend to any other group or class of citizens under the laws or constitution of the State of Colorado.

34. For the above stated reasons, Amendment 2 deprives the plaintiffs of their rights to equal protection of the laws as protected by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983,

and by the Due Process Clause in Article II, Section 25 of the Colorado Constitution.

SECOND CLAIM FOR RELIEF

Freedom of Association and Expression

35. Plaintiffs incorporate by reference paragraphs 1 through 34.

36. Amendment 2 disadvantages and discriminates against persons who hold a particular point of view by excluding a particular idea or belief about sexual orientation from being acted on through normal legislative, executive and judicial processes in Colorado.

37. Amendment 2 has the purpose and effect of limiting meaningful individual and collective advocacy of political, social and economic change on behalf of gay men, lesbians and bisexuals in securing equal rights for these persons.

38. Amendment 2 has the purpose and effect of coercing persons to adhere or profess to adhere to a single, state-approved belief respecting gay, lesbian or bisexual orientation.

39. By affirmatively authorizing and encouraging discrimination on the basis of gay, lesbian or bisexual orientation, Amendment 2 chills the speech of those persons who would otherwise freely speak out on matters related to gay, lesbian or bisexual orientation.

40. For the above stated reasons, Amendment 2 violates the plaintiffs' rights under the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution.

THIRD CLAIM FOR RELIEF

Establishment Clause

41. Plaintiffs incorporate by reference paragraphs 1 through 40.

42. Amendment 2 is based upon and embodies a particular religious view regarding gay, lesbian and bisexual orientation. The primary effect of Amendment 2 is to advance a particular religious belief with respect to sexual orientation.

43. Amendment 2 has no secular purpose. Instead, its purpose, and primary effect, is to advance a particular religious belief.

44. For the above stated reasons, Amendment 2 violates the plaintiffs' rights under the First Amendment to the United States Constitution and Article II, Section 4 of the Colorado Constitution.

FOURTH CLAIM FOR RELIEF

Petition Clause

45. Plaintiffs incorporate by reference paragraphs 1 through 44.

46. Amendment 2 denies plaintiffs the fundamental right to petition their government for a redress of grievances in violation of the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution.

FIFTH CLAIM FOR RELIEF

Vagueness

47. Plaintiffs incorporate by reference paragraphs 1 through 46.

48. Amendment 2 neither defines its own terms, nor specifies the intended sweep of its prohibitions.

49. Plaintiffs and others are forced to guess as to Amendment 2's scope and meaning, and will thereby be deterred from engaging in lawful and constitutionally protected activities.

50. Amendment 2 invites subjective, arbitrary, and viewpoint-based enforcement.

51. By imposing impermissibly vague prohibitions, Amendment 2 on its face violates the plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment and the First Amendment to the United States Constitution, as well as the Due Process Clause of Article II, Section 25 of the Colorado Constitution and Article II, Section 4 of the Colorado Constitution.

SIXTH CLAIM FOR RELIEF

Republican Form of Government

52. Plaintiffs incorporate by reference paragraphs 1 through 51.

53. By allowing Colorado voters to deprive plaintiffs of certain fundamental rights, as elsewhere alleged in this complaint, the use of the initiative as a means for adopting Amendment 2 is a violation of Article IV, Section 4 of the

United States Constitution, under which each state and the citizens of each state, are guaranteed a republican form of government, and of the Enabling Act to the Colorado Constitution that also guarantees to the plaintiffs a republican form of government.

SEVENTH CLAIM FOR RELIEF

Limits on Initiative

54. Plaintiffs incorporate by reference paragraphs 1 through 53.

55. An initiated constitutional amendment that places certain legislation beyond the reach of the general assembly violates Article V, section 1(4) of the Colorado Constitution, which provides that "[t]his section [reserving to the people the power to initiate amendments to the constitution] shall not be construed to deprive the general assembly of the power to enact any measure."

56. By purporting to limit the home rule powers of Article XX, as well as various individual rights protected by Article II of the Colorado Constitution, Amendment 2 constitutes a revision to the constitution which may only be effected through the constitutional convention process provided in Article XIX, Section 1 of the Colorado Constitution.

EIGHTH CLAIM FOR RELIEF

Article XX of the Colorado Constitution

57. Plaintiffs incorporate by reference paragraphs 1 through 56.

58. The cities of Denver, Aspen and Boulder have exercised the home rule powers granted to them by Section 6 of Article XX of the Colorado constitution to prohibit discrimination based on sexual orientation in various settings. A construction purporting to void these ordinances as they apply to gay men, lesbians and bisexuals would be in conflict with the limitation stated in Article XX of the Colorado Constitution.

59. A constitutional amendment placing certain legislation, regulations and policies beyond the reach of municipalities when such legislation, regulations and policies are required by local conditions would usurp the powers granted to home rule cities by Article XX, Section 6 of the Colorado Constitution. Article XX protects those powers except when there is an explicit declaration to the contrary. Amendment 2 is not such a declaration.

60. Article XX of the Colorado Constitution, enacted in 1902 and establishing home rule authority, operates as an implied limitation on Article V, which reserves to the people the power to initiate amendments to the constitution, enacted as part of the original constitution in 1876.

NINTH CLAIM FOR RELIEF

Article IX, Section 15 of the Colorado Constitution

61. Plaintiffs incorporate by reference paragraphs 1 through 60.

62. Article IX, Section 15 of the Colorado Constitution vests in local boards of education the authority to control instruction in the public schools of their respective districts. Local control by district boards of education is the focus of historical development of public education in Colorado.

63. Among the express duties charged to local boards of education is the duty to adopt written policies, rules and regulations relating to conduct, safety and welfare of all pupils, or any class of pupils enrolled in the public schools. C.R.S. Section 22-32-109(1)(w).

64. In exercising its constitutional authority to control instruction and in fulfilling its duty to adopt policies and regulations concerning the conduct, safety and welfare of all pupils, the School District has established the right of students to seek redress for alleged discrimination based on sexual orientation.

65. By purporting to nullify that part of the School District's policy and regulation proscribing discrimination based on sexual orientation, Amendment 2 divests the School District, acting through its Board of Education, of its constitutional and statutory authority to exercise local control over the School District in violation of Article IX, Section 15 of the Colorado Constitution.

TENTH CLAIM FOR RELIEF

Supremacy Clause and Access to Courts

66. Plaintiffs incorporate by reference paragraphs 1 through 65.

67. Amendment 2 prevents state courts from enforcing statutes, regulations, ordinances and policies whereby gay, lesbian or bisexual orientation, conduct, practices or relationships are the basis of a claim of discrimination.

68. Amendment 2 prevents state courts and municipal courts from hearing cases raising claims or defenses that involve federal or state statutes, local ordinances and policies, or constitutional provisions that recognize or protect

existing or future rights of gay men, lesbians or bisexuals. Amendment 2 places the state government and municipalities in the position of incurring legal liability for violation of the constitutional provisions.

69. For the above stated reasons, Amendment 2 violates the Supremacy Clause of Article VI, paragraph 2 of the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the access to the courts provision of the Colorado Constitution, Article II, Section 6.

ELEVENTH CLAIM FOR RELIEF

Limitation on Amendments to State Constitution

70. Plaintiffs incorporate by reference paragraphs 1 through 69.

71. Although the People of the State of Colorado retain the power to amend the state constitution, the state constitution prohibits an amendment that conflicts with the federal constitution. Amendment 2 conflicts with the federal constitution.

72. Amendment 2 unlawfully attempts to limit the constitutional authority of home rule cities as granted under Article XX of the Colorado Constitution to adopt and enforce legislation or regulations protecting rights as granted to citizens under the Constitution of the United States, including legislation and regulations prohibiting discrimination within their municipal boundaries on the basis of sexual orientation.

73. For the above stated reasons, Amendment 2 violates Article II, Section 2 of the Colorado Constitution.

WHEREFORE, the plaintiffs pray for relief and judgment as follows:

A. to declare that Amendment 2 to Article II of the Colorado Constitution violates the United States Constitution, 42 U.S.C. § 1983, and the Colorado Constitution on the above enumerated grounds;

B. to enjoin defendant Romer from proclaiming the vote which would otherwise give effect to Amendment 2;

C. to enjoin defendant Romer from enforcing Amendment 2;

D. to enjoin defendant Norton from enforcing Amendment 2;

E. to enjoin defendant State of Colorado, including its branches, departments, agencies, political subdivisions, municipalities and school districts from in any way enforcing, recognizing or giving effect to Amendment 2.

F. to declare that the protections adopted by various state and local governmental entities prohibiting discrimination on the basis of sexual orientation remain in force as adopted by the respective entities;

G. for costs, expert witness fees, and attorneys' fees as may be allowed by law; and

H. for such other and further relief as the Court deems just and proper.

Respectfully submitted this 23rd day of December, 1992.

JEAN E. DUBOFSKY, P.C.

/s/_____

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PLAINTIFFS' EXHIBIT 46

STATE OF COLORADO

EXECUTIVE CHAMBERS
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Denver, Colorado 80203-1792
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Roy Romer
Governor

EXECUTIVE ORDER

IN CELEBRATION OF HUMAN RIGHTS

WHEREAS, in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form;

WHEREAS, freedom from discrimination is the policy of state government;

WHEREAS, the State of Colorado must continue to take positive steps to ensure non-discrimination, and assure that all citizens, regardless of race, ethnicity, gender, sexual orientation, age, religion, or physical or mental disability, have an equal opportunity to compete for and obtain employment with the State of Colorado;

NOW, THEREFORE, I, Roy Romer, Governor of the State of Colorado, under the authority vested in me under the Constitution and laws of the State of Colorado, DO HEREBY ORDER THAT, with respect to all state employees, classified and exempt:

The head of each principal department, and the president of each institution of higher education, shall ensure non-discrimination based on race, ethnicity, gender, sexual orientation, age, religion, or physical or mental disability, in any matter pertaining to hiring, promotion, training, recruitment, and appraisal, and shall maintain an environment where only job-related criteria are used to assess employees or prospective employees of the State of Colorado.

GIVEN under my hand and the Executive Seal of the State of Colorado this 10th day of December, 1990.

/s/
Roy Romer
Governor

PLAINTIFFS' EXHIBIT 43

PART 11

UNFAIR COMPETITION - DECEPTIVE PRACTICES

10-3-1102. Definitions. As used in this part 11, unless the context otherwise requires:

(1) "Commissioner" means the commissioner of insurance.

(2) "Insurance policy" or "insurance contract" means any contract of insurance, indemnity, medical or hospital service, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any person.

(2.5) Repealed, L. 81, p. 577, § 5, effective June 4, 1981.

(3) "Person" means any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, surplus line insurer, fraternal benefit society, and other legal entities engaged in the insurance business, including agents, limited insurance representatives, agencies, brokers, surplus line brokers, and adjusters. Such term shall also include medical service plans and hospital service plans regulated under parts 1 and 3 of article 16 of this title and health maintenance organizations regulated under parts 1 and 4 of article 16 of this title. Such plans and organizations shall be deemed to be engaged in the business of insurance for purposes of this part 11 only.

10-3-1103. Unfair methods of competition and unfair or deceptive acts or practices prohibited. No person shall engage in this state in any trade practice which is defined in this part 11 as, or determined pursuant to section 10-3-1107

to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

10-3-1104. Unfair methods of competition and unfair or deceptive acts or practices. (1) The following are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

* * * * *

(f) (VI) Inquiring about or making an investigation concerning, directly or indirectly, an applicant's, an insured's, or a beneficiary's sexual orientation in:

(A) An application for coverage; or

(B) Any investigation conducted in connection with an application for coverage;

(VII) Using information about gender, marital status, medical history, occupation, residential living arrangements, beneficiaries, zip codes, or other territorial designations to determine sexual orientation;

(VIII) Using sexual orientation in the underwriting process or in the determination of insurability;

(IX) Making adverse underwriting decisions because an applicant or an insured has demonstrated concerns related to AIDS by seeking counseling from health care professionals;

* * * * *

10-3-1107. Hearings. Whenever the commissioner has reason to believe that any person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice, whether defined or

reasonably implied in this part 11, and that a proceeding by him in respect thereto would be to the interest of the public, he shall proceed as provided in article 4 of title 24, C.R.S. Any final action by the commissioner pursuant to this section shall be subject to judicial review by the court of appeals pursuant to section 24-4-106 (11), C.R.S.

10-3-1108. Orders. (1) If, after a hearing conducted under section 10-3-1107, the commissioner determines that the person charged has engaged in an unfair method of competition or an unfair or deceptive act or practice, he shall reduce his findings to writing and shall issue and cause to be served on such person a copy of such findings and an order requiring such person to cease and desist from engaging in such method of competition, act, or practice, and, if such act or practice is a violation of section 10-3-1104, 10-3-1105, or 10-18-105, the commissioner may, at his discretion, order any one or more of the following:

(a) Payment of a monetary penalty of not more than one thousand dollars for each and every act or violation but not to exceed an aggregate penalty of ten thousand dollars, unless such person, being an insurer, knew or reasonably should have known he was in violation of this part 11, in which case the penalty shall not be more than five thousand dollars for each and every act or violation, but not to exceed an aggregate penalty of fifty thousand dollars in any six-month period;

(b) Suspension or revocation of the person's license if he knew or reasonably should have known he was in violation of the provisions of this part 11;

(c) Payment of a contractual claim to an insured or beneficiary pursuant to an insurance policy if the commissioner finds that the violation of this part 11 caused the failure to pay the claim, which amount shall be determined

by the commissioner at the hearing based on the testimony and evidence presented. This paragraph (c) shall not apply during the pendency of any civil action seeking a declaratory judgment concerning such claims.

(2) Any order issued by the commissioner pursuant to paragraph (c) of subsection (1) of this section may be appealed to the district court, whereupon the matter shall be tried de novo by the district court.

10-3-1109. Penalty for violation of cease and desist orders. (1) Any person who violates a cease and desist order of the commissioner issued under section 10-3-1108, and while such order is in effect, may, after notice and hearing and upon order of the commissioner, be subject, at the discretion of the commissioner, to any one or more of the following:

(a) A monetary penalty of not more than ten thousand dollars for each and every act or violation of an insurer; or a monetary penalty of not more than five hundred dollars for each and every act or violation of an individual;

(b) Suspension or revocation of such person's license.

10-3-1110. Regulations. (1) The commissioner may, after notice and hearing, as provided in article 4 of title 24, C.R.S., promulgate reasonable rules and regulations as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by sections 10-3-1104 and 10-3-1105.

* * * * *

PLAINTIFFS' EXHIBIT 59

Regulation 4-2-9

NON-DISCRIMINATORY TREATMENT OF ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) AND HUMAN IMMUNODEFICIENCY VIRUS (HIV) RELATED ILLNESS BY ISSUERS OF LIFE AND HEALTH INSURANCE

* * * * *

§ I. Authority

This regulation is promulgated under the authority of Sections 10-1-108(8), 10-1-109, 10-8-102 and 10-3-1104(1)(f)(II) Colorado Revised Statutes (C.R.S.).

History.-Eff. 1-1-88.

§ II. Purpose

The purpose of this regulation is to establish standards to assure non-discriminatory treatment with respect to AIDS and HIV Related Illness in underwriting practices, policy forms and benefit provisions utilized by entities subject to the provisions of this regulation.

History.-Eff. 1-1-88.

§ III. Scope

This regulation applies to all Commercial Insurers. Nonprofit Hospital and Health Service Corporations, Health Maintenance Organizations and Fraternal Benefit Societies issuing life and/or health insurance policies, contracts,

certificates of coverage or subscriber agreements in the State of Colorado.

History.-Eff. 1-1-88.

§ IV. Standards

A. No inquiry in an application for health or life insurance coverage, or in an investigation conducted by an insurer or an insurance support organization on its behalf in connection with an application for such coverage, shall be directed toward determining the applicant's sexual orientation.

B. Sexual orientation may not be used in the underwriting process or in the determination of insurability.

C. Insurance support organizations shall be directed by insurers not to investigate, directly or indirectly, the sexual orientation of an applicant or a beneficiary.

D. No question shall be used which is designed to establish the sexual orientation of the applicant.

* * * * *

G. Neither the marital status, the "living arrangements," the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of an applicant may be used to establish, or aid in establishing, the applicant's sexual orientation.

* * * * *

PLAINTIFFS' EXHIBIT 41

COLORADO CODE OF JUDICIAL CONDUCT
(Appendix to Chapter 24)

Revised Effective January 1, 1989

Including Amendments Received Through September 15, 1992

* * * * *

CANON 3
A Judge Should Perform the Duties of His or Her Office Impartially and Diligently

* * * * *

(9) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including, but not limited to, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

* * * * *

PLAINTIFFS' EXHIBIT 42

COLORADO RULES OF PROFESSIONAL CONDUCT
(Appendix to Chapters 18 to 20)

Adopted May 7, 1992, Effective January 1, 1993

* * * * *

RULE 1.2 SCOPE OF REPRESENTATION

* * * * *

(f) In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

[Adopted by the Supreme Court of Colorado May 7, 1992, effective January 1, 1993.]

* * * * *

PLAINTIFFS' EXHIBIT 23
(DENVER ORDINANCE)

DENVER

HUMAN RIGHTS -- PROHIBITION OF DISCRIMINATION IN EMPLOYMENT, ETC.

ARTICLE IV. PROHIBITION OF DISCRIMINATION IN EMPLOYMENT, HOUSING AND COMMERCIAL SPACE, PUBLIC ACCOMMODATIONS, EDUCATIONAL INSTITUTIONS AND HEALTH AND WELFARE SERVICES

Sec. 28-91. Intent of council.

(a) It is the intent of the council that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the city and to have an equal opportunity to participate in all aspects of life, including but not limited to employment, housing and commercial space, public accommodations, education and health and welfare services.

(b) It is the intent of the council in enacting this article to eliminate within the city discrimination by reason of race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability. Discriminatory practices as defined in this article may be subject to investigation, conciliation, administrative hearings and orders or other enforcement procedures.

(c) Except where specifically provided, the provisions of section 1-13 do not apply to this article.
(Ord. No. 623-90, § 2, 10-15-90; Ord. No. 893-91, § 1, 12-2-91)

Sec. 28-92. Definitions.

The following words and terms when used in this article shall have the following meanings:

Age: A chronological age of at least forty (40) years.

Agency: The agency for human rights and community relations.

Director: The duly appointed executive director of the agency for human rights and community relations.

Educational institution: Any private educational institution, including an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system or university and a business, nursing, professional, secretarial, technical or vocational school and includes an agent of an educational institution.

Employee: Any individual employed by or applying for employment with an employer.

Employer: Any person, excluding governmental entities and political subdivisions but including any agent of such entity or subdivision where the agency relationship is created by a written contract, engaged in an industry affecting commerce who has twenty (20) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year; the term shall also mean any agent of such a person.

Employment agency: Any person regularly undertaking or attempting with or without compensation to procure employees for an employer or to procure for employees

opportunities to work for an employer and includes an agent of such a person.

Labor organization: Any organization, agency, employee representation committee, group, association, or plan in which employees participate directly or indirectly and which exists for the purpose, in whole or in part, of dealing with employers, or any agent thereof, concerning grievances, labor disputes, wages, rates of pay, hours or other terms, conditions or privileges of employment and any conference, general committee, joint or system board or joint council which is subordinate to a national or international labor organization.

Marital status: The state of being married, single, divorced, separated or widowed and the usual conditions associated therewith, including parenthood.

Military status: Being or having been in the service of the military.

Physical or mental disability: A physical or mental impairment of an individual which substantially limits one (1) or more major life activities and includes a record of such impairment or being regarded as having such impairment; however, such term does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of a job or whose current alcohol abuse would constitute a direct threat to property or the safety of others; and in the areas of public accommodations or real estate transactions, such term does not include any individual who is an alcoholic and whose unreasonable conduct as a result of use of alcohol is the basis on which a covered entity acts; and such term does not include an individual who is currently engaged in the illegal

use of drugs when a covered entity acts on the basis of such use.

Place of public accommodation:

(1) As defined by section 59-2 of this code: All hostels; hotels; motels; rental rooms; rooming and/or boardinghouses; eating places; shops and stores dealing with goods or services of any kind; hospitals; recreational facilities, public parks; theaters of all kinds and any establishments licensed under chapter 7 (Amusements) of this Code.

(2) Any establishment licensed under the Colorado Liquor Code or the Colorado Beer Code; all banks, credit information services and all other financial institutions; insurance companies and establishments of insurance brokers; clinics, dental or medical; clubs and lodges; bath houses and swimming pools; commercial or public garages, public transportation as well as the stations or terminals thereof; any establishment offering travel or tour services; and public areas and public elevators of buildings and structures.

Real estate broker or salesperson: Any person licensed as such in accordance with the provisions of the Colorado Real Estate Commission.

Religious organizations or associations: Any organization affiliated with a church, synagogue, congregations, parish, brotherhood, religious corporation or any religious society engaging in the works of education, benevolence, charity or missions.

Sexual orientation: The status of an individual as to his or her heterosexuality, homosexuality or bisexuality.

Transaction in real property: Exhibiting, listing, advertising, negotiating, agreeing to transfer or transferring, whether by sale, lease, sublease, rent, assignment or other agreement, any interest in real property or improvements thereon.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-93. Discriminatory practices in employment.

(a) *Generally.* It shall be a discriminatory practice to do any of the following acts, based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual who is otherwise qualified:

(1) *By an employer:* To fail or refuse to hire an applicant or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect status as an employee; but with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job and the disability has a significant impact on the job;

(2) *By an employment agency:* To fail or refuse to refer for employment or to classify or refer for employment any individual or otherwise to discriminate against any individual; but with regard to a disability, it is not a discriminatory or an unfair employment practice for an employment agency to refuse to list and properly classify for employment or to refuse to refer an individual for employment in a known available job for which such individual is otherwise qualified if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the applicant from the job and the disability has a significant impact on the job;

(3) *By a labor organization:* To exclude or to expel from its membership or otherwise to discriminate against any individual or to limit, segregate, or classify its membership or fail or refuse to refer any individual to employment or to classify any individual in any way which would deprive such individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect the individual's status as an employee or as an applicant for employment; or

(4) *By an employer, employment agency, apprenticeship program, labor organization or joint labor/management council:*

a. to discriminate against any individual in admission to or employment in any program established to provide apprenticeship or other training or retraining, including an on-the-job training program; but with regard to a disability, it is not a discriminatory or an

unfair employment practice to deny or withhold the right to be admitted to or participate in any such program if there is no reasonable accommodation that can be made with regard to the disability, the disability actually disqualifies the applicant from the program and the disability has a significant impact on participation in the program; and

b. To communicate, print or publish or cause to be communicated, printed or published any notice or advertisement or use any publication form relating to employment by such employer or to membership in or any classification or referral for employment by such a labor organization or to any classification or referral for employment by such an employment agency indicating any preference, limitation, specification or distinction based on the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual.

* * * * *

(c) *Exceptions.*

(1) *Seniority system.* It shall not be considered a discriminatory practice for an employer to observe the conditions of a bona fide hiring or seniority system or a bona fide employee benefit system, such as retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this act, except that no such employee seniority system or benefit plan shall excuse the failure to hire any individual because of the age of such individual.

(2) *Elderly or physically or mentally disabled.* It shall not be discriminatory for employment to be limited to the elderly or physically or mentally disabled provided that such employment shall not discriminate among the elderly or physically or mentally disabled on the basis of other discriminatory criteria set forth in subsection (a) hereof.

(3) *Bona fide occupational classifications.* Any bona fide occupational qualifications or differentiation based on factors reasonably necessary to the normal operation of the particular employer shall not be deemed discriminatory.

(4) *Religious organizations.* This article shall not apply to employment by religious organizations or associations.

(5) *Individualized agreements.* Nothing in this section shall prohibit any employer from making individualized agreements with respect to compensation or the terms, conditions or privileges of employment for persons suffering a disability if such individualized agreement is part of a therapeutic or job-training program of no more than twenty (20) hours per week and lasting no more than eighteen (18) months.

(6) *Age; position.* It shall not be discriminatory to compel the retirement of any employee who is sixty-five (65) years of age or older who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred

compensation plan or any combination of such plans of the employer of such employee and if such plan equals in the aggregate at least forty-four thousand dollars ($44,000.00).

(7) *Sexual orientation; marital status.* With respect to sexual orientation or marital status, it shall not be discriminatory for fringe benefits, insurance coverage or any other term, condition or privilege of employment to be denied where the employee seeks coverage for an individual on the basis that the individual is their spousal equivalent.

(Ord. No. 623-90, § 2, 10-15-90; Ord. No. 893-91, § 2, 12-2-91)

Sec. 28-94. Discriminatory practices in educational institutions.

(a) *Generally.* It is a discriminatory practice for an educational institution to deny or restrict or to abridge or condition the use of or access to any of its facilities and services to any person otherwise qualified or to discriminate based on the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual.

(b) *Exceptions.* It shall not be a discriminatory practice for admissions to be limited to persons with physical or mental disabilities, of specific religions or gender; except that when any of the above exempted colleges offers a course nowhere else available in the city, opportunity for admission to that course must be open to students of both sexes who otherwise meet lawful requirements for admission.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-95. Discriminatory practices in real estate transactions.

(a) It shall be a discriminatory practice to do any of the following acts based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual:

(1) To interrupt or terminate or refuse to initiate or conduct any transaction in real property or to require different terms for such transaction or to represent falsely that an interest in real property is not available for transaction;

(2) To include in the terms or conditions of a transaction in real property any clause, condition or restriction prohibited by this article;

(3) To refuse to lend money, guarantee a loan, accept a deed of trust or mortgage or otherwise refuse to make funds available for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of real property or impose different conditions on such financing or refuse to provide title or other insurance, relating to the ownership or use of any interest in real property;

(4) To refuse or restrict facilities, service, repairs or improvements for a tenant or lessee;

(5) To communicate, make, print or publish or cause to be communicated, made, printed or published any notice, statement or advertisement with respect to a transaction or proposed transaction in real property or financing related thereto, which notice, statement or advertisement indicates or attempts to

indicate any preference, limitation or discrimination based on race, color, religion, national origin, gender, age, sexual orientation, marital status, military status, family status or physical or mental disability of any individual;

(6) To discriminate in any financial transaction involving real property on account of the location of residence or business, i.e., to *red-line*; or

(7) To restrict or attempt to restrict housing choices or to engage in any conduct relating to the sale or rental of a dwelling that otherwise denies the rental or sale or makes it unavailable.

(b) *Exceptions.*

(1) It shall not be a discriminatory practice for a person to act in conformity with chapter 59 (Zoning) of this Code and nothing in this chapter of the Code shall supersede any provisions of chapter 59 (Zoning) of this Code.

(2) This section shall not apply to multiple-unit dwellings of not more than two (2) dwelling units where at least one (1) of the units is owner-occupied.

(3) Nothing in this section shall prohibit group homes, self-care elderly homes, special-care homes or other facilities whose use is restricted to the elderly or to individuals with physical or mental disabilities.

(4) This article shall not apply to religious organizations or associations.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-96. Discriminatory practices in places of public accommodation.

(a) It shall be a discriminatory practice to do any of the following acts based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability of any individual:

(1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation.

(2) To communicate, print, circulate, post or mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodation will be refused, withheld from or denied an individual or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable or undesirable.

(b) *Exceptions.*

(1) It shall not be a discriminatory practice for a person to act in conformity with chapter 59 (Zoning) of this Code and nothing in this chapter of the Code shall supersede any provisions of chapter 59 (Zoning) of this Code.

(2) This section shall not apply to multiple-unit dwellings of not more than two (2) dwelling units where at least one (1) of the units is owner-occupied.

(3) Nothing in this section shall prohibit group homes, self-care elderly homes, special-care homes or other facilities whose use is restricted to the elderly or to individuals with physical or mental disabilities.

(4) This article shall not apply to religious organizations or associations.

(5) This article shall not apply to insurance risk classification.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-97. Discriminatory practices in health and welfare services.

(a) It shall be a discriminatory practice to do any of the following acts, based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability, of any individual:

(1) To communicate, publish, advertise or represent or cause to be communicated, published, advertised or represented by any health and welfare agency or owner, supervisor, staff person, director, manager or officer thereof, excluding governmental entities and political subdivisions, that any of the services, programs, benefits, facilities or privileges of any health or welfare agency are withheld from or denied to any person;

(2) For any health and welfare agency or worker, supervisor, staff person, director, manager or officer thereof, excluding governmental entities and political subdivisions, to deny or refuse to provide access to any of the services, programs, benefits,

facilities or privileges of any health or welfare agency.

(b) *Exceptions.*

(1) This article shall not apply to religious organizations or associations.

(2) This article shall not apply to insurance risk classification.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-98. Coercion or retaliation.

(a) It shall be a discriminatory practice to coerce, threaten, retaliate against or interfere with any person in the exercise or enjoyment of or on account of having exercised or enjoyed or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this article.

(b) It shall be a discriminatory practice for any person to require, request or suggest that a person retaliate against, interfere with, intimidate or discriminate against a person, because that person has opposed any practice defined as discriminatory or unlawful by this article or because that person has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing authorized under this article.

(c) It shall be a discriminatory practice for any person to cause or coerce or attempt to cause or coerce, directly or indirectly, any person to prevent any person from complying with the provisions of this article.

(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-99. Aiding or abetting.

It shall be a discriminatory practice for any person to aid, abet, invite, compel or coerce the doing of any of the acts forbidden under the provisions of this article or to attempt to do so.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-100. Conciliation agreements.

It shall be a discriminatory practice for a party to a conciliation agreement made under the provisions of this article to violate the terms of such agreement.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-101. Resisting the agency.

It shall be unlawful for any person to willfully resist, impede or interfere with the agency, or any of its representatives in the performance of any duty under the provisions of this article or to willfully violate an order of the agency. The provisions of section 1-13 of this Code shall apply to violations of this section. Each incident shall be treated as a separate offense.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-102. Falsifying documents and testimony.

It shall be unlawful to willfully falsify documents, records or reports which are required or subpoenaed pursuant to this article or willfully to falsify testimony or to intimidate any witness or complainant. The provisions of section 1-13 of this Code shall apply to violations of this section. Each incident of such intimidation or falsification shall be treated as a separate offense.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-103. Compliance with article prerequisite for licenses.

All permits or licenses issued by or on behalf of the city shall specifically require and be conditioned upon full compliance with the provisions of this article. The failure or refusal to comply with any provision of this article shall be a proper basis for revocation of such permit or license.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-104. Posting of notice.

(a) Every person subject to this article except private residences and rental complexes of fewer than five (5) units, shall post and keep posted in a conspicuous location where business or activity is customarily conducted or negotiated a notice whose language and form have been prepared by the agency setting forth excerpts form, or summaries of, the pertinent provisions of this article and information pertinent to the filing of a complaint.

(b) It shall be a discriminatory practice for a person subject to this article to fail to post notices, maintain records, file reports as required by sections 28-105 and 28-106, or to fail to supply documents and information requested by the agency in connection with a matter under investigation.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-105. Preservation of business records.

(a) Where a charge of discrimination has been filed against a person under this article, the respondent shall preserve all records which may be relevant to the charge or action until a final disposition of the charge in accordance with subsection (b) of this section.

(b) All persons subject to this article shall furnish to the agency at the time and in the manner prescribed by the agency such reports relating to information under their control as the agency may require. The identity of persons and properties contained in reports submitted to the agency under the provisions of this section shall be kept confidential and shall not be made public. Every employer, employment agency and apprenticeship program, labor organization or joint labor/management council subject both to this article and to Title VII of the Civil Rights Act of 1964 as amended shall upon request furnish to the agency all reports that may be required by the equal employment opportunity commission established under the Civil Rights Act of 1964. (Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-106. Powers of agency.

(a) The agency is hereby empowered to undertake its own investigations and public hearings on any racial, religious and ethnic or other listed minority group tensions, prejudice, intolerance, bigotry and disorder and on any form of or reason for discrimination in accordance with section 28-91 against any person, for the purpose of making appropriate recommendations for action, including legislation, against such discrimination.

(b) The agency may adopt such rules and regulations as it deems necessary to effectuate and which are not in conflict with the provisions of this chapter.

(c) The agency may at its discretion choose to refer the investigation of any complaint to any other investigatory body, whether public or private, with which it shall arrange to perform such investigation.

(d) The agency may hold hearings pursuant to section 28-111, subpoena witnesses and compel their attendance,

administer oaths and take the testimony of any person under oath, and compel such respondent to produce for examination any books and papers relating to any matter involved in such complaint. Such hearings shall comply with due process requirements.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-107. Filing of complaints.

(a) Any person may file with the agency a complaint of a violation of the provisions of this article. The complaint shall state the name and address of the person alleged to have committed the violation, who shall be called the respondent, and shall set forth the substance thereof and such other information as may be required by the agency. Any complaint under this article shall be filed with the agency within one hundred eighty (180) days of the occurrence of the discriminatory practice.

(b) Complaints filed with the agency under the provisions of this article may be voluntarily withdrawn at the request of the complainant at any time prior to the completion of the agency's investigation and findings as specified in section 28-108, except that the circumstances accompanying said withdrawal may be fully investigated by the agency.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-108. Investigation.

(a) Within fifteen (15) days of the filing of any complaint, the agency shall serve a copy thereof upon the respondent and upon all persons it deems to be necessary parties and shall arrange for prompt investigation in connection therewith.

(b) Within two hundred seventy (270) days after service of the complaint upon all parties thereto or within two hundred seventy (270) days after the completion of the investigation by any person or agency to whom the complaint has been referred for investigation, the agency shall determine whether, in accord with its own rules, it has jurisdiction and, if so, whether there is probable cause to believe that the respondent has engaged or is engaging in a discriminatory practice.

(c) If the agency finds with respect to any complaint that it lacks jurisdiction or that probable cause does not exist, the director forthwith shall issue and cause to be served on the appropriate parties an order dismissing the allegations of the complaint.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-109. Conciliation.

(a) If, in the judgment of the agency, the circumstances so warrant, it may at any time after the filing of the complaint endeavor to eliminate such discriminatory practice by conference, conciliation or persuasion.

(b) The terms of a conciliation agreement may require a respondent to refrain from committing specified discriminatory practices and to take such affirmative action as in the judgment of the agency will effectuate the purposes of this act.

(c) Upon agreement of all parties to a complaint and upon notice to all parties thereto, a conciliation agreement shall be deemed an order of the agency and shall be enforceable as such. Information concerning conciliation efforts shall be confidential.
(Ord. No. 623-90, § 2, 10-15-90)

* * * * *

Sec. 28-111. Hearings.

(a) The agency may hold a formal hearing upon a finding of probable cause to believe that discrimination has occurred. The agency shall serve upon all parties a written notice which shall state the time and place of the hearing.

(b) In accordance with rules adopted by the agency, discovery procedures may be used by the agency and the parties as provided by the Colorado Rules of Municipal Procedure after the notice of hearing has been given.

* * * * *

(e) At any such hearing, the person presenting the case in support of the complaint shall have the burden of showing that the respondent has engaged or is engaging in an unfair or discriminatory practice, and the respondent's conduct shall be presumed not to be unfair or discriminatory until proven otherwise.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-112. Decision and order.

(a) If after a hearing the agency determines that a respondent has engaged in a discriminatory practice or has otherwise violated the provisions of this article, the agency shall issue and cause to be served on such respondent a decision and order accompanied by findings of fact and conclusions of law which shall require such respondent to cease and desist from such discriminatory practice and may require such respondent to take action, including but not limited to:

(1) The hiring, reinstatement or upgrading of employees with or without back pay;

(2) The restoration to the membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program;

(3) The extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons;

(4) Appropriate injunctive relief;

(5) The payment of hearing costs as in the judgment of the agency will effectuate the purposes of this article, including a requirement for a report as to the manner of compliance with such decision and order.

(b) If upon all the evidence the agency finds that a respondent has not engaged in any discriminatory practice, the agency shall issue and cause to be served on the respondent and the complainant an order dismissing the complaint as to such respondent.
(Ord. No. 623-90, § 2, 10-15-90; Ord. No. 893-91, § 3, 12-2-91)

Sec. 28-113. Judicial review.

Any person suffering a legal wrong or adversely affected or aggrieved by an order or decision of the agency in a matter pursuant to the provisions of this article is entitled to a judicial review thereof in accordance with

Colorado Rule of Civil Procedure 106 upon filing in the appropriate court a written complaint for such review.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-114. Enforcement and order.

The decision and order of the agency shall be served on the respondent with notice that, if the agency determines that the respondent has not corrected the discriminatory practice and complied with the order within thirty (30) calendar days following service of its order, the agency will conduct further enforcement proceedings.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-115. Referral to licensing agencies.

Whenever it appears that the holder of a permit or license issued by any agency or authority of the city, is a person against whom the agency after a hearing has rendered a decision and order that a discriminatory practice or a violation of this article has occurred pursuant to section 28-112, the agency, notwithstanding any other action it may take under the authority of the provisions of this article, may refer to the proper entity of the City the facts and identities of all persons involved in the complaint for such action as such agency or authority in its judgment considers appropriate based upon the facts thus disclosed to it.
(Ord. No. 623-90, § 2, 10-15-90)

Sec. 28-116. Effective date.

This article shall become effective February 1, 1991.
(Ord. No. 623-90, § 2, 10-15-90)

PLAINTIFFS' EXHIBIT 30
(DENVER CAREER SERVICE RULE)

RULE 19

APPEALS

Section 19-10 Actions Subject to Appeal
(Effective November 1, 1978; Rules Revision Memo 106A)

The following administrative actions relating to personnel matters shall be subject to appeal:

* * * * *

c) *Discriminatory actions*: Any action of any officer or employee resulting in alleged discrimination because of race, color, creed, national origin, sex, age, political affiliation, or sexual orientation. (Effective September 29, 1988; Rules Revision Memo 113B)

* * * * *

PLAINTIFFS' EXHIBIT 36

Federico Peña
Mayor

SEAL

CITY AND COUNTY OF DENVER
CITY AND COUNTY BUILDING
DENVER, COLORADO 80202

AREA CODE 303 575-2721

PROCLAMATION

WHEREAS, December 10th commemorates National Human Rights Day; and

WHEREAS, It is the policy of the City & County of Denver to see that each individual shall have equal access to municipal employment and city services; and

WHEREAS, It is the City of Denver's policy to bring about mutual understanding and respect among its individual citizens; and

WHEREAS, The City remains committed to its Affirmative Action policy and policies of non-discrimination; and

WHEREAS, Active measures to strengthen that policy will assist in the elimination of prejudice, intolerance and bigotry towards all groups:

NOW, THEREFORE, I, FEDERICO PEÑA, Mayor of the City and County of Denver, Colorado, by virtue of the authority vested in me, do hereby proclaim that it shall be the policy of this administration that:

1. There shall be no discrimination by an agency, department, commission, board or other official entity, or any official representative thereof, on the basis of race, color, creed, religion, national origin, age, sex, physical disability, mental disability or sexual preference in any matter of hiring or employment, housing, credit, contracting, provision of services, or any other matter whatsoever;

2. In order to expeditiously and effectively implement the policy set forth herein, and thereby actively seek to prevent bias and discrimination, the following measures will be undertaken:

   All department heads, supervisors and managers shall forthwith notify all employees of this Proclamation, review departmental activities, take all necessary corrective action and insure future conformity with this Proclamation;

3. The Commission on Community Relations, in accordance with provisions of Chapter 28, Section 23(1) of Denver's Revised Municipal Code, shall receive and investigate complaints of violations of the policy set forth herein and shall issue a report thereon to the Mayor and the administrative head of the city agency, department, commission, board or other official entity involved, along with a recommendation for corrective action which the Commission on Community Relations deems necessary and proper.

/s/

December 9, 1983 Federico Pena

PLAINTIFFS' EXHIBIT 32
(DENVER POLICE DEPARTMENT
OPERATIONS MANUAL)

RR-128 Impartial Attitude

Members, while being vigorous and unrelenting in the enforcement of the law, must maintain a strictly impartial attitude toward complainants and violators. Members shall at all times consider it their duty to be of service to anyone who may be in danger or distress, regardless of race, color, creed, national origin, gender, age or sexual orientation.

* * * * *

RR-122 Respect for Fellow Officer

Officers shall treat other members of the department with the respect and response due to them as fellow officers. Officers shall not discriminate against one another on the basis of race, color, creed, nationai origin, gender, age or sexual orientation.

PLAINTIFFS' EXHIBIT 34

REV. 12-91

DENVER POLICE DEPARTMENT
OPERATIONS MANUAL

102.00 RADIO COMMUNICATIONS

102.01 How to Use the Radio

* * * * *

(6) During radio transmissions, all members are prohibited from using derogatory language relating to race, color, creed, national origin, age, sex or sexual orientation that might reasonably be regarded as offensive to any other person.

* * * * *

PLAINTIFFS' EXHIBIT 35

REV. 12-91

DENVER POLICE DEPARTMENT
OPERATIONS MANUAL

117.00 OFFICERS' RIGHTS

117.01 Officers' Bill of Rights

* * * * *

(2) Police officers shall not be discriminated against or penalized in regard to their employment because of national origin, race, creed, sex, age, religion, sexual orientation, or for any reason not related to performance or the ability to perform as professional police officers.

PLAINTIFFS' EXHIBIT 33

DENVER POLICE DEPARTMENT DIRECTIVE

TO: All Police Department Personnel

FROM: James R. Collier, Chief of Police

DATE: October 29, 1991

NUMBER: 91-13

SUBJECT: Display of Unauthorized Material

It is the policy of the Denver Police Department to prohibit the harassment or belittlement of any employee for reasons related to race, sex, age, national origin, religion, sexual orientation or any other personal characteristic.

In order to comply with this policy, please ensure that all material posted or exhibited on Departmental premises, including but not limited to walls, cabinets, bulletin boards, lockers, or other surfaces, must be non-offensive and authorized for display by the commanding officer of the facility. Anything not meeting such criteria must be immediately removed.

Examples of prohibited items include those depicting scantily-clad or unclad men or women, anything which slurs or holds up to ridicule a particular individual or group of individuals, or that has the effect of diminishing the dignity and respect we owe to each other.

Supervisors and Command Officers are responsible for ensuring compliance with this directive, effective immediately.

PLAINTIFFS' EXHIBIT 118
(BOULDER COUNTY POLICY)

NUMBER: I.13

SUBJECT: Multicultural Diversity

PURPOSE: To declare the County's commitment to multicultural diversity.

SCOPE: This policy applies to all County Departments and all employees of County Departments.

OFFICE OF PRIMARY RESPONSIBILITY: Board of County Commissioners' Office

ORIGINAL DATE: October 1, 1992

LAST REVISION: October 1, 1992

POLICY: It is an expressed goal of the Boulder County Commissioners to foster multicultural diversity in all phases of Boulder County Government. Boulder County promotes multicultural diversity in the workplace and recognizes, understands, and respects the interests and concerns of its diverse employees and citizens. Multicultural diversity, for purposes of this policy, includes race, color, religion, gender, disability, sexual orientation, age, and socio-economic status.

Boulder County is committed to a multi-culturally diverse work force, in all departments, at every level. Boulder County shall strive to design all services and operations, in every department, to serve the diverse citizens of the County. Multiculturalism shall be viewed as an integral and essential element of the County work environment, one in which great value is vested.

It is the responsibility of all County Department Heads to ensure that this goal is articulated to each employee under their supervision. It is expected that all employees exhibit behavior consistent with this policy.

PLAINTIFFS' EXHIBIT 57
(BOULDER ORDINANCE)

TITLE 12 HUMAN RIGHTS

Chapter 1 Prohibition of Discrimination in Housing, Employment, and Public Accommodations[1]

Section:

12-1-1 Definitions.

The following terms used in this chapter have the following meanings unless the context clearly requires otherwise:

(a) "Age" means age between forty and sixty-five years.

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[1]Adopted by Ordinance No. 4571, May 19, 1981. Amended by Ordinance Nos. 4574 and 4646. Derived from Ordinance No. 3824.

(b) "Employer" means any person employing any person in any capacity.

(c) "Employment agency" means any person undertaking, with or without compensation, to procure employees or opportunities to work for any person or holding itself out as equipped to do so.

(d) "Housing" means any building, structure, vacant land, or part thereof during the period it is advertised, listed, or offered for sale, lease, rent, or transfer of ownership, but does not include transfer of property by will or gift.[2]

(e) "Labor organization" means any organization, or committee or part thereof, that exists for the purpose in whole or in part of collective bargaining, dealing with employers concerning grievances, terms, or conditions of employment, or other mutual aid or protection in connection with employment.[3]

(f) "Martial status" means both the individual status of being single, divorced, separated, or widowed and the relational status of cohabitating and being married or unmarried.

(g) "Minor child" means a person under eighteen years of age.

(h) "Person" or "individual" means any individual, group, association, cooperation, joint apprenticeship committee, joint stock company, labor union, legal representative,

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[2]24-34-501(2), C.R.S.

[3]24-34-401(6), C.R.S.

mutual company, partnership, receiver, trustee, or unincorporated organization or other legal, commercial, or governmental entity.

(i) "Physical or mental disability" means a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such impairment. The term excludes current use of alcohol or drugs or other disabilities that prevent a person from acquiring, renting, or maintaining property, that would constitute a direct threat to the property or safety of others, or that would prevent performance of job responsibilities.

(j) "Place of accommodation" means any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind.

(k) "Sexual orientation" means the choice of sexual partners, i.e., bisexual, homosexual or heterosexual.

Ordinance Nos. 4969 (1986); 5061 (1987).

12-1-2 **Discrimination in Housing Prohibited.**[4]

(a) It is an unfair housing practice, and no person:

(1) Who has the right of ownership or possession or the right of transfer, sale, rental, or lease of any housing or any agent of such person shall:

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[4]See 42 U.S.C. §§ 3604-3606.

(A) Refuse to show, sell, transfer, rent, or lease or refuse to receive and transmit any bona fide offer to buy, sell, rent, or lease or otherwise deny to or withhold from any individual such housing because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of that individual or such individual's friends or associates;

(B) Discriminate against any individual because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of the individual or such individual's friends or associates in the terms, conditions, or privileges pertaining to any facilities or services in connection with a transfer, sale, rental, or lease of housing; or

(C) Cause to be made any written or oral inquiry or record concerning the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of an individual seeking to purchase, rent, or lease any housing or of such individual's friends or associates, but nothing in this section prohibits using a form or making a record or inquiry for the purpose of required government reporting or for a program to provide opportunities for persons who have been traditional targets of discrimination on the bases here prohibited;

(2) To whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing shall:

(A) Make or cause to be made any written or oral inquiry concerning the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of an individual seeking such financial assistance, such individual's friends or associates, or prospective occupants or tenants of such housing, or

(B) Discriminate against any individual because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual, such individual's friends or associates, or prospective occupants or tenants in the term, conditions, or privileges relating to obtaining or use of any such financial assistance;

(3) Shall include in any transfer, sale, rental, or lease of housing any restrictive covenant limiting the use of housing on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability or shall honor or exercise or attempt to honor or exercise any such restrictive covenant pertaining to housing.[1]

(4) Shall print or cause to be printed or published any notice or advertising relating to the transfer, sale, rental, or lease of any housing that indicates any preference, limitation, specification, or discrimination based on race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry,

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[1] § 24-34-502(1)(C), C.R.S.

pregnancy, parenthood, custody of a minor child, or mental or physical disability;

(5) Shall aid, abet, incite, compel, or coerce the doing of any act prohibited by this section or obstruct or prevent any person from complying with the provisions of this section or attempt either directly or indirectly to commit any act prohibited by this section;[2]

* * * * *

(7) Shall discharge, demote, or discriminate in matters of compensation against any employee or agent because of said employee's or agent's obedience to the provisions of this section;

(8) Shall:

(A) Offer, solicit, accept, use, or retain a listing of housing with the understanding that an individual may be discriminated against in the purchase, lease, or rental thereof on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual or such individual's friends or associates;

(B) Deny any individual access to or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting housing; or

(C) Discriminate against such individual on the basis of race, creed, color, sex, sexual orientation,

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[2] § 24-34-502(1)(e), C.R.S.

marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual or such individual's friends or associates.[1]

(9) Shall establish unreasonable rules or conditions of occupancy that have the effect of excluding pregnant women, parents, or households with minor children.

(b) The provisions of subsection (a) of this section do not apply to prohibit:

(1) Any religious or denominational institution or organization that is operated, supervised, or controlled by a religious or denominational organization from limiting admission or giving preference to persons of the same religion or denomination or from making such selection of buyers, lessees, or tenants as will promote a bona fide religious or denominational purpose;

(2) The owner of an owner-occupied one-family or two-family dwelling or the owner or lessor of a housing facility devoted entirely to housing individuals of one sex from limiting lessees or tenants to the members of one sex;

(3) A person who seeks to share a dwelling unit with another person from limiting lessees or tenants to members of one sex;

(4) The transfer, sale, rental, lease, or development of housing designed or intended for the use of the physically or mentally disabled, but this exclusion does not permit discrimination on the basis of race, creed,

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[1]42 U.S.C. 3606.

color, sexual orientation, marital status, religion, ancestry, or national origin.[2]

(5) Compliance with any provisions of Chapters 9-3 or 10-2, B.R.C. 1981, concerning permitted occupancy of dwelling units.[3]

* * * * *

12-1-3 **Discrimination in Employment Practices Prohibited.**[1]

(a) It is a discriminatory or unfair employment practice, and no person:

(1) Shall fail or refuse to hire, shall discharge, shall promote or demote, or shall discriminate in matters of compensation, terms, conditions, or privileges of employment against any individual otherwise qualified or to limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates; but with regard to mental or physical disability, it is not a discriminatory or unfair employment practice for a person to act as provided in

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[2]24-34-502(5), C.R.S.

[3]24-34-501(2), C.R.S.

[1]See 42 U.S.C. 2000e.

this paragraph if there is no reasonable accommodation that such person can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job;[2]

(2) Shall refuse to list and properly classify for employment or refer an individual for employment in a known available job for which such individual is otherwise qualified because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability; but with regard to mental or physical disability, it is not a discriminatory or unfair employment practice for an employment agency to refuse to list and properly classify for employment or refuse to refer an individual for employment in a known available job for which such individual is otherwise qualified if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job;[3]

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[2]24-34-402(1)(a), C.R.S.

[3]24-34-402(1)(b), C.R.S.

(3) Shall exclude or expel any individual otherwise qualified from full membership rights in a labor organization, otherwise discriminate against any members of such labor organization in the full enjoyment of work opportunity, or limit, segregate, or classify its membership or applicants for membership, or classify or fail or refuse to refer for employment such individual in any way that deprives such individual of employment opportunities, limits employment opportunities, or otherwise adversely affects such individual's status as an employee or applicant for employment because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates;

(4) Shall print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership that expresses, either directly or indirectly, any limitation, specification, or discrimination on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability or intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification;

(5) Shall establish, announce, or follow a policy of denying or limiting, through a quota system or otherwise, opportunities for employment or membership in a group on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability;

(6) Shall aid, abet, incite, compel, or coerce the doing of any act defined in this section to be a discriminatory or unfair employment practice, obstruct or prevent any person from complying with the provisions of this section, or attempt, either directly or indirectly, to commit any act defined in this section to be a discriminatory or unfair employment practice;

(7) That is an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs shall discriminate against any individual on the basis of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability of such individual or such individual's friends or associates in admission to or employment in any program established to provide apprenticeship or other training; but with regard to mental or physical disability, it is not a discriminatory or unfair employment practice to withhold the right to be admitted to or to participate in any such program if there is no reasonable accommodation that can be made with regard to the disability, the disability actually disqualifies the individual from the program, and the disability has a significant impact on participation in the program;

(8) Shall use in the recruitment or hiring of individuals any employment agency, placement service, training school or center, labor organization, or any other employee referral source known by such person to discriminate on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability;

(9) Shall use in recruitment, hiring, upgrading, or promoting any test that such person knows or has reason

to know tends to discriminate on the basis of race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, age, or mental or physical disability; but it is not a discriminatory or unfair employment practice to provide employment opportunities for classes of individuals that have been the traditional targets of discrimination or to use a form or make a record or inquiry for the purpose of required government reporting, and with regard to mental or physical disability, it is not a discriminatory or unfair employment practice for a person to act as prohibited in this subsection if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the individual from the job, and the disability has a significant impact on the job; and

(10) Seeking employment, shall publish or cause to be published an advertisement with a specification or limitation based upon race, creed, color, sex, sexual orientation, martial status, religion, national origin, ancestry, age, or mental or physical disability, unless based upon a bona fide occupational qualification.

(b) The provisions of subsection (a) of this section do not apply to prohibit a religious organization or institution from restricting employment opportunities to persons of the religious denomination and advertising such restriction if a bona fide religious purpose exists for the restriction.

Ordinance No. 5061 (1987).

12-1-4 **Discrimination in Public Accommodations Prohibited.***

(a) It is a discriminatory practice, and no person shall:

(1) Refuse, withhold from, or deny to any individual because of the race, creed, color, sex, sexual orientation, martial status, religion, national origin, ancestry, or mental or physical disability of such individual or such individual's friends or associates, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation;** or

(2) Publish, circulate, issue, display, post, or mail any written or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that such individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of the race, creed, color, sex, sexual orientation, martial status, religion, national origin, ancestry, or mental or physical disability of such individual or such individual's friends or associates.

(b) The provisions of subsection (a) of this section do not apply to prohibit:

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*See 42 U.S.C. 2000a.

**24-34-601(1), C.R.S.

(1) Persons from restricting admission to a place of public accommodation to individuals of one sex if such restriction bears a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation;* or

(2) Any religious or denominational institution that is operated, supervised, or controlled by a religious or denominational organization from limiting admission to persons of the same religion or ıomination as will promote a bona fide religious or denominational purpose.

Ordinance No. 5061 (1987).

12-1-5 **Prohibition on Retaliation for and Obstruction of Compliance with Chapter.**

(a) No person shall use a threat, communicated by physical, oral, or written means, of harm or injury to another person, such other person's reputation, or such person's property, or discriminate against any person because such person has entered into a conciliation agreement under this chapter, because the final or any other ruling in any proceeding brought under this chapter has been in such other person's favor, because such other person has opposed a discriminatory practice, or because such other person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing before a person charged with the duty to investigate or hear complaints relating to problems of discrimination, but this section does not apply when the threat involves knowingly placing or

*24-34-601(3), C.R.S.

attempting to place a person in fear of imminent bodily injury by use of a deadly weapon;

(b) No person shall willfully obstruct, hinder, or interfere with the performance or the proper exercise of a duty, obligation, right, or power of the city manager, the municipal court, or other official or body charged with a duty, obligation, right, or power under this chapter.

12-1-6 **Provisions of this Chapter Supplement Other Code Sections.**

Anything to the contrary notwithstanding, the substantive terms of this chapter and the remedies herein provided supplement those terms and remedies contained in this code and other ordinances of the city.

12-1-7 **City Manager may Appoint Person to Assist in Enforcement.**

The city manager may appoint a person to carry out any or all of the duties, obligations, rights, or powers under the provisions of this chapter, who may have such job title as the manager designates.

12-1-8 **Administration and Enforcement of Chapter.**

(a) Any person claiming to be aggrieved by a violation of this chapter may, within ninety days of the alleged violation or thirty days after any complaint concerning the same matter has been dismissed by another agency without a final judgment on the merits, whichever last occurs, file a written complaint under oath with the city manager . . . .

* * * * *

(d) If the city manager does not deem it practicable to attempt a pre-investigation settlement or if such settlement attempt is unsuccessful, the manager shall conduct an investigation to determine whether there is probable cause to believe the allegations of the complaint.

(1) If the city manager determines there is no probable cause, the manager shall dismiss the complaint and take no further action thereon other than that of informing the concerned persons that the complaint has been dismissed.

(2) If the city manager determines that there is a sufficient basis in fact to support the complaint, the manager shall endeavor to eliminate the alleged violation by a conciliation agreement, signed by all parties and the manager, whereunder the alleged violation is eliminated and the complainant is made whole to the greatest extent practicable.

(3) The city manager shall furnish a copy of such signed conciliation agreement to the complainant and the person charged. The terms of a conciliation agreement may be made public, but no other information relating to any complaint, its investigation, or its disposition may be disclosed without the consent of the complainant and the person charged.

* * * * *

(e) If a person who has filed a complaint with the city manager is dissatisfied with a decision by the manager to dismiss the complaint under paragraph (d)(1) of this section or if conciliation attempts as provided in paragraph (d)(2) of this section are unsuccessful to resolve the complaint, the aggrieved party may request

a hearing before the City of Boulder Human Relations Commission*, which shall hold a hearing on the matter. If the commission finds violations of this chapter, it may issue such orders as it deems appropriate to remedy the violations, including, without limitation, orders:

Ordinance No. 4879 (1984).

(1) Requiring the person found to have violated this chapter to cease and desist from the discriminatory practice;

(2) Providing for the sale, exchange, lease, rental, assignment, or sublease of housing to a particular person;

(3) Requiring an employer to: reinstate an employee; pay backpay for discriminatory termination of employment, layoff, or denial of promotion opportunity; make an offer of employment in case of discriminatory refusal of employment; make an offer of promotion in the case of discriminatory denial of promotion opportunity; or take other appropriate equitable remedial action;

(4) Requiring that a person make available a facility of public accommodation in the case of discriminatory denial of the use of such facility;

(5) Requiring that a person found to have violated this chapter report compliance with the order or orders issued pursuant to this section; and

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*Section 2-3-6, B.R.C. 1981.

(6) Requiring that a person found to have violated any provisions of this chapter make, keep, and make available to the commission such reasonable records as are relevant to determine whether such person is complying with the commission's orders.

* * * * *

12-1-9 **Judicial Enforcement of Chapter.**

(a) The city manager may file a criminal complaint in municipal court seeking the imposition of the criminal penalties provided in Section 5-2-4, B.R.C. 1981, for violations of this chapter.

(b) The city manager may seek judicial enforcement of any orders of the human relations commission.

(c) Any party aggrieved by any final action of the human relations commission may seek judicial review thereof in the District Court in and for the County of Boulder by filing a complaint for review within thirty days after the date of the final action under Colorado Rule of Civil Procedure 106(a)(4).

12-1-10 **City Contractors Shall Not Discriminate.**

The city manager shall require that all contractors providing goods or services to the city certify their compliance with the provisions of this chapter.

12-1-11 **Authority to Adopt Rules.**

The city manager and the human relations commission are authorized to adopt rules to implement the provisions of this chapter.

AFFIDAVIT OF LESLIE L. DURGIN

Leslie L. Durgin, Mayor of the City of Boulder, one of the plaintiffs in this action, being upon her oath duly sworn, deposes and says as follows:

1. I am the Mayor of the City of Boulder ("City" or "Boulder"), a plaintiff in this action and appeared as a witness at the Preliminary Injunction hearing held in January, 1993.

* * * * *

22. Although the Boulder ordinance is very broad in its application, it should be noted that, notwithstanding the statement of the Legislative Council contained in its analysis of Amendment Two, Plaintiffs' Exhibit 17, at Page 14-15, and Pastor Van's and Professor Broadus' concerns, the First Amendment's "free exercise" clause would provide protection for actions of religious groups whenever adherence to the ordinance would violate the essential religious beliefs of the group. These are the legalities, and they are supported by the City's record in enforcing the human rights ordinance since 1974. For example, when a free exercise claim was made in a sex discrimination case involving a secretary, the defense was carefully investigated before it was rejected, because there was no asserted religious belief justifying the alleged discrimination. The point is that if Pastor Van's religious convictions are such that he cannot hire a gay of lesbian as an assistant pastor, or a woman as a priest, the City will, or course, recognize those concerns. But the City will require some sort of showing, so that a secretary or a janitor might have some protection, depending on the religious convictions at issue. . . .

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26. The Boulder human rights ordinance does not require affirmative action for any protected class. The City of Boulder's affirmative action plan does not address sexual orientation, nor has anyone ever suggested to me that it should.

* * * * *

ATTACHMENTS TO AFFIDAVIT OF DEAN F. DAMON (BOULDER VALLEY SCHOOL DISTRICT MATERIAL)

STUDENT COMPLAINTS AND GRIEVANCES

It is the policy of the Board of Education that all students be treated justly and without discrimination.

Students who are aggrieved by a decision or action of school personnel that they believe to be in violation of Board policies or school rules, or they believe discriminatory in nature shall have available a procedure to inquire concerning the decision or action and to express their concerns. Such procedure shall not apply to a teacher's determination of a student's grade, unless the student believes the grade to have resulted from discrimination.

Adopted: June 18, 1992

CROSS REFS.:
- AC, Nondiscrimination
- ACA, Nondiscrimination on the Basis of Sex
- JB, Equal Education Opportunities
- JF subcodes (all relate to student rights and responsibilities)
- JG subcodes (all related to student discipline)

STUDENT COMPLAINTS AND GRIEVANCES

Students are encouraged to settle at the local school their grievances concerning decisions made or actions taken by school personnel which they believe to be in violation of Board policies or school rules, or discriminatory on the basis

of race, color, creed, marital status, national origin, gender, sexual orientation, or handicap. The purpose of the following procedure is to help a student resolve a conflict with a staff member through problem-solving techniques and dialogue.

When a student believes that s/he has experienced unjust treatment from a school staff member or needs further information to determine whether an injustice has been committed by a school staff member, s/he should discuss the matter with the staff member concerned. The student, if s/he wishes, may seek the assistance of a parent/spouse, a student from the school, or another adult who is a member of that school's staff as an advocate for the first contact. . . . The purpose of the initial level of meetings is to try to problem-solve a solution to the issue informally, not to establish culpability.

If the matter cannot be resolved informally at this initial level, the student or the student and advocate should submit an account of the concern in writing to a teacher or counselor on the school staff. (If the grievance involves the principal, the student may submit the account to a staff member at the Education Center.) This teacher/counselor becomes the Student Grievance Liaison** for this is-

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**A student has the right to ask any school staff member to assist him or her with a grievance using this procedure. However, it is strongly advised that staff members who fill the role as Student Grievance Liaisons have appropriate training in mediation and/or conflict resolution skills. Each school should develop a list of the staff persons who have been so trained, and who have agreed to serve in the role of Student Grievance Liaison. A similar list should be developed of those people housed at the Education Center who are a) willing to serve at the initial

sue. . . . The written account should state the injustice or unfairness experienced by the student with a clear description of the events which occurred including dates, locations, and the persons who were involved. The Student Grievance Liaison will investigate the facts and will meet with the student or student and advocate, and then with the other staff person named in the written account, in an effort to facilitate a mutual resolution of the problem raised. This student Grievance Liaison must attempt to resolve the issue and respond to the matters of concern within five (5) school days, unless both the student and the staff member identified in this written statement agree to extend that period.

If the issue has not been resolved through the use of the Student Grievance Liaison, and appeal to the school principal or designee for further inquiry or review may be made in writing within five (5) school days of the first level decision. The school principal or designee shall review all the facts and information and will attempt to arrive at a mutually agreeable resolution of the problem within five (5) school days. . . .

If the student has reason to believe that all the appropriate information has not been considered or that a fair resolution to the grievance has not been achieved by the school principal or designee, a final appeal may be made in writing to the Superintendent of Schools or designee within five (5) school days after the decision at the building level is made. The Superintendent shall likewise have the opportunity to review all information and will attempt to arrive at a mutually agreeable decision within a reasonable time thereafter. The decision of the Superintendent shall be final under this Policy. Policy KL (Public Complaints) provides

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level and b) willing and/or trained to serve as Student Grievance Liaisons.

a procedure for District patrons to pursue complaints concerning the application of this Policy.

It should be understood that this grievance procedure is not a due process hearing as that concept is applied in an expulsion case, for example. Accordingly, while a student may have other "witnesses" give their perceptions of the facts and present documents as part of the investigation of the incident, the student has no right to have an attorney present the case, to have a tape recording of the meeting, or to "cross-examine" adverse witnesses. . . .

To ensure the integrity of the process and to protect the privacy interests of all persons concerned, this grievance/mediation process shall be deemed to be confidential and information will not be made available to persons not having a legitimate educational interest in the record or the proceedings. . . .

Issued: June 18, 1992

Boulder Valley Public Schools, Boulder, Colorado

(PART OF DEFENDANTS' EXHIBIT C)

August 10, 1992

Jill Clark
Legislative Council
Colorado General Assembly
State Capitol, Room 029
Denver, Colorado 80203-1784

Re: Comment on analysis of Amendment 2 ballot initiative

Dear Ms. Clark:

The first version of the 1992 Amendment 2 ballot analysis contains a serious misstatement of the law in the City of Boulder. The "Local Ordinances" section of the report (page 4 of the report) states:

> "However, the Denver and Boulder ordinances exempt religious institutions and they are free to refuse to hire persons or refuse housing, social services or public accommodations to individuals based upon their sexual orientation. A similar exemption is afforded landlords for small rental units. In Boulder and Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinances."

The report's interpretation of the bona fide religious purpose exemption contained in the Boulder Human Rights Ordinance is inaccurate.

EMPLOYMENT

Section 12-1-3(b) of the ordinance (employment practices) provides:

> "The provisions of subsection (a) of the section do not apply to prohibit a religious organization or institution from restricting employment opportunities to persons of THE RELIGIOUS DENOMINATION and advertising such restriction IF A BONA FIDE RELIGIOUS PURPOSE EXISTS FOR THE RESTRICTION. (Emphasis added).

In Boulder, religious organizations may refuse to hire individuals who are not members of that same denomination or faith. But if an individual who was denied employment on that basis files a religious discrimination claim against the institution, the institution would have to show a bona fide religious purpose for requiring it's [sic] employees to be members of the same denomination. For example: A private Christian elementary school may require it's [sic] instructors to be members of the Christian faith. If a non-Christian applicant is denied employment with the institution because the applicant is not a Christian, and subsequently files a claim of religious discrimination against the school, the school would have to show a bona fide religious reason for it's [sic] requirement.

The religious exemption provision does NOT permit a religious organization to refuse to hire an individual on the basis of that person's race, creed color, sex, SEXUAL ORIENTATION, marital status, national origin, ancestry, age or mental or physical disability. Using the example of the Christian elementary school, the Boulder ordinance does NOT permit the school to refuse to hire an applicant on the basis of the applicant's race, sex, sexual orientation, etc.- even if the school claimed that hiring such a person would

be a violation of it's [sic] religious beliefs or tenets. The bona fide religious exemption is a narrow exemption, only permitting a religious organization to restrict it's [sic] hiring to individuals who are members of the same religious denomination. Religious organizations are exempted only from the Boulder ordinance's prohibition against religious discrimination, and even then, only if they can show a bona fide religious purpose for their policy.

PUBLIC ACCOMMODATIONS

Section 12-1-4(b)(2) of the Boulder Human Rights Ordinance provides that the ordinance does not prohibit the following:

> "Any religious or denominational institution that is operated, supervised, or controlled by a religious or denominational organization from limiting admission to persons of the same religion or denomination as will promote a bona fide religious or denominational purpose."

Again, this exemption is a narrow one, allowing a place of public accommodation, controlled, operated, or supervised by a religious institution, to restrict admission to persons of the same religious affiliation, if it can show the restriction promotes a bona fide religious purpose. The organization CANNOT restrict access or admission on the basis of race, creed, color, sex, SEXUAL ORIENTATION, marital status, religion, national origin, ancestry, or mental or physical disability, even if it claims that it's [sic] religious or denominational tenets require it to do so.

HOUSING

The Council's analysis of the Boulder ordinance's housing exemption states, "In Boulder and Denver, owners with rental spaces in their homes or duplexes (in which they

reside) are exempted from the ordinances." This is not an accurate statement of the law in Boulder.

Sections 12-1-2(b)(2) and (3) do not prohibit the following:

> "The owner of an owner-occupied one family or two family dwelling or the owner or lessor of a housing facility devoted entirely to housing individuals of one sex from limiting lessees or tenants to the members of one sex;"
>
> "A person who seeks to share a swelling [sic] unit with another person from limiting lessees or tenants to members of one sex;"

The exemptions to the housing discrimination prohibitions contained in the Boulder Human Rights Ordinance do not permit the relevant actors to deny housing to an individual on the basis of his or her sexual orientation. The provisions do permit persons in the circumstances set forth in the ordinance to rent or lease their premises to persons of one sex.

I hope you will incorporate this information in the second draft of your report. I am available to answer any questions the Council may have about the Boulder Human Rights Ordinance. Thank you.

Sincerely,

/s/
Dani R. Newsum
Director
Office of Human Rights

PLAINTIFFS' EXHIBIT 48
(ASPEN ORDINANCE)

Sec. 13-98. Discriminatory practices prohibited.

(a) *Definitions.*

(1) *Discrimination:* "Discrimination" or "to discriminate" means, without limitation, any act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment by any person of employment, ownership or occupancy of real property or public services or accommodations. Such discrimination is unlawful and is a violation of this section, provided, however, that the physical condition of an existing building or structure shall not, of itself, constitute discrimination.

(2) *Housing:* "Housing" means any building, structure, vacant land or part thereof during the period it is advertised, listed or offered for sale, lease, rent or transfer of ownership, and during the period while it is being sold, leased or rented.

(3) *Public services or accommodations:* "Public services or accommodations" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages or accommodations to the public.

(4) *Person:* "Person" means any individual, firm, partnership, corporation, association, organization, unincorporated organization, labor union, government agency, incorporated society, statutory or common law trust, estate, executor, administrator, receiver, trustee, conservator, liquidator, trustee in bankruptcy, committee, assignee, officer, employee, principal or agent, legal or personal representative, real estate broker or salesman or any agent or representative of any of the aforegoing.

(b) *Discriminatory employment practices prohibited.* It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification.

(c) *Discriminatory housing practices prohibited.* It shall be unlawful for any person, directly or indirectly, to discriminate against or to accord adverse, unlawful or unequal treatment to any other person with respect to the acquisition, occupancy, use and enjoyment of any housing, including the sale, transfer, rental or lease thereof.

(d) *Discriminatory public services and accommodation practices prohibited.* It shall be unlawful for a person engaged in providing services or accommodations to the public to, directly or indirectly, discriminate against any other person by refusing to allow the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages, including accommodations, and the terms and conditions under which the same are made available, or to

provide adverse, unlawful, or unequal treatment to any person in connection therewith.

(e) *Penalties and civil liability.* Any person who violates the provisions of subsections (b) through (d) hereof shall be deemed guilty of an offense and upon conviction thereof shall be punished by a fine not exceeding three hundred dollars ($300.00) or imprisonment of not more than ninety (90) days or both such fine and imprisonment, at the discretion of the court. In addition, any person claiming to be aggrieved by an unlawful discriminatory act shall have a cause of action in any court of competent jurisdiction for compensatory damages and such other remedies as may be appropriate, including specifically the issuing of restraining orders and such temporary or permanent injunctions as are necessary to obtain complete compliance with this ordinance. In addition, the prevailing party shall be entitled to reasonable attorney fees and costs.

(f) Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage, issued by the City of Aspen is in violation of this section, notwithstanding any other action it may take or may have taken under the authority of the provisions of this section, the City of Aspen may take such action regarding the temporary or permanent suspension of the violator's City of Aspen business license, permit, franchise, benefit or advantage as it consider appropriate based on the facts disclosed to it. (Ord. No. 60-1977, § 1)

AFFIDAVIT OF JOHN S. BENNETT, MAYOR OF THE CITY OF ASPEN, COLORADO

I, John S. Bennett, being first duly sworn according to law depose and state as follows as a supplement to my testimony as previously provided herein in support of the plaintiffs' motions for preliminary injunctive relief . . . .

1. I am the Mayor for the City of Aspen, Colorado, . . .

* * * * *

6. Since the adoption of the City's anti-discrimination ordinance in 1977, the City has not adopted or legislated employment or housing quotas or affirmative action programs based upon sexual orientation and none are forecast for adoption. . . .

/s/
John S. Bennett

PLAINTIFFS' EXHIBIT 117
(AURORA RULE)

1-1: EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION

The City of Aurora is an equal opportunity employer. No person shall be discriminated against because of race, religion, color, creed, sex, sexual preference, age, national origin, ancestry, marital status, political affiliation, organization membership, citizenship, or veteran's status. In addition, no person shall be discriminated against because of mental or physical handicaps unless related to a bona fide occupational qualification. The City shall develop an Affirmative Action plan which identifies the City's goals. Each Department and Division is responsible for achieving specific Affirmative Action goals.

AFFIDAVIT OF NANCY C. CARNEY

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

The undersigned affiant, being first duly sworn, deposes and states upon oath as follows:

1. My name is Nancy C. Carney. I am employed as the Director of Human Resources for the City of Aurora, Colorado. I have held this position since November 7, 1990. In my capacity as Director of Human Resources, I am responsible for the direct supervision of 26 employees including the affirmative action officer of the City of Aurora.

2. The City of Aurora, Colorado's Equal Opportunity and Affirmative Action Policy, as included in the City's Personnel Policies and Procedures Manual, was adopted by resolution of the Aurora City Council (No. R82-119) on November 8, 1982, and states the following:

> 1-1: EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION
>
> The City of Aurora is an equal opportunity employer. No person shall be discriminated against because of race, religion, color, creed, sex, sexual preference, age, national origin, ancestry, marital status, political affiliation, organizational membership, citizenship, or veteran's status. In addition, no person shall be discriminated against because of mental or physical handicaps unless related to a bona fide occupational qualification. The City shall develop an

Affirmative Action plan which identifies the City's goals. Each Department and Division is responsible for achieving specific Affirmative Action goals.

3. This Policy, in this form, has been in effect since November 8, 1982. It applies only to employees of the City of Aurora, and does not offer anti-discrimination protection to the citizens of Aurora or persons employed within the private sector in the City of Aurora. While the Personnel Policies and Procedures Manual has been revised over time, no changes to Section 1-1, the Equal Opportunity and Affirmative Action Policy, have been made since it was originally adopted.

4. Pursuant to the Equal Opportunity and Affirmative Action Policy, the City of Aurora has developed an affirmative action plan with respect to to [sic] race and sex. No plan has been developed for the other classifications listed in the Policy, such as religion, color, creed, sexual preference, age, national origin, ancestry, marital status, political affiliation, organizational membership, citizenship, or veteran's status.

5. To my knowledge, there has never been a request to conduct under-utilization studies or develop an affirmative action plan with respect to sexual preference.

6. The City of Aurora seeks to recruit and retain employees based upon their qualifications for the positions being filled, without regard to the characteristics listed in Section 1-1 of the Personnel Policies and Procedures Manual, with the exception of race and sex, which are subject to the City's affirmative action plan.

7. The City of Aurora makes no inquiry to determine the sexual preference of applicants or incumbent City employees.

FURTHER: Affiant sayeth not.

/s/ NANCY C. CARNEY

October 20, 1993

TESTIMONY OF JEROME CULP

(DIRECT EXAMINATION)

* * * * *

[v. 19, p. 1391]

Q. Concerns have been expressed in this case related to this issue of remedying discrimination against groups that if proper recognition were extended to gays, lesbians, and bisexuals, that affirmative action programs would inexorably follow. Let's define some terms. Would you tell the Court what affirmative action means in the civil rights law area?

A. Yeah. Again, I think that the notion of affirmative action is a notion that has the most confusion in the public's mind. The public tends to think that any policy that has any disparate impact on racial minorities is in fact affirmative action. They include any change in existing policies of as [sic] affirmative action. And I think one can easily distinguish between remedial actions that come about because some individual has proven particularized discrimination and stronger policies that go from goals to the most strong policy, in some sense, quotas. And it's very clear constitutionally that we will only extend some of those policies if in fact people have demonstrated a kind of proof and a history that

[v. 19, p. 1392]

requires them.

So, for example, with respect to gays, lesbians, and bisexuals, it is very unlikely that one would be [sic] want to extend affirmative action policies and employment to them because they haven't suffered the same kind of discrimination in terms of access to education, in terms of access to other things, and other groups have, but that

doesn't mean that they are not discriminated against when people see them or discover that they are gay. So it seems to me that, again, this notion is a red herring. Affirmative action is a policy that causes people to act irrationally and to think irrationally instead of thinking about what the nature of the policy is.

* * * * *

PLAINTIFFS' EXHIBIT 18

THE NATIONAL LEGAL FOUNDATION
6477 College Park Square
Suite 306
P.O. Box 64845
Virginia Beach, VA 23464

Robert K. Skolrood
Executive Director

Telephone (804) 424-4242
Facsimile (804) 420-0655

13 June 1991

RE: ANALYSIS OF LANGUAGE IN AMENDMENT INITIATIVE

Tony Marco, Co-Chairman
Colorado Coalition for Family Values
P.O. Box 49792
Colorado Springs, CO 80949

Dear Tony,

Let me begin by extending my congratulations to you and the Coalition for a job well done. I say "well done" despite the fact that the initiative is still in its infancy because your organization has done so much in providing this effort with a solid foundation which gives it a real chance of success.

I have conferred with two other attorneys on the different drafts. They both have experience with civil rights legislation and they both strengthened the conclusions contained in this letter. Right off let me cut down our options; in my opinion drafts three and four should not be used. As we discussed, they contain the prohibition on legal recognition of homosexual marriages. While homosexuals

do not get far by asking the electorate for special privileges, they do get a good deal of sympathy by asking to be "treated just like everyone else." The presupposition here is that if two people love each other they ought to be able to marry, and if two men or two women "love" each other they ought to be able to marry. Since same sex marriages are not recognized in Colorado at present, I feel that the clause regarding their legal recognition hurts the initiative without really adding anything to it. This leaves us with drafts one and two.

Our first concern is the lead in sentence which begins, "NO PROTECTED STATUS . . ." The question is just what should be included in the laundry list regarding orientation. The initiative is directed against those engaged in same sex activities. The natural pair which comes to mind are homosexuals and lesbians. I believe both groups should be included. I also believe the term "bisexual" should be included for two reasons. The first is that many persons who engage in same sex relations attempt make their homosexual behavior more "normal" or legitimate by saying that they also engage in heterosexual relations. From a moral standpoint of course homosexuality and bisexuality are indistinguishable. But they are perceived differently. Second, it is possible that if bisexuals are not specifically included, then homosexuals could claim that the amendment does not apply to them because they are bisexual and not simply homosexual. For these reasons it is my opinion that all three should be included in the language of the initiative.

The language regarding the agencies of the State of Colorado appear to cover everyone in question from the state legislature to city government to the local school board. The language prohibits them from both enacting *and* enforcing such regulations which is an excellent safeguard. Finally, the language which prohibits any claim by persons in same sex relationships is the most crucial clause in the

amendment. I would note here specifically some language regarding "special privileges." We talked about including such language in the amendment and I told you I felt it was a good idea. I have reconsidered that position and feel I was in error. If language denying special privileges to homosexuals is in the amendment, it could possibly allow homosexuals to argue that they are not asking for any special privileges, just those granted to everyone else. I believe that "No Special Privileges" is a good motto for the amendment's public campaign, but I fear the possible legal ramifications if it is included in the amendment itself.

The language of the amendment should prohibit homosexuals from claiming any rights regarding employment, education, housing or status. Such claims are normally sought through the vehicle of "civil rights" or through discrimination suits. The language of the proposed amendment takes away any right to such an action. The U.S. Supreme Court has already stated that the U.S. Constitution does not confer upon homosexuals a fundamental right to consensual sodomy [see *Bowers v. Hardwick*, 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140(1986)], but that does not mean that Colorado could not. Remember that the ERA did not get into the Federal Constitution but it did get into the Colorado Constitution. But again, the initiative is not seeking to criminalize homosexual acts, merely to prevent them from becoming the basis for civil rights. The language in amendment, especially the phrases regarding "protected status" and "claim of discrimination" should take care of that.

In conclusion, I believe the language in the amendment should prevent the type of municipal ordinance which was attempted in Colorado Springs and elsewhere in your State. There may be some way around the language which I have not foreseen, so I certainly encourage you to seek other counsel on this matter. My hope is that this brief analysis

will be of some help in the process. If I may be of any further service to you, please do not hesitate to contact me. I remain

Very sincerely yours,

/s/
Brian M. McCormick
Staff Counsel

PLAINTIFFS' EXHIBIT 15
(CFV LETTER)

LOGO COLORADO FOR FAMILY VALUES

July 23, 1992

Mr. Stan Elofson
Colorado Legislative Council
029 State Capitol Building
Denver, CO 80203-1784

Dear Stan:

After a careful reading of the analysis sent to me it is evident that the writers of the analysis took great editorial privileges slanted to the pro-homosexual point of view.

I am disappointed that the writers did not stick to stating just the facts. Obviously, this issue is very emotionally charged, and it is very difficult for both sides to stay at a level of factual evidence and not slip off into conjecture and demagoguery. My comments are not meant to be demeaning, please understand this, however, if the voters are to have a clear analysis of the amendment both sides of the issue must be straight to the point and supported with as much imperical [sic] data as possible.

Two brief examples. First, number three on the arguments for the amendment states, "Divergent sexual behavior conflicts with the moral values of certain segments of American society". This statement should be supported by some form of reliable evidence or the analysis writers should not say it. The lack of facts makes it only conjecture, and your analysis should have none of this. The second example. Number two on the against portion states, "The

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amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions." This is a statement based solely on the opinion of those opposed to amendment 2. There are many Colorado voters that vehemently disagree with it. To simply state it as fact (without any reliable evidence to support it) is demagoguery in it's [sic] purest form. I trust you can see my point.

It is very important that the voters get a clear picture of the affects [sic] of the amendment through facts. The writers of the draft were not interest in this. The work is full of catch phrases and misleading, undocumentable statements. It's not the typical excellent work that the legislative Council normally produces.

I've attached a suggested analysis, up through arguments for the amendment, that presents the straight forward [sic] facts without editorializing. I've tried to address the same topics that the original writers did. I firmly believe that some members of the crew that came to interview me are personally against amendment 2 and have inserted pro-homosexual rhetoric into the analysis. Much of it reads like it came directly off the word processor of EPOC.

There will be four people coming to Denver to discuss the analysis. Thank you for reading and considering this letter. I am looking forward to seeing you on Monday.

Sincerely,

/s/
Kevin D. Tebedo
Director

cc. Sen. Ted Strictland, Chairman
Rep. Chuck Berry, Vice Chairman

Scope of the issue:

Homosexuals, lesbians, and bisexuals claim levels of harassment and discrimination against them, in Colorado, are high enough to warrant that state, county, and city agencies classify "sexual orientation" as an additional class needing protections under civil rights laws and ordinances.

The proponents of Amendment two claim that homosexuals, lesbians and bisexuals are not discriminated against enough in housing, employment, and public accommodations to warrant adding "sexual orientation" as a protected class. The proponents also claim that "sexual orientation" does not meet the current requirements used by the U.S. Supreme Court and Federal civil rights authorities for the granting of protected class status.

Current laws and policies:

Local: Three cities -- Denver, Boulder, and Aspen -- have enacted local ordinances that ad [sic] "sexual orientation" to the list of protected classes in those municipalities.

State: Governor Romer issued an executive order (CRS 24-34-402(1)) effective January 1, 1986 - amended January 1, 1992 and April 1, 1992 - that adds to state policies against discrimination, the term "sexual orientation".

Federal: There are no federal civil rights laws or procedures that protect "sexual orientation" as a minority group or protected class. The *Civil Rights Act* of 1964 identifies race, age, gender, nationality, and religion as those classes that meet the legal requirements for protection (see definitions in this analysis).

Other states. There are, as of the writing of this analysis, seven states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Virginia, and Wisconsin) that have included "sexual orientation" in the list of protected classes in those states. The District of Columbia has also adopted an ordinance with the same affect [sic].

Impact of the proposal: Passage of amendment 2 would amend the state Constitution in Article II, section thirty, so as [sic] prohibit the state of Colorado and any of it's [sic] political subdivisions (see definitions) from adopting or enacting laws or policies that would add homosexual, lesbian, and bisexual orientations to the list of protected classes.

Because the state Constitution has precedence over city ordinances, the ordinances in Denver, Boulder, and Aspen would be repealed. As would the Governors [sic] executive orders.

Arguments for the amendment

1. Two reputable marketing studies recently conducted (Simmons & Simmons Research, July 1991, and Over-Looked Opinions, 1990) have shown that , [sic] as a class of people, homosexuals are not economically, and educationally underprivileged. While economic and educational status have nothing to do with basic civil rights allotted to United States Citizens by the Constitution, they are key issues in the granting of protections under the definition of "protected class".

According to Colorado State civil rights authorities with the Civil Rights Division and the Civil Rights Commission, the only avenue to having a claim to protection is to be given the

status of a protected class. There is no ability to claim protection without being a recognized protected class. The only way of obtaining protected class status is to meet the five designated criterion.

Proponents of amendment 2 believe that homosexuals, lesbians and bisexuals do not meet these five criterion and therefore should not be given protections accorded to protected classes. The amendment would not remove the U.S. citizenship of homosexuals and therefore leaves their basic civil rights fully intact.

2. Civil Rights has never been an issue for local debate. Article XX of the Colorado Constitution guarantees local municipalities the ability to function in *municipal affairs*. Proponents of amendment 2 feel that individual and group civil rights is not a municipal affair. The issue of "sexual orientation" is the only civil rights issue being taken to the municipal level without the benefit of federally sanctioned laws.

3. A May 1992 Time/CNN poll indicated that 54% of Americans believe that homosexual relationships between consenting adults is morally wrong. As apposed [sic] to 39% who did not feel that way. The same poll was taken in 1978 and shows that 53% felt it was morally wrong and 38% felt homosexual behavior was not. This and other similar polls call into question whether or not Coloradans accept the behavior, and consequences of said behavior, of homosexuals as something that should be legitimized by granting homosexuals a separate class status. A record number of petition signatures were collected from all over the state to allow the Colorado voters to express their point of view on the November 3, 1992 general election.

4. The proponents of Amendment 2 claim that giving protected status to "sexual orientation" would create a large

financial burden on businesses in the state. Because "sexual orientation" does not exhibit any immutable or readily definable (i.e. visual) characteristics, it is left to the word only of an individual that he/she is actually homosexual, heterosexual, or bisexual. According to professionals with the state Civil Rights Division, this poses a significant problem for any employer to know when he/she is dealing with a protected class. The proponents of Amendment 2 see this as an opportunity, for the homosexual community, to harass businesses through endless litigation. One of the five Supreme Court requirements designed to curb this type of threat is that the protected class exhibit immutable, distinguishable, readily definable characteristics that define them as a discrete group. The supporters of the amendment see this as a pertinent problem for Colorado businesses.

(PART OF DEFENDANTS' EXHIBIT C)

From the desk of . . .

JOHN N. FRANKLIN

Attorney at Law

To: Whom It May Concern
Subject: Special Class Protection or Status for "Gay Sexual Orientations"
Date: March 4, 1992

My purpose in issuing this memorandum is to state publicly, as an eight-year member of the Colorado Civil Rights Commission, and Chairman of that Commission for approximately 30 months, my considered opinion that "sexual orientation," defined as including homosexuality, bisexuality and lesbianism, does not lend itself to what is known among Civil Rights authorities as special class protection or status.

I have been an attorney since 1974, serving El Paso County in various capacities since 1978, and served with the Colorado Civil Rights Commission from 1981-1988, twice as elected Chairman, resigning that position in 1987. I now serve as Assistant El Paso County Attorney and also the County's Risk and Safety Manager. I have administered the (undecipherable) Anti-Discrimination Act for 8 years, and Federal laws including the Fair Housing Act (undecipherable) EEOC provisions. I have litigated cases in El Paso County regarding personnel issues for six years. I am intimately familiar with Civil Rights statutes; I have helped draft numerous manuals and other materials touching Civil Rights and anti-discrimination issues, and am frequently consulted by Civil Rights authorities on these issues.

Based on my experience, both as an attorney and as a visually challenged person, I am very familiar with the term

"protected class status" (a term well-defined and frequently employed by Civil Rights authorities) and all that it entails. In my field, particular categories of specially protected social classes have developed over time, classes that have demonstrated through empirical studies a need for special class protection against race, gender and handicapped discrimination, etc. Several factors play highly significant roles in the designation of these special classes.

First, means must be found to effectively define such classes. Second, such classes must be limited so that they can be effectively protected under Civil Rights laws. Third, these classes must demonstrate rational bases on which designation for special class protection may be made. If Civil Rights authorities are to specially protect a class, that class must be (1) objectively discernible enough to be obviously recognizable as a distinct class; and (2) be able to justify its need for protection, by proving discrimination through economic and other forms of disadvantage. Any class that cannot demonstrate as an entire class that it has been denied promotion, educational and cultural opportunities, etc., so as to have experienced severe disadvantage, does not have a legitimate claim to protected class status, even though individual members of the class may have *suffered disadvantage to some degree.*

These factors are critically important, because if a group is simply awarded special protected class status apart from discernable qualifications and demonstrated need, attention will inevitably be taken away from the legitimate claims of those who have demonstrated true need and discernable qualifications.

Therefore, let us first consider this issue of discernable qualities as it relates to homosexuality. Obviously, if a person is a woman or aged above 40, or physically challenged, it is possible to demonstrate that gender or age, or physical challenge, by universally accepted means. Handicapped protected status, for instance, is an entitlement

for those who are obviously handicapped and perceived by their employers to be so. But homosexuality would be a very subjective classification indeed to establish. How would eligibility for classification as a homosexual, bisexual or lesbian be established? Strictly on the basis of personal allegation? Would protected class coverage begin only when an individual began physically practicing homosexuality? If not, when? Unless actual sexual response is clearly demonstrated by homosexuals, how will one know, for instance, if a job applicant is truly homosexual? What might be the outcome in the case of an applicant who is not homosexual, but perceived by an employer to be so?

How would classification be decided for a bisexual? To what extent is someone bisexual? If a person had one experimental homosexual experience in youth, would that make him or her eligible for bisexual protected class status? How would it be possible to tell if a person who claimed to be homosexual on January 1, 1992, has always been homosexual since birth, or will always remain homosexual?

(Undecipherable) of considerations simply do not lend themselves to careful, prompt (undecipherable) conclude that attempting to define these sexual orientations in terms of classifications needed for protected class status -- or to effectively limit such a (undecipherable) would be extraordinarily difficult, if not impossible, and involve a process (undecipherable), but rather rooted in the realm of non-sequitur.

Second, the question of gays and demonstrated need. While there has been much discussion by gay groups about their need for protection, I do not perceive there to be enough evidence, scientific empirical or otherwise, to demonstrate that gays have been victims of discrimination to the magnitude that would warrant the intrusion of government protection of their interests as a class.

Therefore, unless gays can (1) establish through impartial, scientific means that there are verifiable differences between themselves and other people -- differences which are obviously discernible to public perception -- and unless gays can (2) demonstrate clearly that gays as an entire class have suffered discrimination resulting in severe economic, educational and cultural disadvantage, it is my opinion that they should not be regarded as a specially protected class.

Absent such evidence, I fear that giving gays special, protected status as a vaguely-defined "quasi-class," would, in effect, "muddy the waters," diluting the principles of Civil Rights that have been proven through the years. It is my opinion that all specially protected classes would then suffer for the marginable, questionable gains that would be enjoyed by this vocal few.

I foresee several possible negative consequences of granting protected class status to gays. Would this precedent not encourage others of different sexual orientations, even an entire "commune," to say, "Aren't we a 'family,' too? We're all 'domestic partners.' Why shouldn't we have 'domestic partnership' benefits?" Or, what would prevent heterosexual housemates who aren't married from benefiting from their "domestic partnership" under laws granting protected class status to gays?

Under such laws, it is possible that people who aren't gay might well pretend to be gay, to form "shell" corporations attempting to take advantage of minority contract laws. If gays were made a specially protected class, it could be argued that they be given a certain percentage of such contracts, to make up for past wrongs. I fear that those who are already economically advantaged would thus be given leverage to achieve even greater economic advantage, at the expense of those who are truly disadvantaged.

The resources America now has to bestow on disadvantaged people are well directed toward the protection of currently established classes. I think granting gays special protected status would do a disservice to all those people who are presently being discriminated against or mistreated by diluting the significance of Civil Rights protection. I see no need to elevate gays to the status of a specially protected class on the mere basis that gays' lifestyle or how they have sex is not generally approved by society. And I would hate to see resources taken away from those who are truly in need of special protection, to benefit gays, who, as a class, are not disadvantaged, in my opinion.

Lastly, gays already have established recourse against discrimination. They have the right to pursue civil litigation if they have been defamed or held up to ridicule. They are protected against verbal abuse by harassment laws. They are entitled under current laws to protection of their own property and persons. They are entitled to protection by all the criminal laws of this State.

The basic Civil Rights laws of this country protect all people for basic due process. While gays are not currently elevated to the status of a specially protected class, they do have the same basic protections as all Americans. And I do not believe that either current special class protections given disadvantaged minorities or basic Civil Rights protections enjoyed by all Americans will be threatened if gays are not granted special protected class status in the foreseeable future.

/s/
John N. Franklin
Attorney At Law
Past Chairman, Colorado Civil Rights Commission

520-6485

AFFIDAVIT OF JOHN GILLESPIE

I, John Gillespie, being first duly sworn, depose and state the following from my personal knowledge:

1. I am the Executive Director, Rawhide Boys' Ranch, Route 1, New London, Wisconsin 54961, telephone (414) 982-6100. Rawhide Boy's Ranch is located in a rural Wisconsin area.

2. I am submitting this affidavit to illustrate the extreme position taken by gays and lesbians on the subject of civil rights. I believe, based on my personal experiences, that that position is injurious. I do not wish for any other organizations or individuals, including those in Colorado, to experience what I describe in detail below.

3. I have acted as Executive Director of Rawhide Boys' Ranch since it was established in 1965.

4. Rawhide Boys' Ranch was established by myself, my wife, Jan Gillespie, and Bart and Cherry Starr.

5. Since it was established, Rawhide Boys' Ranch has operated for the purpose of rehabilitating boys who have been adjudicated as being delinquents. Boys enrolled at Rawhide Boys' Ranch are boys with extensive juvenile court backgrounds. They commonly have a history of criminal assault and battery, drug abuse, car theft, breaking and entering, or even homicide.

6. The method employed by the Rawhide Boys' Ranch to rehabilitate the boys emphasizes the use of a model traditional Christian family lifestyle. A brochure publish [sic] by Rawhide Boys' Ranch is attached as Appendix 1. This includes married heterosexual couples, senior residential instructors, residential instructors, and a director of social

services. Job descriptions for each of these positions are attached to this affidavit as Appendices 2-6.

7. The boys are placed in a family-type environment in which they are supervised by the houseparents and a residential instructor. In this environment, among other things, the boys are taught morality and values based on Christian principles. For example, they are taught sexual abstinence until marriage, that drug abuse is bad, and that extra-marital sexual relations are wrong. The boys also receive a conventional education (equivalent to public school education) and certain vocational training.

8. The average boy is 15 1/2 years of age. The range of ages of boys enrolled is 13 to 18 years of age. Rawhide Boys' Ranch is licensed to receive up to 30 boys at a time.

9. Rawhide Boys' Ranch employees a staff of approximately 35, including counselors and high school teachers.

10. Typically, the boys come from a single-parent family and have little or no church background. Most of the parents or guardians of the boys want the child to receive exposure to religion. Therefore, only with the express permission of a boy's parent or guardian, the boys are taken to church. If a particular church is requested, Rawhide Boys' Ranch makes the necessary arrangements to satisfy the request.

11. For the period 1974-1991, none of over 77 percent of the boys that were enrolled in Rawhide Boys' Ranch for a period of at least 12 months had been incarcerated.

12. Boys are referred to the Rawhide Boys' Ranch by the counties located within the State of Wisconsin. Enrollees are accepted on a first come, first serve basis. A typical

enrollee is a teenage boy that is both physically and emotionally aggressive.

13. Under the 1982 Wisconsin Fair Employment Act ("Act"), copy attached as Appendix 7, employment decisions based on marital status or sexual orientation were prohibited. Under the Act, for example, in my opinion, certain actions taken by the Catholic church would be illegal.

14. In the early 1980s, Dane County, Wisconsin, mailed Rawhide Boys' Ranch a questionnaire which sought information concerning Rawhide Boys' Ranch's employment practices as they may concern employment decisions based on marital status, sex, and sexual orientation. Rawhide Boys' Ranch responded by indicating that marital status, sex and sexual orientation were factors on which it based some of its staffing employment decisions. For example, Rawhide Boys' Ranch stated that it only employed heterosexual couples that had been married for at least 5 years to serve as houseparents.

15. Apparently, the questionnaire was forwarded to then Governor Anthony Earl's Commission for Gay and Lesbian Rights. The Commission asked the Wisconsin Department of Social Services to revoke Rawhide Boys' Ranch's license on the basis of the allegation that the Rawhide Boys' Ranch violated the Act.

16. Soon thereafter, State Senator Joe Leean obtained a copy of the Commission's meeting minutes describing a Commission plan to cause a gay or lesbian to seek employment at the Rawhide Boys' Ranch. It was expected that employment would be denied and the individual could then cause a civil rights action to be lodged against Rawhide Boys' Ranch. A copy of the minutes is attached as Appendix 8. The news media discovered the minutes and the matter became highly publicized. See, for example,

attached copies of newspaper articles attached as Appendices 9-15.

17. Gay and lesbian rights advocates alleged that Rawhide Boys' Ranch was anti-gay or anti-lesbian. This was false. Rawhide Boys' Ranch emphasizes traditional family values; it is not anti-gay or anti-lesbian. The Rawhide Boys' Ranch's philosophy is that parents should be allowed to determine what is best for their children.

18. The debate over whether or not Rawhide Boys' Ranch was in violation of the Act led to an attempt to obtain legislation that would exempt Rawhide Boys' Ranch from the Act.

19. Rawhide Boys' Ranch spent approximately $250,000.00* to engage in mailings, produce a video, and retain the services of an individual to tour and speak out in support of an exemption for Rawhide Boys' Ranch. It was believed that without the exemption, Rawhide Boys' Ranch would have to close.

20. Finally, in February 1988 and after years of lobbying and despite opposition from Lambda Rights Network, see Appendix 16, attached, Assembly Bill 916, attached as Appendix 17, was passed into law. The bill amended the Act by defining the word "creed" to mean a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views. As amended by the bill, the Act exempted the Rawhide Boys' Ranch.

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* Rawhide Boy's Ranch's 1993 revenues totalled approximately $1,035,279.00.

21. Rawhide Boys' Ranch's license has not been threatened on the basis of a state civil rights violation since the amendment was adopted.

/s/
JOHN GILLESPIE
Executive Director
Rawhide Boys' Ranch
Route 1
New London, Wisconsin 54961
(414) 982-6100

FURTHER AFFIANT SAYETH NAUGHT.

DEFENDANTS' EXHIBIT B

Talmey-Drake Research & Strategy
Project 92144
December 1992

CHANNEL 4 & THE DENVER POST
DECEMBER 1992 ISSUES SURVEY RESULTS

* * * * *

5. In the last election Colorado voters also passed an amendment to the State Constitution -- Amendment 2 -- that prevents state and local governments from passing laws that prohibit discrimination against homosexuals in employment and housing. It also repealed existing laws that banned discrimination against homosexuals in employment and housing in communities that already passed such laws.

   The people who opposed Amendment 2 say the people who voted for Amendment 2 voted that way because they hate homosexuals. Others say that the people who voted for Amendment 2 were not so much against homosexuals as against laws that would give homosexuals special or protected status when it comes to housing and employment. What do you think? Do you think the majority of those who voted in favor of Amendment 2 voted that way because they hate homosexuals or because they are against laws that would give homosexuals a type of special or protected status?

Hate homosexuals	10%
Against laws	73%
Both [NO PROMPT]	7%

Other 7%
DK/NS 3%

6. Regardless of how you feel about laws that prohibit discriminating against homosexuals in housing and employment, there already exist a number of laws that prohibit discrimination against racial and ethnic minorities and women in housing and enployment. While many people feel that these laws are good, many others feel that society would be better if these laws were repealed. How do you feel? Do you feel there should be laws that prohibit discrimination aganist [sic] ethnic and racial minorities in housing and employment or do you feel that society would be better if these laws were repealed?

There should be laws 74%
Should be repealed 16%
Undecided/DK/NS 10%

7. Since the passage of Amendment 2 by Colorado voters a number of homosexual rights organizations and some celebrities have called for a national boycott of Colorado until Amendment 2 is repealed. Have you seen or heard anything about this boycott of Colorado?

Yes 96%
No 4%

8. And does the call for a boycott of Colorado by homosexual rights groups make you more likely or less likely to support the repeal of Amendment 2.

More likely 25%
Less likely 43%
No difference 28%
DK/NS/Undecided 4%

9. While some people say that the boycott of Colorado will cost the state millions of dollars in lost tourism and business, others say that the boycott won't have much effect, but the publicity will actually bring more tourists and more business to Colorado. What do you think? Will the effect of the boycott hurt the state's economy or in the end will it help it?

Boycott will hurt economy	48%
Boycott will help economy	20%
Won't make any difference	25%
DK/NS	7%

10. Whether or not you feel the boycott will help or hurt Colorado's economy, do you think Colorado voters will vote in favor of repealing Amendment 2 or do you think they will vote against repealing it?

For repealing #2	36%
Against Repealing #2	49%
Undecided/DK/NS	14%
No answer/refused	1%

11. Some people say that many in the homosexual community over reacted [sic] to the passage of Amendment 2, and have actually hurt their cause. Others, however, say that a strong reaction is necessary to change peoples' minds. Again, what do you think? Has the reaction to the passage of Amendment 2 hurt the cause of gay rights in Colorado or has it helped it?

Hurt gay rights	56%
Helped it	27%
Made no difference	6%
DK/NS	11%

12. In light of the passage of Amendment 2 some people are saying that people in Colorado are more prejudiced against homosexuals than people in other states. Other people say that Coloradans are generally more tolerant than people in other states, and that if Amendment 2 had been on the ballot in other states it would have passed in most of them too. What do you think? Are people in Colorado more tolerant or less tolerant of homosexuals than people in other states.

More tolerant	48%
Less tolerant	15%
The same	25%
DK/NS	12%

13. Because of the controversy over Amendment 2, we are particularly interested in finding out how people feel about homosexuality and gay rights issues. I would now like to read you several statements about homosexuality and gay rights, [sic] After I read each statement, please tell me if you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the statement. If you don't have any feeling about the statement, one way or the other, just say so. If I read a statement that you would prefer not to give an opinion about, please tell me, and I will skip over it and go on to the next statement. Also throughout these statements we use the term "homosexual" to refer to both male and female homosexuals.

[PROBE TO DISTINGUISH BETWEEN "DK/NS" AND "NEUTRAL"]

[ROTATE]	--Agree--		-Disagree-		DK/
	Stng	Some	N	Some	Stng	NS
[a] Homosexuals should be allowed to served						

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
in the armed forces.	41%	18%	5%	8%	22%	6%
[b] Homosexuality is morally wrong.	31%	9%	7%	12%	36%	5%
[c] A homosexual is more likely to sexually molest children than a person who is heterosexual.	4%	2%	5%	17%	61%	11%
[d] Except for their choice of sexual partners, homosexuals are not really different from anyone else.	60%	21%	1%	6%	7%	5%
[e] When homosexuals talk about gay rights, what they are really saying is that they want special treatment.	32%	22%	3%	12%	28%	3%
[f] Homosexual couples -- that is couples of the same sex -- should be allowed to adopt children.	18%	17%	9%	12%	37%	7%
[g] Most homosexuals would rather be straight, if they						

	--Agree-- Strg	Some	N	-Disagree- Some	Strg	DK/ NS
had a choice.	9%	10%	8%	19%	32%	22%
[h] Homosexuals shouldn't be allowed to teach in the public schools.	10%	8%	5%	21%	52%	4%
[i] Homosexual behavior should be against the law, even if it occurs between consenting adults.	9%	4%	5%	14%	64%	4%
[j] Most homosexuals could quit being gay if they really tried.	11%	8%	7%	16%	44%	14%
[k] The average person is not nearly so prejudiced against homosexuals as many gay-rights activists would want people to believe.	40%	28%	5%	13%	8%	6%

* * * * *

(ATTACHMENT TO AFFIDAVIT OF PAUL TALMEY)

Talmey-Drake Research & Strategy
Project 93234 SEP93A2.%
September 1993

SEPTEMBER 1993 ISSUES

* * * * *

23. In the last election Colorado voters also passed an amendment to the State Constitution -- Amendment 2 -- that prevents state and local governments from passing laws that prohibit discrimination against homosexuals in employment and housing. It also repealed existing laws that banned discrimination against homosexuals in employment and housing in communities that already passed such laws.

    The people who opposed Amendment 2 say the people who voted for Amendment 2 voted that way because they hate homosexuals. Others say that the people who voted for Amendment 2 were not so much against homosexuals as against laws that would give homosexuals special or protected status when it comes to housing and employment. What do you think? Do you think the majority of those who voted in favor of Amendment 2 voted that way because they hate homosexuals or because they are against laws that would give homosexuals a type of special or protected status?

Hate homosexuals	8%
Against laws	81%
Both [NO PROMPT]	5%
Other	4%

DK/NS 2%

24. In light of the passage of Amendment 2 some people are saying that people in Colorado are more prejudiced against homosexuals than people in other states. Other people say that Coloradans are generally more tolerant than people in other states, and that if Amendment 2 had been on the ballot in other states it would have passed in most of them too. What do you think? Are people in Colorado more tolerant or less tolerant of homosexuals than people in other states.

More tolerant	52%
Less tolerant	14%
The same	25%
DK/NS	9%

25. [ASK ONLY IF Q5 = 1 (REGISTERED VOTER)] Now suppose there was an election being held today, and voters were being asked to repeal Amendment 2 -- the State Constitutional amendment that prevents state and local governments from passing laws that prohibit discrimination against homosexuals in employment and housing -- would you vote for repealing Amendment 2 or would you vote against repealing it.

For repeal	37%	
Against repeal	58%	
Undecided/DK/NS	5%	---> > SKIP TO Q26
Refused	*	---> > SKIP TO Q26

* * * * *

27. Because of the controversy over Amendment 2, we are particularly interested in finding out how people feel about homosexuality and gay rights issues. I would

now like to read you several statements about homosexuality and gay rights, [sic] After I read each statement, please tell me if you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the statement. If you don't have any feeling about the statement, one way or the other, just say so. If I read a statement that you would prefer not to give an opinion about, please tell me, and I will skip over it and go on to the next statement. Also throughout these statements we use the term "homosexual" to refer to both male and female homosexuals.

[PROBE TO DISTINGUISH BETWEEN "DK/NS" AND "NEUTRAL"]

[ROTATE]	--Agree--			-Disagree-		DK/
	Stng	Some	N	Some	Stng	NS
[a] Gay rights groups are some of the most politically influential groups in the country.	23%	28%	5%	21%	14%	9%
[b] Homosexuals should be allowed to serve in the armed forces.	36%	26%	4%	11%	21%	4%
[c] The public schools should teach students that homosexual relationships are morally equal to heterosexual relationships.	8%	7%	5%	20%	55%	6%
[d] Homosexuality is morally wrong.	38%	10%	8%	13%	27%	6%

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
[e] Except for their choice of sexual partners, homosexuals are not really different from anyone else.	46%	28%	2%	11%	9%	4%
[f] The public schools should provide students with appropriate homosexual role models.	4%	7%	4%	20%	59%	6%
[g] AIDS is God's way of punishing homosexuals.	5%	6%	3%	10%	71%	6%
[h] A person is born either a homosexual or a heterosexual, and experiences while growing up have little to do with becoming one or the other.	17%	13%	7%	15%	33%	15%
[i] The federal civil rights laws should be amended to give the same protected status to homosexuals as they give to racial, and religious						

	--Agree--			-Disagree-		DK/
	Stng	Some	N	Some	Stng	NS
minorities.	16%	17%	3%	16%	44%	5%
[j] Homosexual behavior should be against the law, even if it occurs between consenting adults.	7%	8%	3%	22%	55%	5%
[k] When homosexuals talk about gay rights, what they are really saying is that they want special treatment.	35%	24%	1%	14%	21%	5%
[l] A dentist should be allowed to refuse to treat someone who has AIDS or who is HIV positive.	34%	28%	6%	12%	13%	8%
[m] An employer should have the right to fire an employee on the grounds he or she is a homosexual.	7%	6%	3%	18%	64%	3%
[n] Homosexuals should not be allowed to teach in the public schools.	13%	9%	5%	27%	43%	4%

		--Agree--			-Disagree-		DK/
		Stng	Some	N	Some	Stng	NS
[o]	The government should actively discourage homosexual behavior.	17%	9%	5%	18%	47%	5%
[p]	An employer should have the right to not hire someone because he or she is a homosexual.	13%	13%	2%	19%	51%	3%
[q]	A landlord should have the right to evict a tenant on the grounds that he or she is a homosexual.	8%	5%	3%	22%	59%	4%
[r]	Homosexuals should not be allowed to be Scout masters.	26%	14%	6%	24%	26%	5%
[s]	A landlord should have the right to refuse to rent to someone because he or she is a homosexual.	13%	11%	2%	20%	51%	3%
[t]	Homosexual couples should be able to become legally married.	16%	21%	9%	13%	36%	5%

	--Agree-- Stng	Some	N	-Disagree- Some	Stng	DK/ NS
[u] Gay rights are more about making homosexual behavior acceptable than about equal housing and employment opportunities.	38%	26%	4%	14%	12%	7%
[v] Homosexual couples -- that is couples of the same sex -- should be allowed to adopt children.	15%	16%	5%	14%	43%	7%

28. Shortly after Amendment 2 passed last November, the Denver District Court ruled that it could not be enforced until there has been a full trial. Some people say that if the courts overturn Amendment 2 it shows that the people in power in this country will pretty much run things the way they want to regardless of what the public wants. What do you think? If the courts overturn Amendment 2 does it mean that the people in power in this country pretty much run things they [sic] way they want to regardless of what the public wants, or would you think it was overturned for another reason?

People in power ignore public . . 47%
Other reason 43%
Both [NO PROMPT] 2%
DK/NS 8%

* * * * *

TESTIMONY OF WILFORD G. PERKINS

[v. 15, p. 712]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

Mr. Perkins, as with the other witnesses, I'll have you swing around and speak directly into that microphone. There we go. And if you speak into the flat side, it works the best.

Mr. Kay.

DIRECT EXAMINATION

BY MR. KAY:

Q. Would you state your name, please.

A. Wilford G. Perkins.

Q. Mr. Perkins, were do you live?

A. I live in Colorado Springs.

* * * * *

[v. 15, p. 713]

Q. Mr. Perkins, are you involved with an organization known as Coloradans for Family Values?

A. I am the chairman of the board.

Q. How long have you been the chairman of the board?

[v. 15, p. 714]

A. Since its inception.

Q. When was that?

A. Oh, I think we incorporated in April of '91. Approximately. I'm not sure of the exact date.

Q. How did you come to be involved with Coloradans for Family Values? And is that organization sometimes called CFV?

A. Yes, it is. And it's Colorado for Family Values. I became involved as I took part in the discussion of the human relations council in Colorado Springs promoting a change in the ordinance for the city.

Q. What kind of change was being promoted in the City of Colorado Springs ordinance?

A. Well, in substance, my initial introduction to it had nothing to do with sexual orientation. I, two years ago, sexual orientation wasn't in my vocabulary. I became interested when I saw the impact of the change in the human relations proposed ordinance that would have an impact on me as a business person, and that's what caught my interest, and that's why I originally went to the hearings that were being conducted at the council.

Q. When was this?

A. The exact date I don't recall, but it was -- it was prior to our incorporating as a Colorado for Family Values [sic]. There was no organization at that time.

[v. 15, p. 715]

Q. Let me refer you to what's tabbed under Exhibit 10 in that blue book in front of you which is in fact known as Exhibit Y for the record. Do you recognize that document?

A. Not precisely. Is this the final draft of the ordinance as it was presented to the City?

Q. I'm not sure. How many drafts were there?

A. I don't know. There were several.

Q. Do you recognize that as one of the drafts that was used with the City of Colorado Springs?

A. It says that's what it is, yes.

Q. Do you recall ever seeing that document?

A. I'm sure I did. I looked at all of them.

Q. Did you read all of those documents?

A. I read them, yes. I'm not an attorney. I read them as a lay person. And the things that caught my eye were primarily the fact that as a business person, if one of my employees filed a complaint against me even though it could even be a perceived complaint, and they in the first draft said without due recourse of law, they could make me give them any information I had in my business or home, and then the commission was the judge and jury, and frankly, I thought something like that would make a gestapo

embarrassed and I saw this as a real potential problem for business and that's what got me involved, why I want [sic] to the hearings.

Q. So you want [sic] to the city council hearings on this

[v. 15, p. 715]

particular amendment to the City's ordinances?

A. Yes. Yes, I did.

Q. Did you speak out at those hearings?

A. No. In fact, the first meeting I went to there were so many people there I couldn't even get in.

Q. Did that ordinance have anything to do with sexual orientation?

A. Yes. Sexual orientation was in the wording of it.

Q. But you were more concerned as a business person?

MS. WINER: Excuse me, Judge. I'm going to object on the leading.

THE COURT: Sustained. Form of the question. Please ask questions in a non-leading manner.

Q. (BY MR. KAY): What were you concerned about that organization?

A. I was concerned about the impact, as I stated, the potential impact of just more red tape and more problems involving this type of complaint.

Q. Did there come a time when you became concerned about the sexual orientation aspects of that ordinance?

A. Well, as I read about it in the papers and then as I began to associate more with my friends who were involved with this, prior -- this issue prior to my involvement, then I began to see the impact of the sexual orientation clause.

[v. 15, p. 717]

Q. And what did you see as the impact that you were concerned about?

A. Well, I guess I probably went through -- through the kind of emotions and thinking that probably a majority of people in Colorado on this issue is that prior to this involvement with this ordinance and the sexual orientation, sexual orientation wasn't in my vocabulary. As a business person, we've had homosexual customers. I didn't consider them a threat to anybody. We did business just like everybody else. I have homosexual acquaintances. Some celibate -- one, not a large number, one is celibate, another is practicing. I didn't -- you know, I -- it just was not an issue with me.

Q. Did you have any homosexual employees at your Chrysler dealership?

A. I don't know. I may have. I have been asked that question by reporters, and I said if I did or if there are now, they are doing a good job.

Q. Do you make sexual orientation an issue at your business?

A. No, we don't.

Q. How did your involvement in the Colorado Springs ordinance which is in front of you lead to your involvement in CFV, Colorado for Family Values?

A. Well, as I began to become better involved on

[v. 15, p. 718]

what the implications of sexual orientation and then to understand that this really was the motivating factor in this proposed ordinance, and then I began to learn that there were ordinances in Boulder and in Aspen, and along about this time they were -- there was a vote on referendum type vote in Denver that was in progress, which had not caught my attention. But I began to go through this process and listening to this whole discussion of discrimination, and as most people, I had a negative feeling about discrimination, and had a tendency, I guess, to equate it with slavery, and Black situations, and I had to -- civil rights -- I was not a civil rights expert and don't claim to be now, but I began to understand that in America, there's no blanket protection from discrimination unless you are a member of a protected class.

Well, I never thought about these kind of things. But -- and it's important to understand and I had to get this straight in my head that there has to be a difference from this protected class, and as I've studied it I understand that the Civil Rights Act of 1964 began to identify groups of people who they termed to be suspect of discrimination, and to see whether they should go into a protected class. Which of course is what this Amendment is all about. And naturally, human beings, being what we are, we would all like to have as many advantages as we can. So there had to be some kind of a criteria to determine who is worthy of a protected class

[v. 15, p. 719]

status. Because there are many many reasons where people are discriminated against in America and there is no

protection from discrimination. If you are left-handed, if you are seven feet tall and you are not a basketball player, if you are four feet tall, there are problems addressed with that, and if you are -- every job description, of course, has some discriminating factors in it, so there has to be a criteria. And we discovered that this criteria had to do with economics and education, the matter of identification, and also the fact of political influence.

And as we went through the whole research, as to the economics of this, there had to be a definite history of discrimination. I'm sorry to take so much time about this, but I had to go through this to understand it, there had to be a history of discrimination that had prevented people from making an average income. That had denied them from access to average educational opportunities. And I guess when you look at the Black American situation, back in the 50's and early 60's that there was no question, there had been a history of discrimination which prevented them as a group, not individually and not isolated instances, but as a group from having the capability of making an average income and getting adequate educational opportunities.

When they looked at the political influence, I think that's changed some since then, but at that time they were

[v. 15, p. 720]

not politically powerful enough to affect these other conditions. And then as I looked at this last classification of identification, there was -- with the exception of religion for the most part, there was a clearly identifiable immutable physical characteristic so society knew they were dealing with a protected class person and give them a higher consideration. As we looked at the homosexuals, as a group, and then we had to figure out that the only way you could tell, they would have to say they were. How do -- are they economically disadvantaged? And by their own

research they are not, and you have access to that, and we -- and one of the surveys made by a homosexual marketing research firm they showed that 20,000 sampling around the nation and they showed average income over $55,000 for homosexual households, and we knew that the average income on heterosexual and just average Americans was just $32,000 and if you look at the traditional minorities it's down around $11, $12,000. So just taking that alone they were not disadvantaged economically.

Educationally, again, they showed very high. 62 percent having college degrees as compared to 24 percent of average Americans, and 17 for females.

And 30 percent, these are approximations, but 30 percent had advanced degrees. So they weren't disadvantaged. There had to have been no history of discrimination in those areas that affected those two.

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Q. You are not saying that there was no --

MS. WINER: Excuse me, Judge, but I'm going to object to the leading.

THE COURT: Yes. Questions that start "you are not stating" are leading questions. Please rephrase.

Q. (BY MR. KAY): Did you consider whether they had been discriminated against other than economically and educationally in your analysis?

A. Well, what we concentrated on was the protected class status. You know, discrimination takes forms in a lot of things. As an [sic] used car salesman I have experienced discrimination. You know, I can do something about what

people think of me as a used car salesmen who do business with me, but as an industry, unfortunately, we have earned our reputation, and it's not a good one.

Now, does that mean I should go to the city council and ask them to write an ordinance to give me more respect because I suffer discrimination? I didn't see any connection by the fact that there is discrimination. We have to look at does that discrimination impact a group of people to the extent they deserve protected class status and the criteria that has been used up to this point doesn't say so. Now that's my impression.

Q. Did you look at whether they had been subject to name calling or gay bashing as people have termed it in

[v. 15, p. 722]

the past?

A. Well, it's my opinion and I think it's a matter of fact that if someone is -- if a homosexual is harmed physically or threatened or their property damaged, somebody is breaking the law, and they ought to be apprehended and prosecuted. No question about that. Now, if that's taking place and someone is breaking the law, they should be prosecuted.

Q. You looked at education and income?

A. And we also looked at the idea of political influence.

Q. What did you find there?

A. Well, I can tell you -- before the campaign started, I was pretty naive about that, but I knew just looking at what was going on in this nation that political influence is

demonstrated everyday [sic]. Later in the campaign, I got a better education on that. But I think --

Q. Political influences everyday [sic] by whom?

A. There's no question about they are very politically affluent, very politically affluent.

Q. You are talking about the gay and lesbians?

A. I am talking about the gay and lesbian community, however you want to identify them.

Q. How do you identify them?

A. Well, it's a problem. But basically if somebody

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tells me they are homosexual, I assume they are. And I would say that it basically is the desire to have sex with that someone of the same gender.

Q. How do you identify them as a group?

A. I can't. I mean they can form together, I guess, and present themselves as a group. But it's a self identification. That's one of the problems.

Q. Have they done that? Have they gotten together in groups that you know of?

A. Yes, they have. The national gay and lesbian task force is one of the most influential PAC groups in America. So they -- when they identify themselves and join organizations that say this is what they are, what they propose, I guess you have to say, yeah, that must be it.

Q. What else did you do in your analysis on the sexual orientation issue as it relates to suspect class or protected class?

A. Well, this identification is a very important one, because as I looked at that as a business person, if it became an advantage to be homosexual, then also one would have to say, well, I'm homosexual and if you used the term sexual orientation and put it in a protected class, then it means that every time a business person makes a personnel decision, they open themselves to the potential problem of being confronted with I didn't get that job because I was homosexual or I didn't

[v. 15, p. 724]

get that job because I'm heterosexual or I didn't get that promotion or I didn't get the raise or what have you, and all based on whatever they described themselves as being. And now, that doesn't mean they would always win the lawsuit. But it means you would always have to defend yourselv and you would always face the possibility of losing a case like in any of those matters. So as a business person that was extremely important to me.

Q. Any other analysis you did on the protected class status and whether it should or should not be granted to -- on the basis of sexual orientation?

A. Yes. As we looked at the history of this civil rights matter and sexual orientation, who we discovered through the last 16, 17 years that the National Gay and Lesbian Task Force or some other organizations with same motivation have been promoting legislation in Congress which would include sexual orientation as a protected class under the Civil Rights Act of '64. And as we thought about it, and as it dies in committee, it has every year, and I think for a very good reason, the reason being that sexual orientation is everybody. All the time, every situation. Now, to

assume -- and this is what we used in our campaign, the special right of protected class status is a special right. Because everybody doesn't have it in every situation. Now, if everybody has this special right in every situation, then who has a special right? And the

[v. 15, p. 725]

answer is nobody. And who loses in that group? The losers are the very people for whom the Civil Rights Act was initiated. People who -- groups in society that needed a leg up to get started in education, jobs, employment, through affirmative action. These are all parts of it making the protected class status work. And personally I am very much in favor of civil rights. I am very much in favor of groups of people who need a leg up in society getting the opportunity. And I see this as a real threat to the purpose of the Civil Rights Act in 1964.

Q. And --

A. If they were to include sexual orientation.

Q. -- any other analysis you did on this issue?

A. Well, there was a lot of detail work that was done and some of the other fellows could probably address better than I.

Q. Let's talk about that. Who are the other people involved in CFV at its inception?

A. Well, the two founders of CFV and two people that were I think most instrumental were Kevin Tebedo and Tony Marco.

Q. How did you come to be involved with those two and their organization known as Colorado for Family Values?

A. Well, Kevin I did not know. Perhaps I had met sometime [sic]. I know his family. I had done business with his family and with his mother in particular.

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Q. His mother is a state legislature [sic]?

A. Yes, she is a state senator. I [illegible] known her through other political work. And Tony, I had a slight acquaintance with in that we went to the same church. We were not -- we just went to the same church and had known each other.

Q. Let me ask you was CFV formed as a religious organization or a religious right organization?

A. Well, we have been confronted with that question on many many times, and if you look at the Amendment, it doesn't say anything about immorality or morality or criminalization or anything like that. It addresses protected class status. Now, people approach the idea of Amendment 2, many people do, from a religious persuasion. People on both sides of the issue. Some say it's a bad deal. Some say it's a good deal. We did not -- Amendment 2 is not a religious issue, as a piece of legislation, even though some people approach it in that manner. It's a matter of protected class status, and that's the issue that we argue.

Q. Is it a religious issue to you?

A. I would come from a religious persuasion, because my faith is very important to me. But that is not the thrust of the amendment. Even though someone approaches it from a religious prospective on the opposing view they can be just genuinely sincere about that. We argued this primarily from a

[v. 15, p. 727]

civil rights status. Now, in certain environments where we were sending information to churches or pastors, we made reference to religious issues because that was a -- that was their interest. But, if you were to look at our radio spots, or you look at our television spots during the campaign, it doesn't address that at all. We do make some reference to that in the tabloid that we used during the campaign, but as I say, in a political campaign you look at the market that you are appealing to with whatever the media you are using, and that's the way you present it, and that's the way we did.

Q. So you did have some religious material --

MS. WINER: Excuse me, Judge. I would object to summarizing the testimony.

THE COURT: I'm going to sustain that as well. It's in the nature of a summary; is also in the nature of leading.

Q. (BY MR. KAY): Did you have any religious material in your campaign materials?

A. Yes, we did.

Q. Was that the thrust of your campaign materials?

A. No, it was not.

Q. After your involvement with the Colorado Springs ordinance -- by the way, what happened to that Colorado Springs sexual orientation ordinance?

A. Well, eventually the city council voted it out

[v. 15, p. 728]

eight to one.

Q. What was your next involvement in the political arena as it relates to sexual orientation provisions or laws?

A. Well, as we began to look at what happened in Colorado, and we began to apply what we had thought and researched and discussed and considered, we saw that this was an issue in the entire state. There were a variety of ways it could be approached. But as we considered statutes, and we considered possibility of using the legislature, we felt like that the best way was to give the entire state an opportunity to vote on the issue and use the initiative process, and that's what we decided to do.

Q. What made you think it was a statewide issue?

A. Well, one of the main reasons was that the Governor had issued some directive regarding government agencies, the human relations or the civil rights commission was making it a state issue.

Q. How were they making it a state issue?

A. Well, they were implementing this through their whole civil rights commission structure. And thinking in terms of the nature of civil rights legislation, it's much broader than local areas. And so that when you go through the initiative process, you have to gain signatures, and then people everywhere in the state, qualified voters, have an opportunity to vote on it. And the other reason that we wanted to use the

[v. 15, p. 729]

initiative process instead of trying to go through the legislature, we were very aware of the fact of the very strong political influence that the homosexual proponents had. And it's much easier for them to influence a small group of legislators as opposed to having everyone have an opportunity to express their opinion on the issue. So that

probability was the most compelling interest that we had in going through the initiative process.

A. How did you come up with the language that eventually became known as Amendment 2?

Q. Well, we employed the use of attorneys that we discussed the basic issue that we wanted to address and that was protected class status for homosexual and bisexuals and lesbians, and we gave that to the attorneys, and they massaged it, they were all constitutional attorneys or eventually that were called into [sic] critique and to, you know, give their impression, because we knew at that time we would be going through the process that we are here today. And this, of course, is no surprise. So in order to be sure that we met the constitutional requirements, we had constitutional attorneys draw it up. We had constitutional attorneys around the country review it, and this language, I didn't read it all, but I'm sure that's it, was what we came up with. And when we submitted that to the Secretary of State, and the Attorney General, they -- I don't now how many appeals there were regarding

[v. 15, p. 730]

the wording, but as I recall there were four or five, but to my knowledge there was not one word changed in the way we originally submitted the proposed amendment.

Q. Now, you are talking about the petition process -- the referendum process that you went through to get Amendment 2 on the ballot?

A. Yes, that's correct. We had to get the wording approved before we could print the forms to get the signatures for the initiative. We had to -- that all had to be approved before we could start distributing them and getting signatures.

Q. Did you do that process yourself?

A. Well, I personally yes, I did -- well, you mean gathering signatures?

Q. The whole process, the language being drafted?

A. No.

Q. Submission to the Secretary of State, submission to the Attorney General, the hearings on the language, obtaining the petition signatures, did you do all that?

A. No. I was in attendance most of the time. A lot of that was done by the legal people and Kevin and Tony were directly involved more than I was in that, but I was present in many of the things that were talked about.

Q. Was the amendment language eventually approved to go on the ballot?

A. Yes, it was.

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Q. What did you do then?

A. Then we went into the process of gaining signatures to get it qualified to be placed on the ballot in November of 1992.

Q. How did you do that?

A. Well, we used the traditional manner of just distributing the forms with people who are on your side in this issue. There's two ways to do it, and you can pay to have professional petition carriers getting signatures. We

didn't have any money. The other way is to get volunteers to carry the signatures, and these [sic] what we did. And I personally carried the petition.

Q. How many signatures did you eventually get?

A. Me personally?

Q. No, the organization.

A. Approximately 85,000. I would like to point out, though, that it the process I personally gained or secured over a thousand signatures. And I did this in all kinds of arenas, so to speak. I was in service clubs, in business, in church, in parades, one parade I attended, in shopping malls. My wife thought that the clipboard had become an appendage. And I talked with a lot of people. And this whole process really strengthened my resolve and understanding of how the majority of people in Colorado felt. And it wasn't a matter of hatred. It wasn't a matter of trying to deny civil rights to

[v. 15, p. 732]

homosexuals. They have the same civil rights as everybody else. Their whole premise of the people that I talked to was that they have equal rights, and they certainly don't deserve any special rights. And that's why they signed the petition.

Q. Is that what you intended Amendment 2 to do?

A. Well, what we intended Amendment 2 to do was to deny protected class status to homosexuals. And in the process, that does not give any protected class status to heterosexuals.

Q. Why not?

A. Our argument consistently was throughout the campaign that how you have sex for whatever reason is not an appropriate criteria for civil rights.

Q. After you obtained enough signatures to get this amendment on the ballot for November of 1992, did you conduct a political campaign to support this amendment?

A. Yes, we did.

Q. CFV did that?

A. Colorado for Family Values did that, yes.

Q. And how did you do that?

A. Well, we used a lot of the traditional manners of conducting a political campaign. We didn't have the money to do some of the things that should be done in a campaign. We didn't have the money to conduct polls. We thought that we had done a considerable amount of polling and just gathering the

[v. 15, p. 733]

signatures, so we had to rely on that. We set up groups of people in the communities all over the state to support our campaign. We used I think pretty much the traditional manners of conducting a political campaign where we could afford it.

Q. Did you have any experience in conducting political campaigns prior to this?

A. I have been involved in the political campaigns not never as a candidate, but I have been campaign manager for a couple of -- for city council candidate, for -- and then he later on went on to be a state representative as a candidate.

And I've been involved in other actions as a business person in the last 45 years in Colorado Springs.

Q. Did CFV produce any written material in support of its political campaign to promote Amendment 2?

A. Yes, we did. One other thing, I am a precinct committee member.

Q. Let's look --

MR. KAY: Before we move on, Your Honor, I would move admission of Defendant's Exhibit Y, the proposed city of Colorado Springs sexual orientation ordinance.

MS. WINER: Your Honor, I don't think any foundation has been laid for it. I think that Mr. Perkins has stated for the record that he doesn't know what draft this is or whether it is or isn't what the State has said it is. So that would be the basis of my objection.

[v. 15, p. 734]

THE COURT: Anything further, Mr. Kay?

MR. KAY: I think he's identified it, and that that was -- he was involved in that process at the city level.

THE COURT: The objection is overruled. Mr. Perkins hasn't indicated that this is the final draft which was approved, but he has indicated it was one of those, and it's offered for an indication of how he got started in the process, and it will be received for that purpose.

Q. (BY MR. KAY): Mr. Perkins, if you'll turn to tab 8 which is Exhibit W, do you recognize those documents?

A. Yes, I do.

Q. What are those documents?

A. This tabloid -- let me see. Is it all just one document?

Q. It's a lengthy document with a couple of shorter ones in the back.

A. This is the copy of the tabloid that we distributed toward the end of the campaign.

Q. When you say tabloid, you mean the original of this looked like a little newspaper?

A. That's correct.

Q. And it's been copied in individual little sections?

A. That's correct.

Q. So the original if he had it would open up

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like a newspaper or tabloid?

A. That's correct.

Q. What's at the back of that, behind the tabloid?

A. This was a handout that we have used. These two are brochures that we used during the campaign.

The CFV report is a monthly letter that we mailed out to our data base, and that we used this after the campaign, this started after the campaign.

Q. Are all those documents that are produced by Colorado for Family Values and other than the last CFV report were prepared during the campaign?

A. That's correct.

MR. KAY: Your Honor, we would move for admission of Exhibit W.

MS. WINER: We have no objection, Judge.

THE COURT: W is admitted.

Q. (BY MR. KAY): How many copies of this campaign material did you produce and distribute throughout the State of Colorado?

A. The tabloid we printed 800,000. I really don't know exactly how many of the handouts we printed but a large number.

Q. Did you distribute all those throughout the state of Colorado during the campaign?

A. The tabloid which was distributed toward the end

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of the campaign, we estimate that we did not have the money to mail it, so we delivered them by hand, and we estimate that we delivered approximately 750,000. The handouts were used -- given to our supporters and they distributed those.

Q. Did Colorado for Family Values do any other campaigning in support of Amendment 2 other than publish this material and distribute it?

A. Yes, we did. And I guess it was at that time that I was really introduced to the tremendous political influence that the homosexual proponents have in Colorado. And not only Colorado, but over the country.

Q. How was that?

A. Well, bear in mind now I have been in business and our company has been in business in Colorado Springs since 1945. And I started doing television commercials in the early 50's. I just want to give you an example. There are three television stations that cover the Colorado Springs market, excluding the cable. Two of those stations, and I have been a substantial advertiser on all of those stations over the years, two of those stations, the news departments were so biased on this, it was absolutely amazing to me, and I said, hey, guys, I'm a customer, remember? This is old Will. I come in here and I give you several thousand dollars a month. Lighten up a little. But that didn't help a bit.

Q. When you say they are biased, what do you mean?

[v. 15, p. 737]

A. I mean in the way they approached this situation. They absolutely took our opponent's position, and we had to dig out of a hole every time I talked to them. Let me just give you an example that happened one morning. I was in Grand Junction, and I have been called by a radio station in San Antonio, WOAI wanted an interview, so I made arrangements and I called them from the airport in Grand Junction and they said, Mr. Perkins, we are going to put you on hold for a moment, until the host comes on, and I listened to the host give the whole misconception of Amendment 2 and just bury me before I'm even introduced on the program.

Q. What was the misconception.

A. That's the kind of thing that I experienced all the time.

Q. What is this misconception in the meaning?

A. Well, the misconception, for instance, he describes it as Amendment 2, the amendment that denies homosexuals civil rights in Colorado. That's nonsense.

Q. Why is that a misconception?

A. Because we do not deny civil rights for homosexuals in Colorado. They have the same civil rights as everybody else.

Q. What else have you experienced?

A. Well, I came to Denver to place the television spots --

[v. 15, p. 738]

Q. We are talking about the campaign?

A. I'm talking about the campaign. And we had two aspects to our campaign. Civil rights and the behavior aspect. Now bear in mind I had no problem with the spots except in the Denver market. In one of the stations in Colorado Springs, we -- where we had the problem was with the behavior spots, and let me go into that in detail. We didn't have money to do the traditional television campaigns, so we used ten second spots, announcements. In this ten seconds -- in these ten second spots there was footage of gay pride parades. We didn't stage the spots. We didn't produce them. They were public parades in San Francisco.

The first time I saw the footage, I said I don't think this could happen in America. We have to make absolutely sure that this is correct, that we are not using trick photography, what have you. So we call the San Francisco police department and described what we had, and they said, yes, that's the way it is. And we said, Well, Don't you have any laws against obscenity and indecent exposure and that sort of thing, and they said, oh, yes, we do, and they said but our main job is to keep the peace, and if those people didn't get what they want they get really nasty. And then besides that, nobody wanted to lose their job. And I said, what do you mean by that? And he said, well, the Mayor's in the parade.

Now, the Mayor is now a United States senator.

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But the situation is this: Even though they had the laws in place in San Francisco where this particular group has so much influence, they overlook the laws. And they disregard them in order to accommodate what they are doing. So we felt, knowing full well never saying that all homosexuals parade like this, but this is an aspect of what Colorado was being asked to embrace and to give protected class status to, and we felt that this was an aspect of this whole issue that the citizens of Colorado had a right to know about, and it was part of their decision making process.

So in the ten second spots which we heavily censored and which we required that they run after 10:00 p.m. at night, we -- I came up. I already purchased the time in Denver, the channels, if I remember the channels, I think there was 2, 4, 9 and I think 12 bought the time. No problem. Later on submitted the footage, submitted the actual spots. And they all in Denver said, no, we won't run these. It's not appropriate for our station. So I went to the cable stations and I got the same answer. What had happened is that we had been effectively censored from running these spots. And bear in mind they ran everyplace

else in the state, no problems, but only in Denver did they say this is not acceptable.

After the election, NBC aired an hour-long special, hosted by Maria Shriver, Prime Time in Denver, carrying uncensored footage of the same parade, the same footage we tried

[v. 15, p. 740]

to get censored, heavily censored, to run them after 10:00 o'clock at night, and it was absolutely appropriate at that time. That's the kind of bias that we experienced, and the reason I say this represents influence. When you are running a political campaign, if the media is on your side, normally you are the winner. That's why they were surprised -- so surprised when we were victorious. They were flabbergasted.

Q. Let's talk about who supported and who opposed this Amendment during the campaign. In the state of Colorado, what elected officials came out against Amendment 2?

A. Senator Campbell was out spoken [sic] on the issue. I'm trying to think of the -- there were ads in one of the political papers that is distributed before the state convention, I forget what the name of the paper is, but I remember there were other politicians opposed to us but the one that made the biggest impression on me was Campbell. What made an even bigger impression on me was the fact that the central committee of the democratic party came out strongly in opposition of Amendment 2. The Republican party did not make any statements about it. To my knowledge, there was no candidates making a strong public position about Amendment 2 that was brought to my attention.

Q. Other than now Senator Campbell, any other candidates that were running for election in November that came out against Amendment 2?

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A. I can't specifically identify them by name, because I don't remember. There were some, but I don't know. I can't think of their names at this time.

Q. How about officials that were not running for election, but already elected officials? Any of those come out in opposition to Amendment 2?

A. Well, if you call Governor Romer a politician, you would have to say that he was the honorary chairman of EPOC, which is our opposing organization. Patricia Shroeder, Representative Schroeder was another honorary chair person [sic]. The Mayor Webb was in opposition to Amendment 2. To my knowledge, the only newspaper editorial staff that took our position was the Gazette Telegraph in Colorado Springs and the Tribune in Greeley. Now, there may have been others but I'm not aware of them.

Q. So two newspapers that you know of supported Amendment 2?

A. Yes.

Q. How many newspapers in Colorado came out in direct opposition to Amendment 2?

A. How many are there?

Q. All the rest came in direct opposition?

A. Yes, to my knowledge.

Q. The Denver Post? The Rocky Mountain News?

A. Rocky Mountain News, yes.

[v. 15, p. 742]

Q. Grand Junction Central?

A. Yes. Pueblo.

Q. Pueblo?

A. Chiefton.

Q. Did any --

A. Does that give you some idea of what media influence means?

Q. -- did any elected officials in the State of Colorado, state, city, or county, come out in support of Amendment 2?

A. They may have in private. But after the election, there were comments made both ways by some, but during the elections and during the campaign, I do not recall that kind of support from the Chamber of Commerce. They were very politically motivated, and most of the comments that came were in opposition to Amendment 2, especially after the election. I don't -- this was a movement of the people, not the politicians. They didn't touch it.

Q. Did the Colorado Civil Rights Commission take a position on Amendment 2?

A. Yes, they did.

Q. What was their position?

A. Their position was in opposition to it and that always confused me. The people that the civil rights commission purports to represent are the people covered under

[v. 15, p. 743]

the Civil Rights Act. And here's a piece of legislation that could seriously affect civil rights in this nation and this state, and former chairman of the civil rights commission, Mr. Ignacio Rodriguez, Mr. John Franklin from Mark Probe, those three former chairmen of the commission were very much in favor of Amendment 2. Men who had devoted their lives to this. And so men whose counsel we sought during this campaign and publicly took our position, who I consider experts on this issue, were 100 percent behind Amendment 2. And yet the commission under the direction of Jacqueline Marquez and Rabbi Steven Foster took an opposite view. And it was interesting to me that they would be promoting an issue that would be detrimental to the people they represent.

Q. How would it be detrimental?

A. Because it will dilute the whole meaning of civil rights and dilute the resources that are available to be used, And Jacqueline Marquez commented in the report I heard during the campaign about the fact that they were understaffed and didn't have the personnel and so forth to meet all of the needs of the commission, and Mr. Duran who was also one of the civil employees of the civil rights commission stated in some of the material that we used of his that it would dilute the resources available to the implementation of the civil rights by the commission.

Q. During the campaign, did CFV take a position on

[v. 15, p. 744]
whether Amendment 2 would affect people's rights under what in Colorado is known as the Smoker's Bill of rights?

A. During the campaign we were constantly being barraged by the fact that the homosexuals didn't have any recourse if they were fired simply because they were a homosexual. The Smoker's act which was -- I don't think it says anything about smokers -- in fact, I know it doesn't, but it was commonly referred to as the Smoker's Act because it was promoted by the tobacco industry, and in 1990, it was becoming popular to ban smoking on the job to some businesses and so forth, and they were concerned that it would be possible for an employer to discharge a person who wasn't actually smoking on the job but he knew they smoked in their private life. So the idea basically says, as my understanding of the Smoker's bill, is that it's illegal to discharge someone who is engaged in a legal activity off the job. It's illegal to fire them for that reason from the job. So we thought about this, and saying, well, now if homosexuals are just wholesaling being discharged because -- only because they are homosexuals, this would be a perfect resource for them. Sodomy is legal in Colorado. They are claiming that being homosexuals and engaging in a legal activity off the job and because somebody fired them but they are homosexual that would be a perfect resource. And keeping in mind that the Smoker's Bill went in in 1990. Well, during our campaign nobody had used it that way. Later on, I guess

[v. 15, p. 745]
now there is an attorney here in Denver who used that and was awarded a $91,000 judgment for it.

Q. Why did he claim he was fired, if you know?

A. As I understand it, he claim he was fired because he was homosexual.

MS. WINER: Your Honor, I would object. That's objectionable.

THE COURT: It's hearsay unless you are offering the case for the Court to take judicial notice.

MR. KAY: I would offer the case. It was a Denver District Court case and an attorney here in the City and County of Denver sued his employer for being terminated.

MS. WINER: Your Honor, I would object to --

THE COURT: If you tell me what the case name is and the case number, the Court is able to take judicial notice of its own files.

MR. KAY: It's Borquez versus Ozer & Mullen. The plaintiffs listed Mr. Borquez as a witness throughout this entire trial.

MS. WINER: Your Honor, I have no objection to the Court taking judicial notice of the case.

THE COURT: Thank you.

Q. (BY MR. KAY): Mr. Perkins, did you use the term special rights in the Amendment 2 language?

A. No, we did not. And --

[v. 15, p. 746]

Q. And why not?

A. Well, as we were getting a consultation from attorneys around the country, one of the attorneys that we were consulting with was a man by the name of Bruce

McCormick, and Mr. McCormick, as he reviewed this language, sent us a letter in which he gave us the advice that -- and in essence was saying that special rights it not a legal term and should not be used in the wording of the amendment itself but it would be a good campaign slogan.

Q. Did you use it as a campaign slogan?

A. As we thought through our whole campaign, this was really the thrust of our campaign, that protected class status was a special right. Homosexual proponents wanted that special right, and we said that's not appropriate. They have equal rights but not special rights. And that was basically the thrust of our campaign.

Q. What happened? Obviously, Amendment 2 passed in November. What has happened since the passage? What has Colorado for Family Values done since the passage of the Amendment in November of 1992?

A. We have been involved in several things. Shortly after it -- as you know, shortly after the election, the suit was filed which we are in process here now. The homosexual proponents initiated a boycott of the state. There had been a boycott on my business throughout the campaign. So

[v. 15, p. 747]

one of the things that I have done as I have been interviewed by radio stations and some television stations around the country is to do whatever I could to dispel the basis of this boycott. We have been acting as a resource for other states which are involved in the same issue who see the threat the same way we do. We have prepared information for them that would have been extremely useful to us if we had had them as we went through our campaign. We have been involved in informing our supporters with a monthly newsletter, and it's -- we feel a responsibility to the majority

voters of Colorado to continue to represent Amendment 2 on this -- here in the state of Colorado.

Q. You mentioned an organization by the name of EPOC?

A. Yes.

Q. That you said was your opposition. What was EPOC?

A. Well, let's see. It's equal opportunities and I forget what it stood for, and I told them if you want equal opportunities, you already got that, so come on over to our side, but they didn't see it that way. But they were our counter part [sic].

Q. Do you know -- first of all, how much money did Colorado for Family Values raise and spend during the election?

A. Well, approximately $375,000. This was all a

[v. 15, p. 748]

matter of record. I don't have an exact amount but approximately that.

Q. Do you know how much EPOC raised and spent?

A. Their reports indicated approximately twice that much.

Q. So almost $800,000?

A. It didn't include all the free media they got but that's what they spent.

Q. During the campaign, what position did EPOC take on Amendment 2? What was their campaign slogan?

A. Well, basically, they said we don't want protected class status. We don't want affirmative action. We just want equal rights. And they talked about the protection in jobs, housing, and public accommodations. And one debate that I had with attorney Pat Steadman at the Brown Palace Hotel for the City Club of Denver, he said that's all we want --

MS. WINER: Your Honor I'm going to object to the hearsay.

THE COURT: The last question was what was their policy or what was their approach against the amendment, and all I'm hearing as this is being representative of the arguments or the approach that EPOC took, not as hearsay. I'm hearing it representative of the opposition.

Mr. Perkins, you may complete your answer.

THE WITNESS: Thank you, Your Honor.

[v. 15, p. 749]

Mr. Steadman, who was a spokesman for EPOC and I had appeared with him on other occasions, made the point that all they were interested in was protection in jobs, housing, and public accommodations. And when it came my time, I suppose there were 150 people or so in the audience, I asked him I said how many of you have ever spent a night in a hotel or motel with someone of the same sex? Either on a convention or vacation or what have you. Nearly everybody raised their hand. I said how many times when you registered at the counter did the clerk ask you if you were homosexual. And nobody raised their hand. I said how

many times when you rented a house or an apartment or bought a house or whatever did anybody ever ask you if you were homosexual? And nobody raised their hand. And I said how many of you when you applied for a job did anybody ask you if you were homosexual? And nobody raised their hand. I said how many of you employers out there know how many homosexuals you have working for you? And nobody raised their hand. I said how many of you care? And nobody raised their hand. I said in any of those instances, you could make it happen. You could make that become the central issue, but you would have to make it that. And then I sat down and Mr. Steadman stood up and he said okay, he said, I admit it, it hardly ever happens, but if it does there ought to be a law against it. And the people laughed. They understand that if you have a law for every conceivable thing that can happen, you

[v. 15, p. 750]

can restrict society to a point where it really can't function. Somebody said that more definitively, the less you have.

MS. WINER: Your Honor I have to object to this hearsay. I think it goes way beyond the question that was asked as far as what is the position of EPOC.

THE COURT: Yes, the answer has strayed beyond the limits of the question. I think we will take the noon recess and we will return at 1:30.

(A recess was taken.)

AFTERNOON SESSION, FRIDAY,
OCTOBER 15, 1993

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

THE COURT: Mr. Perkins, you can resume the stand.

THE WITNESS: Thank you.

THE COURT: Thank you. Mr. Kay, you're in direct. You may continue.

MR. KAY: Thank you.

FURTHER DIRECT EXAMINATION

BY MR. KAY:

Q. Mr. Perkins, a lot has been said about what Amendment 2 does to homosexuals, lesbians and bisexuals. Would you tell the Court what you feel Amendment 2 does for the citizens of the state of Colorado.

[v. 15, p. 751]

A. In terms of the effect on the homosexuals, at no time have we ever promoted mistreatment of homosexuals, and as I said earlier, if someone is doing that, if they're maligning them, threatening them, whatever, somebody's breaking the law. The laws are in place to protect that, and they should be administered.

As far as the effect on the rest of the state, our objective was to deny protected class status to the homosexual, bisexual and lesbians, who were the only ones who were seeking that on sexual orientation.

We also said that sexual orientation is not an appropriate criteria for civil rights, and that includes heterosexuals.

We think that the crux of the matter and the reason we think it's such a pivotal, important, compelling reason for Amendment 2 is the fact that under Amendment 2,

homosexual proponents can advocate any kind of a program they want to in Colorado, but they have to do that as a special interest group and not as a protected class, and we think that has very important ramifications.

Take the school situation, for example. If homosexual proponents go in and approach the administration and say, we think homosexuality should be taught as being normal, healthy, just another way of doing things, it should be taught by homosexuals, if necessary we should be able to lead students

[v. 15, p. 752]

through this activity to help them make a choice and identify where they're going sexually -- now, if the parents hear about this and they object to that and homosexuals are a protected class, then they have a -- you know, being a protected class isn't saying they can break the law, but those gray areas makes it much more difficult to win an argument in a setting like that if you're dealing with a protected class situation. We want the playing field to be level, and we want parents to be able to express their opinion.

And let me give you just an example. I was talking with the superintendent of one of the large school districts in Colorado Springs, and I said, "Doctor, what will you do when a group of parents come to you and say, "We represent straight children and homosexual children. We're very concerned about the locker room and the shower room and the toilet facilities here at the school. Now, we think that there should be a facility for straight boys, there should be a facility for homosexual boys, there should be a facility for homosexual girls and for straight girls, and we know that since sex takes place in the bathroom in some instances" -- and there's plenty of documentation to that, "'we feel like there should be supervision in the homosexual bathrooms.'"

Now, his remark was --

MS. WINER: Your Honor, I'd have to object to this hearsay.

[v. 15, p. 753]

THE COURT: The response of the school superintendent would be in the nature of hearsay. It's sustained.

Q. (BY MR. KAY) can you tell the Court what your feelings are about this issue without --

A. Yes, I can.

Q. -- giving them what the school administrator may have said to you?

A. The objective of the homosexual proponent is to blend the gender issue to where it is not a matter of discussion, it's not an important thing. In the case I described, one solution would be to just have one bathroom so you wouldn't have discrimination for anybody, and I think this is one of the important reasons that homosexuality does not have protected class status, because this issue will be debated as this progresses, and that's why I consider it to be extremely important.

Q. Did you intend Amendment 2 to discriminate against homosexuals, lesbians and bisexuals?

A. Our intention of Amendment 2 was to deny them protected class status. It was not a matter of discrimination.

Q. Do you hold any ill will toward homosexuals, lesbians, bisexuals, gay men personally?

A. I'm going to have to say that my experience with this whole thing has made me more compassionate to homosexuals,

[v. 15, p. 754]

and I say that in the light of the fact that, as I've studied the issue for the last months, almost two years, I poured a lot of my life into it. I say that and I am more than ever convinced that the importance of Amendment 2 is extremely pivotal for this state and for this nation even though I'm very compassionate to the situation with the homosexuals.

Q. Have you experienced any problems in your personal life as a result of your being involved in the Amendment 2 campaign?

A. This is a very emotional issue. I guess that's one thing everybody would agree on, and some people are prone to express their opinions in various ways. My personal business has had a boycott on it for several months prior to the state. I get -- people bring me copies of things that appear on fax machines in Colorado Springs referring to me, but I understand that. I understand that it's emotional. It's important to everybody regardless of what side you come from, and I don't make a big deal out of that.

MR. KAY: That's all I have, Your Honor.

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(CROSS EXAMINATION)

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[v. 15, p. 770]

Q. Sir, excuse me again. I've asked you whether you know of any cities or states or municipalities that actually have any quotas for gays and lesbians.

A. Any ordinance that establishes homosexuals as a -- or sexual orientation as a protected class --

Q. Mr. Perkins?

A. -- affirmative action is a logical progression.

* * * * *

[v. 15, p. 771]

Q. I'll start from the question before that, then. In the Amendment 2 text right there, you also refer to quota preferences; isn't that correct?

A. That's correct.

Q. Although you don't know of any cities or states or municipalities that actually have any quotas for gays and lesbians, do you?

A. I said that any ordinance that has protected class status, affirmative action is a logical progression of that.

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[v. 15, p. 786]

(REDIRECT EXAMINATION)

Q. Mr. Perkins, how did Amendment 2 fare with the religions in the state of Colorado? How many supported and how many opposed Amendment 2, if you know?

* * * * *

THE WITNESS: Thank you.

I thought as I looked at this that we would get broad support from pastors. We called one meeting. We sent out letters to 400 pastors in Colorado Springs asking them to come to a meeting where we could explain this, and we had two associates show up for that meeting. I tell people that I know how General Custer felt the morning he mod. .ed that first arrow

[v. 15, p. 787]

shirt. That was my first big surprise.

During the campaign we -- the outspoken people on this issue for the most part were -- who were people of the cloth were on the other side of this issue. I vividly remember one of the captions from -- I think it was the Rocky Mountain News that said, "300 Denver Area Pastors Blast Amendment 2."

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TESTIMONY OF TONY MARCO

[v. 15, p. 821]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

I'll ask that in your testimony you speak directly to the flat side of the microphone. It will assist everyone in hearing

DIRECT EXAMINATION

BY MR. TYMKOVICH:

Q. Good afternoon, Mr. Marco.

A. Good afternoon.

Q. Please state your name.

A. My name is Anthony Nicholas Marco.

* * * * *

[v. 15, p. 828]

Q. Mr. Marco, could you describe for us now the events that led up to the issue that we are in court today, and that is the Amendment 2 initiative process. Are you familiar with an organization called Colorado for Family Values?

[v. 15, p. 829]

A. Yes, I'm familiar with it.

Q. What is that organization?

A. Well, it's an organization whose goal was very simple and direct through the initiative process to put into place an amendment which would say that homosexual, bisexual, and lesbian orientation was not to be granted protected class status, and all that comes attendant with that status in the state of Colorado.

Q. How did you personally first get involved with this issue of sexual orientation?

A. Well, that's an interesting question. It dates back to February 6th, 1991. On that date, I had no idea that Boulder, Denver, and Aspen, had ordinances granting protective class status to gays. A friend of mine called me up and said that a bill was to be considered the next day by the House Judiciary Committee up here in Denver, HB-1059 to be exact, and that this bill would first of all grant for the first time legal recognition to sexual orientation equivalent to that of ethic [sic] groups. In fact, the bill was entitled Ethnic Intimidation Bill. It was authored by Wilma Webb who is the wife of Mayor Wellington Webb, and it said that -- this added to substantially a previous ethic [sic] intimidation bill sexual orientation and added penalties equivalent to felonies for any group that would -- might simply make remarks that would make someone feel uncomfortable because of their sexual

[v. 15, p. 830]

orientation.

Now, what this represented to me was aggression against the fundamental rights to free speech, free association, and potentially free exercise of religious believes [sic] of all Colorado citizens, since this was a bill with state-wide import, and furthermore, to me, immediately when I heard this, I said this is preposterous, the equation of sexual orientation with ethnicity to me that represented the colossal nonsequitur. And my friend said simply someone needs to go up there and testify genes [sic] this will [sic].

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[v. 15, p. 831]

Q. How do you believe that HB-1059 equated ethnicity and behavior?

A. Well, quite, simply by extending the same protections as it says from harassment, that were enjoyed by handicapped people, the aged, a number of other categories, and recognized ethnic groups or protected classes extending those same protections to gays as an entire class.

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[v. 15, p. 833]

Q. You used the term "protected class status." Could you describe what you mean by that?

A. Well, I think that the Attorney General of the

[v. 15, p. 834]

state of Colorado in their analysis and ballot initiatives defined the term quite well. It refers to the awarding of a particular recognition under law of a group who has been chosen for protection from discrimination and chosen to be given the ability to claim discrimination, you know, under civil rights laws.

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[v. 15, p. 836]

Q. And can you describe the founding of Colorado for Family Values for me, please.

A. First of all, there might be a couple of other

[v. 15, p. 837]

items, but that we need to mention that demonstrated what I considered to be statewide aggression by gay militants and supporters as the fundamental rights of Colorado citizens. These two instances of statewide activity were in the -- well, three, brought by Governor Romer's executive order were not the only impetus that precipitated Amendment 2. In

addition, we found as a result of Governor Romer's executive order pressure being exerted by the gay militants on the student affairs departments of universities and the University of Colorado is to make it mandatory follow all clubs whatever their nature on campus to either accept devout gays in membership or to lose all privileges. This is one example of this. We have from an article in which Robin Miller who is the author of the Colorado Springs ordinance something to the effect that there was a broad statewide agenda of the militant gay movement which in fact Amendment 2 pretty much put on hold because of the necessity to very actively oppose passage of the amendment. But all of these questions came to bear and came to the point around, oh, February 15th to February 21st or so, when I began thinking about the possibility of finding a way to put a stop to this kind of aggression with one single act.

* * * * *

[v. 15, p. 839]

Q. Why did you come to the believe [sic] that a statewide measure was appropriate and necessary?

A. It was necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease. Secondly the legislature is very vulnerable to all kinds of lobbying and other activity without citizens' direct representation on that activity. Lobbying for which I discovered gay militants were very very well equipped and were very well experienced. And so the only way to insure that this kind of activity would stop would be through passage of constitutional amendment. And since the citizens have the right to enact constitutional amendment through citizen initiative process, this seemed the logic [sic] way to accomplish that purpose.

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[v. 15, p. 842]

Q. Now, on the easel behind you is a copy of the text of Amendment 2. Can you explain to us how or why the language was chosen that you selected to use within the text of the initiative?

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THE WITNESS: Okay. The fundamental principal behind the drafting of the initiative language was quite simply to take those factors which we felt that gay militants had

[v. 15, p. 843]

themselves said that they desired, plus all of the factors that are attendant on achievement of or awarding of protective class status and simply say no to those.

Q. Why did you use the terms homosexual, lesbian, or bisexual orientation conduct, practices, or relationship? Why did you select that phrase?

A. Actually, I didn't select that phrase. That was selected and reviewed by the constitutional attorneys involved.

Q. What was CFV's intent in using that language?

A. The intent of using that language was quite simply to forbid the awarding of protected class status and other attendant benefits thereof at that point. And that was, I would say, the sole intent of this. Now, I'm not in a position to question what the -- you know, what these constitution attorneys wrote and reviewed, but I can say that the protected status terminology came from the second draft of the Colorado Springs Human Rights Ordinance, and that,

of course, was written at least in part by Robin Miller who was a devout lesbian attorney.

Q. How about the phrase minority status?

A. We took that from Denver. I don't know whether it's called Human Rights Ordinance or whatever. I have that ordinance also. And also some material relating to it in some the term minorities is used referring to all those protected under that ordinance.

[v. 15, p. 844]

Q. How about the phrase quota preferences?

A. Well, in the Boulder ordinance, I have found a phrase that according to former Colorado Civil Rights Commission chairman John Franklin, former Colorado Civil Rights Attorney Earl Rodriguez, and director of Regional Offices for Colorado Civil Rights Division Tom Duran allowed for, did not call for but allowed for affirmative action for all classes protected under the ordinance, which would have included sexual orientation; thus implying possible affirmative action benefits.

The second draft of the Colorado Springs Human Rights Ordinance also called for a review of the city's affirmative action policies. Presumably in my thinking it allowed for the inclusion of the new classes that now would have been protected by that ordinance which included sexual orientation. There were a number of other ordinances from other places in the country protecting sexual orientation and reports that I had that indicated that affirmative action was being sought by gay and lesbian relatives in the book after the book was written by--

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[v. 15, p. 845]

Q. (BY MR. TYMKOVICH): Mr. Marco, what about the phrase claim of discrimination? How was that derived?

A. From my understanding, only groups of joint protected status can make claims of discrimination under civil rights law, so it was absolutely necessary to include that phrase to round off the entire concept of forbidding protected class status of sexual orientation.

Q. How did you intend to affect the rights of gay people through the use of that language.

A. Quite simply to simply say that gays would not be recognized as a protected class and therefore not have claims of discrimination. The two go inextricably together. There is no such thing as a group that enjoys claims of discrimination which is not regarded legally as a protected class.

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[v. 15, p. 846]

Q. I didn't ask you the people you intended the Amendment 2 to apply to and by its terms it applies to the state of Colorado and various entities. What was the intention of CFV in drafting that language?

A. The primary intention was to resist statewide aggression on the part of gay militants against the fundamental rights of Colorado citizens.

Q. So it applied to governmental entities?

A. Yes, governmental entities. And in addition, our thinking was that civil rights protections of this sort are a matter of statewide concern. My opinion, the application of specific civil rights protections from town to town is a retrograde principal. I thought the whole issue was settled back in 1964. The Civil Rights Act of '64, which in a sense overruled the ability of local jurisdictions to decide whether or not they were going to protect certain specific classes. Obviously, if it comes extremely inefficient, let's say they have separate water fountains for let's say African American people in one town and not have them in another and to conduct business in that way this was also an attempt to consolidate the State's policy with regard to this issue.

[v. 15, p. 847]

Q. By its language, it's intended to apply to political subdivisions, municipalities and school districts?

A. That's correct.

Q. How comprehensive did you intend Amendment 2 to be?

A. General statewide import, covering the disposition of this issue whenever it occurred. I did realize that this would nullify enforcement of Boulder, Denver, and Aspen's gay rights ordinances, but that effect was in fact only incidental to the larger purpose of the amendment.

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[v. 15, p. 850]

Q. What was the intent of the effect of Amendment 2 on the private sector or private individuals?

A. It had no intended effect on private sector business or employment policies within private corporations, you know, there's no intended effect in that regard. This is simply an amendment to limit government from extending the protected status to this kind of sexual orientation.

* * * * *

[v. 15, p. 852]

Q. What was the purpose that CFV had a concern about the local ordinances?

A. Again, my concern is that this represents a retrograde principal in civil rights. I don't think these kinds of issues are a matter of local certain [sic]. Also, my

[v. 15, p. 853]

analysis of the strategy of the gay militant movement is that gay militancy prefers to begin an attempt to gain larger scale protections by first getting passage of smaller -- of ordinances on smaller scale in towns and cities around the state and then using these as leverage to then approach state legislators with concepts of a larger scale, larger scale measures.

Q. And?

A. And so by dealing with all of this in essence in one full swoop, we simply closed the lid on the entire issue here in the state of Colorado.

Q. Was Amendment 2 intended to take away all of the legal rights of gay, lesbian and bisexual individuals in Colorado?

A. No. And of course, I don't believe for a moment that it has that effect.

Q. What sorts of rights or legal protections did you believe existed after Amendment 2 had passed and were implemented?

A. Well, the right to petition, the right to vote, the right to lobby politically, the right to conduct business, the right to freely associate, every right that has been recognized as fundamental to every U.S. citizen. The only privileges I would say denied to gay, lesbian, bisexual citizens under Amendment 2 are attendant on the right to secure and make

[v. 15, p. 854]

use of protected class status.

Q. What about any laws relating to employment?

A. I don't see that amendment 2 has any effect on laws such as, for example, the so-called Smoker's Bill which in fact doesn't mention smokers but simply grant protection to any citizen from being dismissed for any legal off-the-job activity. So I don't think it affects these kinds of laws that may be on the books nor does it affect private corporations who may desire to extend employment practice protections within the organization to gay people.

Q. Now, you've testified that you proposed special rights for gay individuals on civil rights grounds and you prepared written materials to reflect yours and the organization's thinking on that. What was the nature of your analysis, and why you didn't believe this group should be eligible for protected class status?

A. Again, in essence, I moved away from using the term special rights because it legally has not meaning from what I understand. But in terms of protected class status, I you understand that the U.S. Supreme Court through a number of decisions has delineated certain criteria which offer boundaries to groups that are to be recognized a

suspect classes. These criteria involve, one, the demonstration that the entire class has mean income that is below the average, as a result of societal pressure or harm inflicted on that group for utterly

[v. 15, p. 855]

irrational bases. And also under that category would come measurable cultural and educational deprivation or disadvantage. The second criteria states that the group must demonstrate obvious immutable characteristics which clearly define it is a class. And the entire class must do so. And third criterion is that the group must be demonstrably politically powerless, and therefore in need of government support, in order to advance its interests and to bring such a group to a par in American society.

* * * * *

[v. 15, p. 861]

Q. What were some of the consequences of the problems you saw if gay individuals did seek protected class status that you and your organization objected to?

A. I think my fundamental objection is that sexual orientation affords no rational basis whatsoever on which to define or identify the class of people seeking the protections. And as far as I'm concerned, this opens the door to an enormous amount of potential civil rights fraud. Secondly, the inclusion of sexual orientation under whatever definition to the realm of protected classes in fact represents a threat to the entire structure of civil rights as we know it for the very simple reason that if we suddenly allow sexual

[v. 15, p. 862]

orientation protected class status, we have effectively made nearly a hundred percent, I would suppose, if one says that virgins have no sexual orientation, at least nine [sic] percent of American society suddenly becomes a protected minority.

That's a fundamental observant in my opinion. These protections were given to groups who could demonstrate that such protections were needed to grant sexual orientation protected class status would mean the rendering of entire civil rights protections as we have always known them and represent classic non-sequitur in an utterly irrational principal.

Q. What concerns did you have about the effect of sexual orientation provisions on the business community?

A. I think possibly Mr. Perkins could speak to that better than I could. I don't know whether it's permissible for me to present a couple of operative scenarios, but in essence, granting these protections allows an immediate factor of intimidation to enter into the employment practice or the practice of hiring in businesses. And for example, person might come in under ordinance granting protected class status through sexual orientation to apply for a job along side an African American person and a woman, let's say, and say, well, I notice you have a number of African American people working here, you have a number of women, how many homosexuals do you have? Can you imagine this person who's a Caucasian male and who says I am a homosexual and I want this job, you have an

[v. 15, p. 863]

immediate potential threat of a lawsuit if the employment is denied and possible grievance complaints on behalf of the other two recognized protected classes who were denied that job. In that case, the plaintiffs' definition of sexual orientation offer no grounds whatsoever for proof of one's identity in terms of sexual orientation. So the potential for fraud in cases like that is enormous.

* * * * *

Q. (BY MR. TYMKOVICH): What were CFV's concerns with respect to private organizations, if any?

A. In essence, what we saw here was a denial of the right of free association without a rational basis. And under certain circumstances on behalf of recognized protected classes, the category right of free association is suspended temporarily so that those classes would not be shut out. Now, in this case the denial or the right to free association was without a rational basis in my opinion.

Q. And what was CFV's concern about the effect of sexual orientation provisions on religious organizations or

[v. 15, p. 864]

churches?

A. Well, in essence, this granting protected class status of sexual orientation threatened the total demolition of various religious denominations, and others who did not or whose moral beliefs were not in accord with the gay lifestyle or the militant gay political agenda.

Q. Excuse me, didn't the ordinances typically have a religious exception?

A. These religious exemptions are deeply flawed and extremely weak in a number of regards. Most of the ordinances I have read simply say that the religious organization does not have to hire someone who is not of their denomination. That offers no protection whatsoever because on thing anyone can undergo the membership training classes, whatever a church might require, and then afterwards in therefore becoming a member of their denomination and afterwards say I am a homosexual and I wish to seek employment or something or another. Secondly, these exemptions do not cover what are known as parish church organizations at all since most of these

organizations are not denominate in nature and therefore no protection is offered whatsoever. Third, these kinds of protections would put the church at an instant disadvantage in the public eye because gay militants do say that churches are the only organizations allowed to, quote, discriminate against gays without have to suffer recriminations. And fourth, a sort of panoply, if you

[v. 15, p. 865]

will, hangs over all 58 of the organizations in the form of the U.S. Supreme Court precedent Bob Jones University versus Simon which ruled that the beliefs of all non-profit 501(3)(c) organizations must be in accord with pubic policy. If for example gays are ever to be cast as a protective class to the Civil Rights Act of 1964, all religious exemptions would be swept away like match sticks in a hurricane. So these are simply what I would call smoke screens to lull religious opponents of this kind of legislation to sleep.

* * * * *

(CROSS-EXAMINATION)

[v. 16, p. 877]

Q. Now, you've got to be a member of a suspect class in order to make a claim of discrimination; isn't that right?

A. Yes.

* * * * *

[v. 16, p. 878]

Q. (BY MS. WINER): In your thinking, the way you have though about this and evolved your analysis and written about it, as far as you're concerned, you've got to be a

member of a suspect class in order to be able to make a claim of discrimination; isn't that true?

A. Well, a protected or suspect class.

Q. So, you've got to be a member of either a protected class or suspect class?

A. That is at least my understanding. Again, I'm not an attorney so that doesn't represent an expert opinion.

* * * * *

[v. 16, p. 879]

Q. Okay. Now, Colorado for Family Values' campaign slogan on Amendment 2 was no special rights; isn't that correct?

A. That's correct.

Q. But special rights is actually a meaningless term, isn't it?

A. It is a mainly meaningless term.

Q. Your further involved analysis revealed it was meaningless and irrelevant to the real debate; isn't that correct?

A. I believe that's true. And I also believe that hate as a family value is a meaningless term, as well. These are just political slogans.

Q. But if you could do it all now, if Amendment 2 hadn't passed yet, you wouldn't use no special rights as your campaign slogan because it is a meaningless term?

* * * * *

Q. You believe that the idea of no special rights is irrelevant to the real debate, don't you, sir?

A. I believe it is.

* * * * *

TESTIMONY OF HARVEY C. MANSFIELD, Ph.D.

[v. 16, p. 988]

the witness herein, having been first duly sworn, on oath testified as follows:

DIRECT EXAMINATION

BY MR. TYMKOVICH:

Q. Could you please state your name and employment, sir.

A. Harvey C. Mansfield. I am a professor of
[v. 16, p. 989]
government at Harvard University.

Q. Is it correct you've been called by the State to offer opinion testimony on political and structural reasons on theory for constitutional reasons such as Amendment 2?

A. Yes.

* * * * *

[v. 16, p. 993]

THE COURT: NN is admitted in evidence and Professor Mansfield is received as an expert in those areas, political theory, political philosophy, political structures and

[v. 16, p. 994]

American constitutionalism.

* * * * *

Q. Could you briefly describe for the Court generally what the framers' theories of the American constitution are.

[v. 16, p. 995]

A. The American constitution is -- was a new kind of republic. A republic which had never been seen before, a large republic. All previous republics have been small republics which depended upon a strict education to teach people to trust one another. And were kept small so that the government would not be too large. Those governments suffered from terrible failings according to the founders. Those would be the republics of ancient Greek [sic] and also modern worlds Venus and Hong. For one thing they were too weak to sustain themselves against foreign entities. But they suffer from the problem of majority faction. Majority faction according to Madison's familiar definition and Federalist 10 is a group that acts contrary to the rights of individuals or against the public good. These majority factions were particularly prevalent in small republics because the people there could be activated by democracy and led into hasty decisions contrary to the rights or contrary to the public good.

So they proposed to replace this tradition of small republics with a large republic. This would be a large republic that would be strong enough to withstand foreign

entities and have a strong central government and a strong military and a strong executive power too, and which would not depend on a strict moral education but rather make greater appeal to self interests. And which therefore also would not depend on a homogenous nation, but on a heterogenous, one

[v. 16, p. 996]

composed of many different groups.

Q. And is that what we mean by our system of representative government?

A. Representative government is a way of making the large republic work. It puts government at a distance from the people. So that there were appointed judges and congressmen and the president or executives with terms were not immediately subject to the popular will once they have been elected. So in the large republic, it's kind of a constitutional distance between the government and the people which enables the government to liberate, slow things down, and prevent hasty decision.

Q. What role do state governments fit within that federal structure that you've just been describing?

A. Well, state governments retain for this large republic the advantages of small republics because they are closer to the people and they allow issues to be taken up at a closer and more visible level. And the state governments as well as local governments within the states allow the people to feel that the government as a whole belongs to them. This is also a function of the most popular branch of the federal government which according to federalists obviously is a house of representatives which is elected every other year.

So the government most [sic] both have this constitutional distance, this is a certain distance between the

[v. 16, p. 997]

government and the people, in order to make government work better and to make it more moderate, and there must be a connection between the government and the people. Some way of making the people feel that this government is theirs.

Q. Now, you mentioned the term "factions." What do we mean my [sic] factionalism or factions within our government?

A. Well, this same definition that Madison gave is still useful today. A faction is a group of people who acts contrary to the rights of individuals or contrary to the public good. And this is the evil which is epidemic. It's a popular government. They start with a commitment to popular or republican government and therefore they look to that evil or trouble which is most associated with that form of government.

Q. And what role does interest group politics play within that mix that you've been describing?

A. According to Madison's famous argument, the moral heterogenous people allows for different interest groups. And since it's a popular government, it will be ruled by the people. But being ruled by the people means being ruled by a majority of the people. However, in a large and heterogenus nation, there isn't any automatic majority. Every majority has to be composed because there isn't a simple or obvious majority that can have its will, so to speak, automatically.

So this composed majority consists of a compromise or a coalition of different groups.

[v. 16, p. 998]

Q. How do those coalitions form within our system?

A. Well, within our system, they form in a number of ways, but all of them requiring political activity, especially political parties with chief instruments of coalitions built in our system, but a private or semi-private so called pressure groups also play an important function in this system.

Q. You are familiar with the election surrounding Amendment 2. Is that an example of coalition building its proponents, Colorado for Family Values?

MR. EURICH: Objection. Leading.

THE COURT: The form of the question is leading. I will allow the Professor to answer. I have the sense it is the Professor who's testifying not the podium.

You may answer, Professor.

THE WITNESS: Amendment 2 seems very much to be in this tradition, American tradition of coalition politics because it represents an attempt by a small group at the beginning to convince a majority of Coloradans that this amendment is something they need. And in order to do that, they had to pull together others with different opinions somewhat from their own who were willing to agree on this particular language. And on this result. For example, not just those of the religious right or those who dislike homosexuals, but also, say, conservatives who are against intrusive government, and liberals who think that the addition

[v. 16, p. 999]

of gays to anti-discrimination ordinances dilutes the civil rights of other more disadvantaged groups.

So in our system, it wasn't the case that the single group beginning this movement was sufficient to pull it through. In order to do that, it had to moderate its fuse.

Q. (BY .IR. TYMKOVICH): What sort of mechanisms did the framers counter balance the actions of interest groups?

A. Well, first of all, the large republic itself makes it very difficult, just because we have so large a heterogenus [sic] nation makes it very difficult for any one group to dominate. It always has to get a coalition of alike thinking but not perfectly alike thinking groups. So that what we have is a nation of minorities, there isn't any official majority in this country. And this is in short by the notion of representative government which puts the government as a whole at a certain distance from the people, and it is also in short by the system of federalism that enables state governments to give and to breathe freely within this larger atmosphere.

Q. Now, Colorado and a lot of western states have a tradition of the initiative and referendum mechanisms, popular democracy, plebiscites. How do such devices fit within the constitutional scheme that you've been describing?

A. Well, initiative and referendum are instruments from the progressive era. They were originally attempts and I think they are still such to bring government closer to the

[v. 16, p. 1000]

people. A kind of criticism of the original founding and a statement that the constitutional distance I was speaking of had grown too great and government needed to be brought back closer to the people. So the Colorado initiative which is very common in this country now [sic] been in Wisconsin, California and so on, and it enables the people to make a

change, from themselves, not necessarily through the parties. In fact usually not. In their constitution.

Q. And that process is another one of the checks and balances that you were describing?

A. Yes. This is one of the checks that goes to the attempt to keep government close to the people.

Q. How does the initiative mechanism relate to what you are describing as the large republic?

A. It requires since the State, after all, is not a locality or a neighborhood but in itself a larger republic than the republics of ancient Greece, it remembers there's a process of coalition built in and to be gone through in order to secure enough people to make a majority on such a measure as Amendment 2.

Q. I suppose we live in an imperfect Madison democracy. What sort of changes have occurred in American politics that relate to this process that you've been describing?

A. Well, you could look at the Civil War, Amendments

[v. 16, p. 1001]

13, 14, and 15th amendments which nationalized and constitutionalized the question of slavery, removing it from statewide decision and requiring a uniform national group. And in fact, most of the civil rights legislation has been of the same kind. It's constitutionalized or in the case of a Civil Rights Act of 1964 nationalized the question of civil rights in order to remove rights from -- the rights of individuals from the jeopardy they will be in if they were ruled over by local and fascias majorities.

Q. Could you relate to the situation we find ourselves in with Amendment 2.

A. Well, Amendment 2, I think, was an attempt of this kind to decide the question at the state level and to remove the right of local majorities in Boulder and Aspen and Denver to pass anti-gay discrimination ordinances.

Q. And why would our electorate -- what are some of the reasons why our electorate would want to do that?

A. They would want to do that to moderate the issue. Instead of having it decided by local majorities who felt very strongly and were concentrated, it should be decided more moderately by a statewide majority that is gathered in a way that it insures or at least gives a high probability of a compromise in the moderate solution.

Q. Why would the statewide coalition necessarily be more moderate than say the local coalition that you've

[v. 16, p. 1002]

described?

A. Well, it wouldn't necessarily but there's a good probability of it. There's as much probability as you can achieve by the use of governmental forum. The reason is in order to get a statewide majority, you have to moderate your views, and you have to appeal to people and counties in different parts of the state, both rural and city, and also to different interests of the state. And particularly to people who aren't closely ideologically involved in the question of gay rights.

Q. So in sum, then, could you describe how this process affects the dangers or the issues of factionalism that you've described.

A. Well, I think Amendment 2 was an attempt to reduce the danger of local fascias majorities who would pass intrusive anti-gay ordinances. And it will do so by requiring that the decision be made at the statewide level where the politicians have to think of the people in the middle, the moderates, and the centralists.

Q. Well, what would be wrong with just leaving the issue to local majorities, local governmental counties, local cities, which was the status quo prior to Amendment 2?

A. It could be done, and it is done I think wisely with many other issues. But on this one, the people of Colorado determined that they wanted a more moderate solution for the

[v. 16, p. 1003]

state uniformly than would be available to these three municipalities or others that might choose to join them.

Q. Now, Amendment 2 in effect is a restructuring of government. What type of issues would an electorate normally look to in placing such an issue say in the state constitution like Amendment 2 attempts to do?

A. Well, it would be a kind of issue where there might be a hiding partisan or inflamed minority that would want its way and get its way in certain municipalities to the disadvantage of the minorities living in that locality, just what I think happened in this case.

Q. Can a reconstruction of this sort support stability and respect for the political process?

A. I think so. First, it solves the problem more moderately and less intrusively. And second, it gives the people a sense that they can -- that the government is not alien to them, and that they can get together by their own

initiative, and thinking in a constitutional mode to produce a result that gives them a sense of satisfaction and accomplishment.

Q. In your opinion as a political theorist and teacher, is Amendment 2 an appropriate way to address that response and that structural concern?

A. In my opinion it is.

Q. What do we mean by the tyranny of the majority,

[v. 16, p. 1004]

and how does that fit into the process you've been describing?

A. The tyranny of the majority would just be a majority faction. Once again, evidencing it is a group acting against individual rights or against the public good, and that is the special problem of a popular government. Because in a popular government, the majority rules. It looks as if any majority that's ruling is legitimate because it goes along with a form of government as a whole. So a tyranny -- but actually it can be, a majority can be tyrannical. So it's a majority that looks legitimate but isn't. Therefore a particular problem in republican governments. If there's just a minority that's trying to impose it will, that's much easier to deal with because you simply say that's a minority and not the majority. But if it's a focus or tyrannical majority, there's a difficulty.

Q. Some might argue, for example, that Amendment 2 constitutes a tyranny of the majority. How would you respond to that accusation?

A. Well, that's the kind of debate which is what one would expect in an issue of this kind. I would respond by saying that the content of Amendment 2 is the least intrusive

both politically and morally of any other solution that's been proposed.

Q. Why would you say that, Professor Mansfield?

A. It's the least intrusive politically because it

[v. 16, p. 1005]

allows the local minorities who don't agree with anti-gay discrimination ordinances to live according to a regime of rights in which there's no protected status for them. And it's the least intrusive morally because it doesn't require you to take a stand one way or the other on the gay question. Even though there is a kind of moral consequence to Amendment 2; namely, that it doesn't result in the moral equivalence of heterosexuals and homosexuals.

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[v. 16, p. 1007]

Q. Now, plaintiffs have also argued that Amendment 2 somehow dismisses debate or reduces the competition among ideas. How would you respond to that criticism?

A. I think it proves the competition of ideas because, as I said, it takes the argument out of the extremes of both sides and brings the center or the people in the middle into it because Amendment 2 being a statewide question has to -- had to appeal to those voters who were not personally or deeply involved in the question of gay rights. It had to make -- the movement behind Amendment 2 had to make general and coalition building arguments. These arguments are more moderate and also have greater variety than the arguments of the yes and no which we find from the extremes.

Q. Plaintiffs have also argued that Amendment 2 exacerbates divisiveness without our state. How would you respond to that statement?

[v. 16, p. 1008]

A. I would say, no, that on the contrary represents a solution which permits a kind of live and let live policy, which offers the least intrusion into our lives and morals much -- I think much less than a statewide anti-gay rights discrimination law would do.

Q. Why is that, Professor Mansfield?

A. That's because it justifies less intrusion of local or state government into people's behavior and attitudes. It provides more respect for the realm of the private both politically and morally because I have tried to show morally this is an expansive rather than a constricting solution that you find in Amendment 2.

Q. And Professor Mansfield, is it your opinion that Amendment 2 is an appropriate way to deal with that issue as you've described it?

A. I think it is indeed, yes.

MR. TYMKOVICH: Thank you.

* * * * *

(CROSS-EXAMINATION)

[v. 16, p. 1009]

Q. Have you looked at the campaign materials used by CFV, Colorado for Family Values to see whether or not in fact they were appealing to moderates?

A. I don't say that every group in the Colorado

[v. 16, p. 1010]

election was behaving moderately.

Q. Let me ask the question more precisely. You have not looked at the campaign materials used by Colorado for Family Values, have you?

A. That's right.

Q. So you aren't aware of the extent to which those materials included graphic descriptions of homosexual behavior, are you?

A. I got some inkling of that this morning.

Q. You would not consider that to be an appeal to moderates, would you?

A. It's an appeal to -- well, one of the groups in the coalition.

Q. But not to moderates?

A. Yeah -- yes, I mean you are moving my argument from moderation as a kind of result of having to appeal to many different groups to a group called moderates.

Q. But you would not consider graphic descriptions of homosexual activity by a fringe of the homosexual community to be an appeal to moderates, would you?

A. No, I wouldn't, no.

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[v. 16, p. 1012]

Q. What you call a hypothetical campaign you refer to it that way because you don't know what this campaign looked like, do you?

A. I think I do. I think that it was not just a campaign against pedophilia, but also in great part even much greater part based on an argument that government is too intrusive and it's a protected status for gays is the first step towards affirmative action for them and this certain resentment against this sort of special treatment.

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TESTIMONY OF JOSEPH EDWARD BROADUS

[v. 17, p. 1175]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

It appears not to be Morris [sic] Code.

DIRECT EXAMINATION

BY MR. KAY:

Q. Would you state your name for the record.

A. My name is Joseph Edward Broadus.

Q. Mr. Broadus, how are you presently employed?

A. I am presently employed as an Assistant Professor of Law at George Mason University in Arlington, Virginia, and also a Special Assistant to Carl Anderson on the United States Civil Rights Commission.

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[v. 17, p. 1177]

Q. What do your duties as special assistant to a member of the United States Commission on Civil Rights include?

A. They include both policy analysis and legal analysis of issues that have appeared before the Commission and evaluation of reports that come in from the National Advisory

[v. 17, p. 1178]

Commissions and the State Advisory Commissions that the Commission has. They are a wide range of duties. They are largely those of a special assistant who has to review and digest and make comment on matters of importance before the Commission.

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THE COURT: Professor Broadus is received as an expert in constitutional law and civil rights law and may give opinions under Rule 702 in those areas. His opinions, however, aren't going to interpret the law for the Court in the ruling that it must make.

* * * * *

[v. 17, p. 1186]

Q. Has sexual orientation been addressed at the national level in either Title 7 or a separate act?

A. Sexual orientation has been repeatedly considered both by the Court as to whether or not it was within the inclusion of what was meant by sex within the meaning of Title 7 and by Congress because of repeated invitations and lobbying attempts to get it included inside Title 7. And significantly, despite a lengthy history of effort and many debates and considerations, Congress has never found the arguments related to sexual orientation inclusion persuasive.

In a similar way, it can be compared to the way
[v. 17, p. 1187]
Congress has treated other kinds of conditions which are viewed as being -- as having a behavioral language. For example, alcoholism is addressed and considered within the context of the Rehabilitation Act. Yet there are limits on the ability to consider it because it's recognized that it could be well end [sic] despite the fact that alcoholism represents -- may in some cases, as the Supreme Court has urged, in some cases have a genetic link, and despite the fact that it demean. a personality, despite the fact that it creates a dynamic social and other situations, despite the fact that people in this group people who are prone to be alcoholics and engage in alcoholism are looked down upon in society and discriminated against, despite all of those, there's a very special need for measuring behaviors that have -- that really are behavioral and measurable, and alcoholism is an example of it. Drugs are treated the same way. There are other conditions that people have attempted -- that meet those kind of criteria.

The same would be for sexual orientation. Compulsive gamblers, for example.

Q. Have you made an analysis of whether or not in your opinion it would be appropriate to place sexual orientation under Title 7 on the federal act or on a separate act like the ADA or an age discrimination law?

A. Yes, I have.

Q. And what is your opinion?

[v. 17, p. 1188]

A. My opinion is that the same that Congress has mentioned it would be inappropriate to do that. It has all of the problems that exist, for example, with alcoholism or some of these other conditions, and I would bring your attention, for example, alcoholism does not create a permanent protection for the party. It simply creates a protocol by which the employer and the employee can work over some period to attempt to cure -- to cure the problem. And if there's a failure in this process, then normal employment procedures can be taken to terminate.

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[v. 17, p. 1189]

Q. (BY MR. KAY): Mr. Broadus, in your review of the Boulder, Denver, and Aspen City Ordinances, what were you reviewing those for? What were you trying to determine from those ordinances?

A. I was greatly concerned with whether these ordinances contained provisions or were structured so as to have applications that would raise serious questions about whether or not they would impinge upon the right of free exercise of religion or association or whether or not they would impinge upon the rights of intimate association that

have to do with a family or the rights of parents to advise and counsel their children.

Q. And those rights that you were concerned they might impinge upon, where are those rights found in our system of constitutional government?

[v. 17, p. 1190]

A. Those rights are found in the First Amendment.

Q. What is your opinion on the Denver, Boulder, and Aspen anti-discrimination statutes and whether they impinge on those fundamental rights or not?

A. My opinion on the statute was, well, they vary in their terms and degrees. They all have terms that are deeply disturbing on their possible impact on those rights.

Q. And what are those terms and what are those potential impacts on those other fundamental rights?

A. In the case of the Aspen statute, it is the complete indiscriminate application of all these provisions to all of those interests without any effort, accommodation, or association or limit.

Q. And what are those accommodations? What could have happened to accommodate those fundamental rights of free exercise of religion, association, privacy, et cetera?

A. Well, as I said, the statutes vary. And in the Boulder and in the Denver ordinances, there are attempts to draft exemptions for religious institutions; although, there is not one that drafted, for example, to exempt religious and motivated conduct. Typical one is the inclusion of marital status as a category.

In other jurisdictions, it has been held that these marital status provisions apply to home owners or small units of renters, amounts to a violation of both a freedom of

[v. 17, p. 1191]

religion and freedom of association to choose in their home to have a provision under the penalty of even of just a misdemeanor but under penalty of criminal sanction denies a parent the right to control the environment. For example, if you are in a situation where you need to rent a room in your home that says that you can't make decisions about moral or ethical or other evaluation of character that is personal in any range is quite damaging to those associational interests.

I would say even, for example, the ability to choose the person whom shares your home on the basis of religion, something that we might not want to see happen in commerce, is a right that we might want to preserve in the privacy of one's home because one may want to choose intimate associates because of their ability to contribute to one's spiritual growth by your shared practice of religion. And there was -- you know, the notion that that person's right to do that, to live inside their own home perhaps and commune with people of their own faith and share their values that is something that is deeply recognized in our society for a long or for a lengthy period of time, and its trashed by these ordinances and in a disturbing way. They can proceed with complete disregard for that.

Q. Now, in your review of these three city ordinances, do they go beyond the classifications found in federal law for civil rights protections?

[v. 17, p. 1192]

A. Yes, they do. Yes, they do. They go well beyond the classifications found in civil rights protection.

Q. And do you have an opinion as to the appropriateness or inappropriateness of that?

A. I have an opinion as to the appropriateness of it. Part of it is -- grows out of a matter that I have just stated, and the other part grows out of the inclusion of what may well be broad enough to include behaviorially-based activity which has generally been against national policy. It's very bad policy to weigh on the side of, you know, one set of behaviors as opposed to another. Particularly, for example, behavior like marital status. If what we are talking about in marital status as one of these clearly spells out is putting the weight on cohabitation, it's at odds where the notion that there is a legal status of marriage since what it seems to say is that while this status of marriage exists it has to be meaningless in that no one can do anything to aid or abet it to proceed with complete irrelevance to a category that exists at least in part because it's been found to be in the vital interests of the state.

Q. Do you have an opinion as to whether adding all of these additional categories beyond what the federal civil rights laws provide for breathe disrespect for civil rights laws in general?

A. Yes, I do. And the answer is yes. I think one

[v. 17, p. 1193]

of the things that's happened is -- and its difficult to weigh the impact of this. For example, the ADA which definitely does address a very vital question of discrimination against the disabled is so loosely worded as to include within its provisions almost 80 percent of the American population, and we are just lucky that most of those people haven't had the opportunity to find lawyers and proceed in the system with their claims. We are just lucky that's the case. And one of the big debates over the enactment of the Americans with Disability [sic] Act was between people with no historic

or critical kind of disabilities, and those with like disabilities over what definition should be included in the Act. And most of that was loss but as to the kind of provisions that are here, for example, you know, escalating cohabitation, you know, to the status of a protected class definitely does bring the law into disrespect if for no other reason that it makes a mockery of those other provisions talking about how vital the central marriage is to the society.

And further, there has been a growing sense, you could even find it in the academic literature of debate about the religion and the efficacy of Title 7 law and effect upon American character itself, not of living in a society where we help the truly needy and we attempt to avoid doing injury, but the fact that we are evolving in a society of victimization where even those who are relatively well off seek to protect

[v. 17, p. 1194]

themselves as being needy and use the power of the State to gain what could be a special privilege.

Earlier I heard some discussion about whether or not these statutes or ordinances result in awarding of any special privilege to any class of person and, of course, the answer is that every civil rights provision ends up awarding special privileges. And it does that because the property right is vested in the owner. The right to rent or dispose is one of the great and honored roots in our society. So if you redefine a class that has a right to limit your discretion in disposal and use, you have transferred the property right from the prior title holder to this class. And that constitutes a very large privilege.

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[v. 17, p. 1196]

Q. Is there a concern in your opinion -- is there a concern with having all these different cities creating different classifications which are also different from the state civil rights protections group?

A. Yes. And I think the more troubling concern with these ordinances appear to be precisely the kind of warning that Madison issued with the Federalist about the potential abuse of local majorities. . . .

* * * * *

[v. 17, p. 1198]

Q. Let's turn our attention now to Amendment 2. Have you made an analysis of how Amendment 2 relates to these concerns that you've expressed about the city ordinances of Boulder, Denver, and Aspen?

A. Sure. Yes, I have.

Q. And?

A. It's essential -- essentially what it does is say to these local governments that have been so completely reckless in their basic concern for the constitutional items in the areas of privacy and freedom of association, it says to them if you don't know how to play with your toys, we are going to take them away from you. You are simply not going to be permitted to legislate in this area.

Q. "This area" would be in the area of granting protected status based on homosexual, bisexual, and lesbian orientation?

A. Yes.

* * * * *

(CROSS-EXAMINATION)

[v. 17, p. 1224]

Q. Now, you have already told us you have no idea whether there have been any abuses in Denver, Aspen, or Boulder on any of the concerns that you've expressed, right?

A. Yes.

Q. You've already told us you have no idea about that?

A. The only --

[v. 17, p. 1225]

Q. You have no information about that, correct?

A. The only information I have is from the record where the parties who supported the measure said that they had concerns about both what was happening inside.

Q. You don't know of any specific example of the kind of abuses that you think ought to drive this wholesale sweeping away of rights, correct? You don't have any specific knowledge?

A. No.

* * * * *

TESTIMONY OF ROBERT P. GEORGE, Ph.D.

[v. 18, p. 1282]

the witness herein, having been first duly sworn, on oath testified as follows:

THE COURT: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. TYMKOVICH:

Q. Good morning, Professor George. Could you please state your name and place of employment for the record.

A. It's Robert P. George, and I teach at Princeton University.

Q. How long have you taught at Princeton University?

A. For eight years.

Q. What subject matters do you teach at the University?

A. Legal philosophy, civil liberties, American law and theory.

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[v. 18, p. 1284]

Q. Over the past couple of years, again, could you describe the subject matter of the courses that you've taught?

A. Yes, I have taught course [sic] in philosophy of law which considers issues at the juncture of legal, moral, and political philosophy, and particularly the relationship of law and morality. I've taught an undergraduate course on civil liberties. I have taught that course every year which takes a range of issues of civil rights and liberties that implicate important moral considerations. I have taught graduate seminars from time to time called American law and theory which is a consideration of the writings of American legal philosophers from about the time of the founding of the Harvard Law School, and again the emphasis of that course is on issues relating to morality and law. I have taught an undergraduate seminar in the Woodrow Wilson School of Princeton on alternate dispute resolution mediation and arbitration and so forth and the subject matters of that course, and I taught a freshman seminar last year on national law theory and the theory of law.

Q. Have you obtained any awards or fellowship as a

[v. 18, p. 1285]

result of your academic work?

A. Yes. I received various awards as an undergraduate at Swarthmore, and a scholarship there. I then received two outside fellowships to attend Harvard. I then got a fellowship at Harvard to attend Oxford.

Q. Have you done any additional work relating to your relevant background relating to your law degree?

A. Yes. I'm of [sic] counsel at a law firm in Charleston, West Virginia called Robinson & McElwee.

Q. I understand you are a Supreme Court fellow. What did that involve and when did you do that?

A. That was in the 1989, '90 Supreme Court term, and I was a Tom C. Clark Judicial Fellow on the staff of the Chief Justice and his administrative assistant.

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[v. 18, p. 1286]

Q. And have you written any books or edited any books?

A. Yes, I have. My book entitled Making Men Moral, which is subtitled Civil Liberties and Public Morality was published by Oxford University press last month. I'm the editor of a book called Natural Law Theory: Contemporary Essays, which was published by Oxford University press in 1992. And I'm the editor of a forthcoming work which is now in production called The Autonomy of Law: Essays on Legal Positivism, which will also be published by Oxford University press. All of those works have as their center piece issue considerations of the relationship of law and morality.

Q. And that was also the thesis of your book Making Men Moral?

A. Yes, indeed.

Q. Have you written any article in the area of sexuality or religious sexual conduct?

A. Various of my articles and in some respects my

[v. 18, p. 1287]

book touch on those issues, but I have written one article that is centrally focused on them, and that was a review essay, a long review of Judge Richard Posner's book Sex and Reason, which was published by Harvard University

recently, a couple of years ago, and my review is in Columbia Law Review.

Q. Professor George, since you are a Commissioner on the U.S. Commission on Civil Rights, could you explain your activity in that regard?

A. Yes. The United States Commission on Civil Rights was founded in 1957. It was created by Congress, and then under the 1957 Civil Rights Act, U.S. Civil Rights Act, it was then recreated and rechartered under the United States Commission on Civil Rights Act which was in 1983. It is currently made up of eight commissioners, all of whom serve part time. We have a chairman and a vice chairman. There is a full time staff director who oversees our staff in Washington D.C., and we have six regional offices of the Civil Rights Commission. Our jurisdiction extends to the investigation of allegations of the denial of voting rights based on various criteria, race, sex, religion and so forth, and more generally to make recommendations to Congress and the President for the reform of civil rights law where in the Commission's judgment have inquired into various matters, held hearings and so forth, the Commissioners believe that reforms are appropriate.

Q. What are the nature of the investigations that

[v. 18, p. 1288]

the Commission pursues of which you are familiar?

A. I have only been on the Commission since January of this year, so I haven't had an opportunity to be involved in a panoply of the Commission's activities, but since this time I can report that we held three and a half days of hearings on the causes of the Los Angeles riots and tried to take information from witnesses from Los Angeles as to how those tragedies could be avoided in the future. We have a comprehensive project which was to investigate racial and

ethnic issues in American cities. Prior to my joining the Commission, the Commission issued a report on ethnic tension in a Washington D.C., neighborhood that had experienced some rioting. We will, this spring, hold hearings in Crown Heights, New York, which has also been the scene of racial and ethnic tensions. The real focus of our Commission's work at the moment at least is in the racial and ethnic area.

Q. Professor George, what are the protected classes or groups under the jurisdiction of the U.S. Commission on Civil Rights?

A. Our statute does not frame the issue in terms of protected groups. It rather mentions categories. We, for example, investigate voting rights, allegations of voting rights, violations where the person making the allegation claims to have been denied the right to vote on the basis of race, sex, ethnicity, religion, age, or disability. I believe I have

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covered -- I believe I have covered them all.

Q. And sexual orientation is not one of those categories?

A. It is not.

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THE COURT: Professor George is received as an expert in moral philosophy, government and political science, civil liberties and public morality. He may give opinion testimony under Rule 702 in those areas.

MR. TYMKOVICH: Thank you, Your Honor.

Q. (BY MR. TYMKOVICH): Professor George, you are a

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student and a teacher of American government. How do you define government power?

A. The authority of government to act for the sake of the public good.

Q. And what sort of theories of government do you teach?

A. Well, let me distinguish a couple of levels. When we talk about theories of government on the one hand, we might be talking about what I usually refer to as political theories. Theories of what the good government -- the best government, the ideal government would be like, how it should be run and what its concerns should be. We can contrast the political theory of Aristotle and Thomas Hobbes and an American political theorist such as John Rolls. Now, on the other hand, we might distinguish theories of government in the following sense: We might distinguish the type of government that we have at the federal level in the United States; that is to say, a government of delegated powers giving certain powers under our constitution but forbidden by the very theory of the constitution from exercising any powers that aren't given from governments like the governments in the several states' governments of general jurisdiction which exercise police powers, powers to protect public health, safety, and morals, subject to whatever constraints are imposed on those governments by the federal or state constitutions or by law.

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Q. Would you explain in a little more detail this intersection between law and morality, civil liberties and public morality that you've mentioned.

A. Well, I have written a whole book on the subject, and to do it justice, I would have to recapitulate much of what is in the book. The theme -- one of the central themes of the book is that government, particularly governments of general jurisdiction exercising policy powers.

Q. Such as states?

A. Yes. Very frequently of necessity make moral judgments. I'm very critical of the view, in my book, I'm very critical of the view that government ought to be or even can be neutral with respect to moral questions. The questions of law often implicate moral judgments that need to be made. Now, among these judgments are judgments pertaining to civil liberties. The proposition that people are entitled to exercise free speech within certain limitations, of course, is itself a moral proposition. The argument people ought to enjoy freedom of religion is a moral proposition. Many of the laws that we consider to be the great achievements of American politics, for example, our civil rights laws are state moral propositions. In many cases, controversial moral positions on which the state, the government is not, it shouldn't be, and it couldn't be neutral.

Q. Wouldn't there [sic] been a moral judgment that forms

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the basis of our principle or notions of equality?

A. Yes. Oh, certainly, certainly. The proposition stated in the Declaration of Independence that all men are created equally, certainly that's a moral proposition. We embody a proposition like that in our constitution, in law, on

the federal level, in the equal protection clause, and of course, many states have equal protection laws. Our civil rights laws aim to protect quality among citizens.

Q. Why do you say government does not and even cannot remain neutral on these questions?

A. Well, government has to decide, for example, whether people are entitled to freedom of speech or freedom of religion or equal protection of the laws or they aren't. There's no avoiding the question. Whichever way you come down on it, you've made a moral judgment. You can pretend that you haven't made a moral judgment, but you have. If you come down saying, no, people are not equal, people of a certain age are morally superior and inherently have a greater dignity than people of a younger age, and black people have less equality than white people, if you have made that judgment, you have made a moral judgment. In my view, incorrect moral judgment, but a moral judgment.

If you take the view of the Declaration and equal protection clause seriously and hold for fundamental equality of dignity, then you have stated a moral judgment.

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Q. You have written about what you call the moral ecology of communities. What do you mean by that, Professor George?

A. I mean by that the framework of expectations and understandings that's abroad in a community relating to issues of moral significance. Where people's actions will impact upon their character and likely impact upon others whose behavior is affected for good or for ill by their example. That's what I mean by the moral environment of

a community or the moral ecology of the community. It's that moral environment or moral ecology that is at stake in the traditional understanding of the police powers of states, as governments of general jurisdiction, exercising police powers, to protect public health safety and morals.

Q. Would the state of Colorado and its local communities -- its local cities, its local counties be a community that you described?

A. Yes. Again, subject to the particular rules of the state constitution in Colorado. I have not made a study of the constitution of Colorado. But I would assume that Colorado, like other states, is a governmental general jurisdiction, and the municipalities and counties and so forth in the state of Colorado participate in derivative fashion in the general jurisdiction of the state of Colorado.

Q. Now, in our system of government not only in

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Colorado but other states of general jurisdiction, how do we address moral issues politically and culturally?

A. Well, in certain areas, the moral issues have been addressed at the constitutional level. So an issue is as it [sic] were taken out of ordinary politics and put in the constitution. Now, often since the constitution cannot be made to apply clearly and unequivocally in every unanticipated case, it will be necessary for judges exercising their authority to interpret the constitution to make what are in effect moral judgments. Other times, the constitution does not remove the moral question at stake from the ordinary processes of politics, and therefore it's left there. Here, the people must deliberate and decide either through their elected representatives or themselves by initiative and referendum how to resolve the public policy question, which might very

well be a question of public morality that needs to be decided.

Q. How do we accommodate competing or different visions of public morality in such a system?

A. By argument. It's very important that free and fair opportunities for argument take place. It's critical that those who will ultimately decide the question, whether in the legislature or by referendum debate the issues and make the appropriate resolution. That is where the issue remains in the field of politics. If the issue will finally be resolved in court, then it's important that those responsible for ultimately

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making that decision entertain fairly and hear the arguments on both sides of the question. Since neutrality in a great many cases is impossible, and in any event, I think undesirable, it will be necessary for some points of view to win and others to lose. And of course, it's entirely possible that the people or their elected representatives or judges interpreting the constitution will make a mistake, so that the decisions regarding public morality that are made are the wrong decisions, they might be decisions that are too permissive, they might be decisions that are not permissive enough with respect to whatever the moral issue is that is in question. But since a decision has to be made, there will necessarily be those whose view will not win out.

Q. In your opinion, Professor George, is there anything illegitimate about pursuing moral judgment through electoral process?

A. There can't possibly be if we believe in democracy.

Q. Why is that, sir?

A. Well, these decisions will bear on us from all sides. They will have to be made. Virtually any issue will implicate at some level certain moral judgments or value judgment. Any political issue, unless we are to remove those issues through a philosopher king or something, they will be made by the people. Those decisions will necessarily be

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subject, in our country and in this state as well as my home state of New Jersey, subject to constitutional limitations. You can't do just anything in the name of public morality. You can't pursue the goal of having a sound moral environment, good public mortality [sic] by just any means. There are constitutional considerations, constitutional limitations on the means that can be used. And sometimes the ends that can be pursued. But subject to those limitations, political process is an appropriate one for resolving moral questions.

Q. What type of issues do we typically place in our constitutions either at the state or federal level?

A. Well, issues having to do with the structure of government, for example, how the government will be structured. Issues having to do with basic civil rights and liberties. Issues where the people in their wisdom wish to reserve moral judgments to themselves rather than having been made by their elected representatives. There are probably other categories that aren't coming to mind, but those are some.

Q. How does constitutionalizing an issue, placing an issue in the constitution, address some of those concerns?

A. Well, it's placed in the constitution -- that will have a couple of implications. One ordinarily at our federal -- in our federal government and at the state level, it will mean that disputes about its meaning will have to be

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resolved in courtrooms rather than at the ballot box, rather than at the polls. It also means that in effect the people have reserved that decision to themselves, and thereby taking it away from or not giving it to their elected representatives. I think that's the crucial implication. So the matter is no longer in the ordinary political process. A decision has been made by the people through the process of constitution making or amending the constitution, and if that's to be changed, it will have to be by the people again.

Q. Professor George, we have the text of Amendment 2 on the easel behind you, and on its face it appears to reserve and not address moral judgment about homosexuality in the state. Does a provision like Amendment 2 really weigh into the moral debate?

A. No. I have seen Amendment 2 before, but would you mind if I took a moment to read it again?

THE COURT: Go ahead.

Q. (BY MR. TYMKOVICH): Please do.

A. Well, Amendment 2 certainly embodies the judgment of political morality about the appropriate level at which to decide the question of whether there will be a protected class status bestowed on homosexual, lesbian, or bisexual orientation. So, to that extent, it does involve moral judgment.

Q. Is there anything from your reading of Amendment
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2 that would prohibit or somehow limit homosexual activity or behavior?

A. I don't see how it could be interpreted that way.

Q. Professor George, we in societies --

A. Could I also add that I don't see that it's inconsistent with prohibitions on homosexual conduct or certain forms of homosexual conduct. It doesn't require or embody any such prohibitions.

Q. Exactly. Subject to other provisions and conditions as the U.S. Supreme Court has interpreted it?

A. Certainly.

Q. Professor George, societies make political judgments about sexual conduct and sexual morality all the time, don't they?

A. Yes, they do.

Q. And societies address this troublesome issue of homosexuality, homosexual orientation all the time, don't they?

A. Yes, they do.

Q. Now, as a professor of philosophy, as a student of moral philosophy, if you could just very briefly describe some of the major philosophical traditions and how they have addressed the issue of sex morality or conduct?

A. Again, it would be impossible for me in this context to be very comprehensive, but if I could mention a few,

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that would be helpful. And if you want to raise more, I will be happy to do that.

The classical tradition of philosophy founded by Socrates and transmitted to us in the first instance by the

great student Plato and by Plato's great student Aristotle and picked up by the Roman philosophers and by the great midevil [sic] philosophers by Thomas Aquinas, that type of philosophy as it bears on sexual conduct tended to take the view that sexual pleasure should be sought only in the context of marriage. Now they differed on their conventions, different cultures in which this tradition was embodied differently in various respects as to their understanding of marriage, but in all of them that I know about, marriage was understood to be a committed exclusive heterosexual relationship, and it was in this tradition marriage has [sic] celebrated not only as a source of children but as a source of comfort and joy and companionship for the married spouses. An earlier challenger to this tradition was the traditional philosophy sometimes called hedonism. Hedonism differed radically from the mainstream classical tradition that I have just referred to as found by Socrates in its explicit celebration as pleasure, as a good, and in some cases as the highest good. According to the more radical hedonist, the way to life [sic] a valuable life was to live a life pursuant to pleasure.

These two traditions clashed, and you see the
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clash of the traditions in the writings of Plato and to a lesser extent Aristotle.

Q. To what extent did the hedonist or Platonic philosophers deal with this issue of shame and sexual conduct?

A. Well, the mainstream classical tradition of Socrates, Plato, and Aristotle is the one that took very seriously the idea that -- bad sexual conduct was shameful. It was damaging to the integrity of persons. It was corrupting of their moral character, and it was shameful, something that a person who had appropriate self respect would not indulge

in and would not subject themselves to the moral consequences of.

The hedonist tradition is quite different in that respect. I mean it's pleasure is good, perhaps the ultimate good and is to be obtained wherever it can be obtained without shame subject now to certain limitations. I mean even the most radical hedonists ordinarily would not approve of destroying others or hurting others in the pursuit of pleasure, but nevertheless subject to those limitations, pleasures should be sought and could be sought without shame, wherever it was to be obtained. Shame was an issue, but it was one where the classical mainstream tradition saw it as implementing bad sexual acts; whereas, hedonism tended not it [sic] see it implicated there at all.

Q. Who was the proponent of that view of sexuality?

A. I think its primary proponents are -- might not

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be real historical figures. I think it's best understood as it's put in the mouths of Socrates opponents and interlocutors of Plato's dialogs involving Socrates. So you have the character Calaclees in the dialog making it very powerful and there are other figures in other Platonic dialogs who play the same.

Q. Do they make that argument about sexuality?

A. Yes, in the Gorcegus you get a lively exchange between Plato and Socrates who is to be representing Plato's own view and Calaclees over sexuality and particularly over homosexuality, and you get what to my mind is quite a clear condemnation of homosexual conduct by Socrates, and we can infer by Plato. That inference is buttressed by Plato's own later work particularly in the laws where we get a

closer rejection of homosexual conduct and other forms of non-marital sexual conduct.

Q. Now, you've mentioned two major philosophical traditions. Are there others that you've described?

A. Certainly there are variances of the hedonist tradition. In the Roman tradition sometimes called epicureanism. Precise definition of epicureanism are controversial but people regard that as a highly hedonistic sort of tradition. Later we got the development much much later the development of a school thought called ulitarianism and ulitarianism is the view that we live well, we do the morally

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right thing when we maximize good and minimize evil, and some of the leading, in fact possibly the person we consider the founder of ulitarianism provision Jeramy Benship understands good and evil in hedonistic terms. He said that men are under two masters, pain and pleasure. When we say maximum good, we mean maximum pleasure. And some of Benship's later disciples rejected hedonism while maintaining his view that the maximum of ethics ought to be maximum good, and minimum evil, but what they were replacing was his hedonistic conception of good and evil. But there are even among contemporary ulitarians there are people who differ on this issue. Others rejected hedonism. The thing that links them together as ulitarians or as philosophers say, conventionalists is the method of moral judgment, the method of obtaining good consequences and minimizing bad consequences.

Q. What are the other major philosophical traditions?

A. You certainly have more traditions of philosophy that are embodied in the great religious traditions of the west. There's a very powerful and important string of Jewish philosophy, a family of traditions rather than a single

tradition. There's a very powerful philosophical tradition in the Islamic tradition. Islamic philosophy flourished in the middle ages and carries on today. There is a strong tradition -- there's several strong traditions of enlightenment

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philosophy. Let me name two of them. One is the tradition of moral skepticism of which the philosopher David Huhm was the leading figure. And this is a tradition of radical doubt with the capacity of reason to make moral judgments. This tradition was -- came into conflict with the enlightenmnt [sic] tradition of a German philosopher named Kant, K-a-n-t. And Kant held for the ultimate rationality of moral judgments; saw moral judgment as a matter of pure practical reason.

Q. And how did the religious traditions fit into that [sic] others that you've described, the Judaic tradition?

A. Well, you get feeding into the religious traditions are thoughts from religious thinkers outside of those traditions as well as from secular thinkers. So, for example, the Christian tradition of philosophy which emerges as a strong tradition of philosophy in the middle east, like figures like Thomas Aquinas takes other large sectors of the classic tradition of Plato and Aristotle.

The same is true of important traditions within Jewish philosophy. And Jewish philosophy and Christian philosophy in the middle ages also engage with one another and have an impact on each other. Enlightened philosophy engages with Christianity as well. We ordinarily think of Kant as a secular philosopher, and that's true in the sense that he did not appeal to divine revelations for moral judgments. In that respect, he was what is sometimes referred to as a natural law

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philosopher or he was not in the philosophy of Thomas Aquinas but he happened to be a Christian, and his thought is drawn on by many contemporary Christian philosophers.

Q. Professor George, if you could summarize, please, how did these various traditions, these various schools of thought deal with the issue of sexual conduct in general and homosexuality in particular?

A. I think it's fair to say that all of these traditions took the question of sexual conduct very seriously. They saw it as a central moral question and one to be resolved for those that believed in the power of reason to resolve moral problems by reason. Here, of course, the outlier [sic] would be those schools of ethical thought that are skeptical of the power of reason. For example, Humes thought, and for people in that tradition, reason has no real ultimate power to resolve those questions. Humes said that reason is not only to be the slave of passions and should never pretend to do anything other than to serve and obey him. So his view of sexual morality, although I don't know his scientific teachings on it, one would, I think, infer from what he says that questions of how one ought to conduct one's self sexually are essentially pragmatic questions; that bad sexual conduct would be sexual conduct that would have bad consequences for one or others for one or others or people around others or one's society.

Other traditions treat these questions as serious
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moral questions and questions to be resolved by reason, not necessarily questions that can be answered by mechanical knowns [sic] cranking out the computer solution to a question of sexual mortality [sic] but rather by the very careful synthetic reflection that's necessary to resolve any complicated moral question, whether in the area of sexuality or any other area.

Q. Bringing then these issues into the 1990's, how do these traditions affect the way we make laws and make decisions about public morality today?

A. Well, there's not a Kantical tradition today. There's not a single tradition of philosophy that has the whip hand that controls our public life. We share, as a society, we share a number of moral beliefs, but we divide on others. And among those on which we divide are those having to do with sexual conduct. And it's interesting to me that people from different traditions can join together reaching the same conclusions influencing each others' judgments on one side or the other of these debates.

Q. How do you mean that?

A. Well.

Q. In particular, this debate about how we regulate sexual conduct or even homosexuality in our society?

A. An Aristotelian who would reject certain of Kant's philosophy would nevertheless quite rightly join up with a representative of Kantean philosophy in rejecting certain

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sorts of conduct including homosexual conduct. Sometimes there are some Aristolelians and some Kanteans who would reject the specific teachings of Aristotle and Kant on homosexual acts or converse to sexual acts and would join together despite their philosophical differences in arguing for the moral value of homosexual conduct.

Q. Would such moral judgments be rational in your opinion, Professor George?

A. The debate is a debate about reasons. It's in that respect a rational debate. Rational arguments are to be made

on both sides. One has to decide and if one is a public policy maker or if one is a citizen of the state that's trying to decide a public morality issue by referendum, one has to decide where the sounder reasons are as far as one could see what the truth of the matter is that's got to be decided, but it has to be decided, it seems to me, by evaluating the reasons that are given on both sides, the philosophical arguments that are to be made for and against. It's a rational debate.

Q. You couldn't say that one side of the debate or the other is acting erratically or invidiously or prejudicially, would you?

A. It depends on the particular debate. If somebody is lying, or manipulating the debate, then people are not engaging in rational argument. But on the other hand, it's possible in all these areas whether with regard to sexual

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morality or other controversial moral questions to debate the issues in a rational manner where nobody is lying, nobody is manipulating the debate. People are putting forth their reasons and going with their best judgment and coming into intellectual contact with those who see it a different way. And we have to argue it out. And we might change each other [sic] minds in some cases. Someone will hear the arguments on both sides and make the decision on that, but it's a debate on which arguments can be put forward on both sides.

Q. That's what we mean by politics?

A. At it's best, that's what we mean by politics. Politics is the reason for public action on both sides of controversial issues.

Q. Is it safe to say in this debate over how we regulate homosexuality that there are reasonable people on both sides of the issue?

A. Oh, absolutely.

Q. Professor George, you indicated that laws or social regulations pertaining to sexuality or homosexuality in particular are not based on prejudice or religious beliefs, why would you say that?

A. Could you repeat your question. I'm sorry, I couldn't hear it.

Q. You indicated that laws pertaining to sexual morality or homosexuality in particular are not necessarily

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based on religious or sectarian beliefs, revealed reason. Why do you say that?

A. Well, I say that because reasons can be given serious significant arguments; in fact, have been given on both sides of these questions. It's possible for someone to give an argument in favor of the value of homosexual activity without that argument simply being a reflection of that person's desire to engage in that activity or have others engage in that active [sic]. In other words, instead of relying on one's sentiments or desires, one can give reasons. On the other side of the issue, the same is the case. Someone can simply opt out of rationally thinking about the issue and simply denounce homosexual activity without a moment's thought because it happens to not strike him as a good idea or that person can consider the advanced reasons that can be given against homosexual conduct.

Q. Would it be legitimate for people to bring those religious motivations to the public debate?

A. I don't think I referred to religious motivations. I'm talking about the reasons, the publicly accessible reasons that can be exchanged between people who might not share the same religious views or belong to the same religious tradition. Many people have religious beliefs.

Q. How have those religious beliefs affected their views on civil liberties and on public debate about law?

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A. Well, people's religious beliefs fit into their general moral and political beliefs in many ways, and it depends on the individual person. Sometimes it depends on the individual religious tradition. Some religious traditions are more comprehensive than others about matters of political morality, personal morality, and some individuals accept by-in-large the teachings of their religious tradition. And others stay in the religious tradition in some sense while rejecting many of its teachings.

The key thing is that these issues can be publicly debated by people of different religious convictions, giving and exchanging reasons without any necessary appeal to revealed teachings that are not accepted or -- by people who aren't members of that religion or to which they have no access since they are outside of a religious tradition.

Q. Even if people did bring specific religious concerns to this public debate, is that legitimate?

A. Yes. I think it is legitimate the same way it was legitimate for Dr. Martin Luther King to appeal to the religions in advancing the cause of civil rights. It's a mistake to ask people to ignore or lay aside their religious traditions. It's unfair. I think it's a violation of their own civil rights. I think that it would, in effect, disenfranchise

religious people from participation in public debate, but what religious people can be asked to do is, in the public argument,

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present public accessible reasons for the points of view, whether pro or con on homosexual conduct or any other issue, publicly accessible reasons that they have to present.

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[v. 18, p. 1313]

Q. In your opinion, Professor George, does Amendment 2 endorse or promote a particular version of moral philosophy?

A. I don't believe it does. It seems to me that

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people from various viewpoints, philosophical backgrounds could approve or disprove [sic] of Amendment 2. I can't say that's an Aristolean or hedonism amendment or Kantean amendment or Hobbesean amendment.

Q. What do you believe it does then?

A. I believe it forbids political subdivisions within the state of Colorado from making laws that would give protected class status on the basis of homosexual, lesbian, or bisexual orientation. It in effect constitutionalizes the debated question of whether this should be civil rights type protections that are based on sexual conduct or sexual orientation.

Q. And in your opinion, Professor George, is that a legitimate approach to civil liberties in our system of government?

A. Yes. It seems to me it's an appropriate approach. It would not be inappropriate to take a different approach, but it's not inappropriate to take the approach that Colorado has taken either by constitutionalizing the issue. I would say it's appropriate to not constitutionalize it. It's appropriate to constitutionalize it. The people of Colorado have to decide.

Q. On this issue of regulation of sexual conduct, what does society care why do we draw lines in this area, Professor George?

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A. Because the moral environment the moral ecology of the community has an impact on everybody in the community. That framework of expectations and understandings that bear on various ways on ourselves, our family and our children is an important matter. It affects our institutions. Institutions of marriage and family, for example. It affects our whole self understanding. Our understanding of ourselves as sexual beings, for example. Our understanding of ourselves as people who are personal. We are not just things, but we are persons. Our bodies aren't just things or instruments. They are part of our personal reality. If understandings emerge that treat us, treat people as instruments, those will have profound impacts on institutions like marriage in the family that we value. Now, of course, it might be that some people's best considered moral judgment is that our bodies are instruments; that our bodies are subpersonal realities; that the manipulation of the body by consciousness in pursuit of satisfaction is an appropriate way to lead a life. Some people might take a modified or more hedonist approach, but that has to be argued for if someone thinks a value would be something that protected sexual pleasure, that has to be argued for. I, myself, would reject it, but I think it has to be argued for.

* * * * *

(CROSS-EXAMINATION)

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Q. And you have not studied the political debate about homosexuality in Colorado, correct?

A. I have not studied it. That's true.

Q. So to the extent you told us earlier that the quality of that debate will depend on whether there's lying or manipulation or any of that sort of thing, you don't know whether that occurred or not?

A. Well, I don't know from the sense of direct knowledge, but I do know this much, even in Plato's dialogs which are put forth as models of debate, not all the argumentation that Plato depicts for us there is fair or unmanipulative. Even in the best versions there will be necessarily and I would be surprised if it didn't happen in Colorado on both sides of any issue, any issue where the passions are engaged, those who fall short of rational argument. So although I don't know the specifics, I wouldn't be surprised if on one side there was lying and manipulation and on the other side there was also lying and manipulation.

* * * * *

AFFIDAVIT OF JAMES HUNTER

James Hunter, being duly sworn, states as follows:

1. I am a professor in the Departments of Sociology and Religious Studies at the University of Virginia. I have held this position since 1989. I was initially appointed as an assistant professor in 1983.

2. I received my doctorate at Rutgers University in 1981. My fields of concentration are in the history and sociology of American culture, religion and politics and in sociological theory. I have published 6 books and over 2 dozen essays in these area. My book, *Culture Wars: The Struggle to Define America* (Basic Books, 1991), is currently in its sixth printing. It was a finalist for the 1992 *L.A. Times* Book Award. My book, *Evangelicalism: The Coming Generation* (University of Chicago Press, 1987), was winner of the 1988 Distinguished Book Award of the Society for the Scientific Study of Religion and also selected by *Choice* as one of the outstanding scholarly books of 1987. My edited book, *Articles of Faith; Articles of Peace: The First Amendment Religion Clause and the American Public Philosophy* (Brookings Institution, 1990), was winner of the 1991, Gustavus Myers Award for the Study of Human Rights).

3. The purpose of this affidavit is a) to place the dispute over Amendment 2 in a larger cultural and political context; b) to outline and criticize a theory of power used to claim that gays and lesbians are politically powerless; c) to offer an alternative conceptualization of power and to offer evidence of the nature and extent of power gays and lesbians have acquired; and d) to summarize what is at stake in this dispute and why the referendum process is one legitimate means for addressing such disputes.

4. The first point to be made is that the controversy over Amendment 2 in Colorado is not an isolated and eccentric dispute but one that is national in character and rooted in the American public's most deeply held beliefs and values. It is a microcosm of a larger culture war waged in America today. To be sure, homosexuality and gay rights in particular, comprise one set of conflicts in a larger culture war. Other areas of dispute would include abortion, funding for the arts, the relationship between church and state, and content of public school textbooks, sex education, multiculturalism, among many others. Certainly the controversy over homosexuality and gay rights is among the most divisive of the culture war.

5. As with most issues of the culture war, there is a deeper symbolic struggle underneath the particularities of the dispute over Amendment 2. In the case of homosexuality and gay rights, the fundamental matters at stake are "what constitutes normalcy in regard to human sexuality" and "what constitutes legitimate family structure, order and relations." This set of issues implicit in Amendment 2, then, touches upon what Americans view as good, right and proper for aspects of their social life. In a larger context we should see the dispute in Colorado over Amendment 2 as part of a deeper symbolic struggle to define the "first principles" of how Americans will order their lives together.

6. The culture war, of which the dispute over Amendment 2 is just one instance, is not rooted so much in politics or in the older political party divisions. Rather these disputes are rooted in different and competing systems of moral understanding. The principles and ideals that mark these systems of moral understanding are by no means trifling but have a character of ultimacy to them. They

provide a source of collective identity and a basis for cohesion in the communities that hold them. This is why claims by opposing moral communities seem so incommensurable.

7. It is because the differences are at root moral in character that there is usually dispute over the meaning of law itself. In the case of Amendment 2, one side believes that the referendum inhibits the protection of *basic* rights; the other side believe that the referendum merely inhibits the creation of a new class of *special* rights.

8. Precisely because of the "character of ultimacy" motivating such groups that it is inaccurate to construe the competing moral values and commitments involved in the disputes over Amendment 2, gay rights more broadly, or over the culture war at large, as between religious values and commitments on the one hand, and non-sectarian or neutral values on the other hand. The reality of the situation is much more interesting and complicated.

9. For one, formal religion exists on both sides of these disputes. Those that morally oppose homosexuality and the expansion of gay rights tend to be religiously conservative in their orientation. Those that favor the expansion of gay rights are not, by contrast, religiously neutral. In every major mainline Protestant denomination, in the larger Catholic community and in the largest movements in Judaism, there are gay and lesbian groups and each of these draw upon the theological and religious resources of their traditions to justify their moral and political claims.

10. Even those who claim no explicit theistic commitments are not somehow religiously neutral. In social science and philosophy, secularity does not mean moral or religious neutrality. As theoretical and empirical work in the sociology of knowledge has demonstrated, all knowledge is

based upon certain "faith" assumptions. There is, then, a fiduciary nature to all world views or cultural systems, even when they are secular in nature. For this reason one always finds a sectarian (and even fundamentalist) moral fervor among secularists involved in these disputes.

11. The competing moral visions at the heart of today's culture war take expression as polarizing tendencies in American culture. Most Americans occupy a vast middle groups between these polarized rhetoric. This is also true when studying the opinions of the citizens of Colorado as they reflect upon homosexuality and Amendment 2. Indeed, the sociological and cultural make up of average citizens supporting Amendment 2 and opposing Amendment 2 is remarkably variable. This is to say that voters approach this public policy and the issues surrounding it with a variety of perspectives and range of interests.

12. Where the polarizing tendencies in American culture tend to be sharpest is in the organizations and spokespeople who have an interest in promoting a particular position on a social issue. These organizations have tremendous power to shape public debate.

13. In the context of the larger cultural conflict and the conflict over homosexuality in particular, the view that gays and lesbians are "politically powerless" is simply untenable.

14. The most obvious flaw of the argument (as articulated by plaintiff's witness, Professor Kenneth S. Sherrill) is that it is ahistorical; it is, for all practical purposes, blind to a movement that is rapidly growing and changing. There is no question that gays and lesbians have been, even in recent generations, essentially voiceless, and thus powerless. But to contend that little or nothing has changed in recent decades, that gays and lesbians remain relatively "politically powerless" in American public life, is

silly. This argument would deny or underplay the emergent and now dynamic character of the social and political movement surrounding the gay and lesbian experience in America.

Conceptualizing Power

15. Though the most obvious flaw of the argument is that it is ahistorical in character, its most serious flaw is that it builds upon an understanding of power that is one-dimensional and out-dated; an understanding that is no longer accepted at face value in mainstream social science.

16. This older model (and the one employed in Professor Sherrill's perspective) defines power as the probability of individuals or groups realizing their will even against the resistance of others. As this perspective evolved within the discipline of American political science, the term gradually acquired a certain behavioral meaning. Power came to be understood as what some people *do* to others. It is observable when one group achieves a course of action even in the face of opposition. Such a view generally presupposes *openly* conflicting relations among opposing parties. Most commonly, this view has been applied to the study of the dynamics of the modern state. In this context, power emerges out of the resolution of conflicting and competing interests (typically measured by policy preferences and articulated grievances) through a process of formal bureaucratic decision-making.

17. The two cases offered up by Professor Sherrill as illustrations of the political powerlessness of gays and lesbians fit his theoretical assumptions perfectly. The first illustration of "political powerlessness" is the failure of gay people to prevent congressional enactment of legislation mandating the Centers for Disease Control to withhold life

shape in four analytically-distinct expressions: military, political, economic, and ideological. These are overlapping networks of social interaction which reflect distinct (but related) institutionalized mechanisms for attaining human goals.

21. Mann's work is only an example. One could also mention the pathbreaking work of Stephen Lukes, Michel Foucault, Jurgen Habermas, Roberto Unger, Pierre Bourdieu among others. Part of the problem is Professor Sherrill ignores the theoretical developments contained in their work; developments that have formed the cutting edge of theoretical thinking *since* the 30s, 40s, and 50s when Robert Dahl and Harold Lasswell (scholars upon whom Professor Sherrill relies) were publishing.

22. What most of the theorists since Dahl and Lasswell have insisted upon and emphasize, in one form or another, is that power, in its most thorough and complete expression, involves the capacity to define reality in society; an ability to set the agenda for society.

23. In this perspective, power can be understood as the capacity to determine what social and political issues are relevant or irrelevant, what in social life is to be singled out for praise or condemnation (e.g. measures of good and evil), what standards may be imposed to measure justice or fairness. To suggest that power ultimately involves the capacity to influence the agenda of social life is to suggest that power exists as the capacity to persuade, to convince, to even shape the consciousness of people. Thus, power not only involves what is *done* to others; it also involves what is authoritatively (if not convincingly) *communicated* to others. This explains why it is that battles over public policy are very often battles over language: those controlling the

language of a debate will likely have the upper hand in its outcome.

24. The exercise of power at this level involves political/legal/cultural activities oriented toward "the production of common sense." Such activities not only aim at framing particular positions as superior to all others, they also strive to make the reasons for that superiority seem "natural". The capacity of a social group or movement to make its *particular* preferences and practices seem natural, then, is the key to its control. These particularities of preference and practice become standard throughout society while shrouded in a cloak of neutrality. Reality, then, is redefined so thoroughly and completely that the very categories by which disagreement is articulated and organized are delegitimated from the outset. The very ground by which dissent could be put forward is ruled out of bounds.

25. The reason I emphasized the more recent and more nuanced conceptualizations of power is because the conflict I have called the culture war -- of which the dispute over Amendment 2 is but a case study -- is at heart a *cultural* conflict, not a political conflict. Cultural conflict obviously has political implications but at the heart of cultural conflict are competing definitions of reality; competing moral visions of public life. In short, the *only* way to analyze this situation adequately is to work with a conceptualization of power appropriate to the kind of conflict taking place. At the very least this means that one must employ a multidimensional approach to power and its manifestations.

26. In a multidimensional approach to the conflict at hand, one can see that legislative gains or losses is only one way of measuring the relative power of a group. The power of a group or subculture must also be measured by a) its relative legal and political standing vis a vis the state (including the standing of claims made against the state for the redress of grievances, the representation of positions and advocates in political bodies, etc.), b) the relative size, coherence and strength of the social movement that forms the infrastructure for the various legal and political claims made, c) the social location of the group or movement, and d) the relative recognition of the group's existence in the popular imagination and in public culture and the relative legitimacy of its claims among non-group members.

27. **Legal and Political Standing:** Once again, legislative victories or losses is a very narrow gauge of political power. Given the conflicting nature of social and political change, any collective action vis a vis the State is an assertion of power.

28. Consider first the claims for redress of grievances made in the judiciary. In the last twenty-five years (according to a LEXIS search of homosexual discrimination cases), 285 federal and state court cases concerning the discrimination of homosexuals are on record. The majority of the cases dealt with discrimination in employment. But there have also been the full range of cases involving the child custody rights of homosexual parents, homosexual marriages, application for funding or institutional approval of gay organizations, housing or rental discrimination, the membership rights of homosexuals in private organizations or clubs, the rights of homosexuals to march in public parades, the legality of military recruitment on university campuses where conflicting stances toward homosexuality

exist, gays discharged from the military, the rights of religious universities to not officially recognize or fund gays organizations, the treatment of homosexual prisoners, the applicability of Title VII to discrimination matters based upon sexual orientation, the obligations of insurance companies to cover health benefits of an employee's homosexual partner, and so on.

29. Such cases have not emerged randomly over these years but rather have increased dramatically. In 1968, for example, there was one case; in the 1970s there were 35 cases; in the 1980s there were 170 and already in the 1990s there have been 79. Litigation obviously requires financial and legal resources. At the very least, the growth in the number of these cases is a measure of an expanding confidence and sense of entitlement among gays and lesbians that the courts can and will take seriously their claims.

30. The trend in the actual outcome of these cases is also quite telling in this regard. When excluding cases that evoked split decisions (affirming in part; denying in part) and cases in which homosexuality is referred to only in a tangential manner, there is a clear pattern of successful litigation over the past 25 years. In the 1970s, 30 percent of the court decisions favored gays; in the 1980s, 45 percent of the court decisions favored gays; and already in the 1990s, 50 percent of the court decisions favored gays.

31. Over the years, the courts have been the most sympathetic toward discriminations claims made in the areas of private sector employment and housing. They have been the least sympathetic toward discrimination claims made in the area of homosexual marriage, child custody, and homosexual conduct in the military. Yet even in the cases concerning homosexuality in the military, public policy cited by the plaintiffs as a demonstrated area of gay political

powerlessness, the story told through these court cases points to a growing leniency toward homosexuals in the military.

32. In all, the image evoked by all of this litigation is that of a battering ram repeatedly hammering against the gates of traditional institutionalized restrictions against homosexuals and homosexuality. The gates have not been pushed open in all ways but the hinges are clearly weakening and the wood is noticeably splintering. Such is a measure of the power of gay and lesbian collective action.

33. Beyond the growing power of gays and lesbians to press their claims in the judiciary, there is the growing ability to mobilize resources in the realm of electoral politics.

34. The Human Rights Campaign Fund (founded in 1980) with an affiliated political action committee (or PAC) has seen an increase in its budget over the past 6 years from $846,000 (in 1987), to 1.9 million (in 1989), to 4.5 million (in 1991) to 5.5 million (in 1993). Even in 1988 the HRCF was the ninth largest independent PAC and 25th on the Federal Election Commission's list of fundraisers.

35. In 1992 the first PAC to support homosexuals only, the Gay/Lesbian Victory Fund, emerged. The group's chairman, David Mixner, observed in the *Washington Times* (January 21, 1992) that "[t]wenty years ago we couldn't get them [politicians] to take our checks." Compared to today, "it's like night and day . . . . Obviously, the next step is to run our own candidates."

36. This process was already well-underway. In 1980 there were fewer than half a dozen openly gay elected officials around the country, but by 1990 that number increased to 50. According to the National Gay and Lesbian

Task Force, there were 52 openly homosexual elected officials by 1992.

37. Even through the conservative Republican, Reagan-Bush years, gays and lesbians were asserting their political clout. In 1980, the *Washingtonian* announced that "gays were [Washington, D.C.'s] Mayor Marion Barry's key voting bloc."

38. As is well-known, in the 1992 Presidential campaign, homosexuals were important if not decisive to Clinton's win. Gays and lesbians contributed more than $2 miliion dollars into the Clinton campaign fund. As Norman Ornstein of the American Enterprise Institute said in *The Advocate* (January, 1993), "[t]he gay community provided Clinton with tremendous logistical and financial support. It is a force to be reckoned with." Tim McFeeley, director of the Human Rights Campaign Fund, was even more bold. Said he, "[Clinton] was elected president on the strength of the gay vote, and he knows it. If you're a politician and know you are elected on the strength of a constituency, you have to pay attention to that constituency."

39. To suggest that these developments are unimportant in assessing the relative power of gays and lesbians in American society is to deny the claims of the gay and lesbian advocacy groups themselves.

40. Consider, for example, the assessment of The National Gay and Lesbian Task Force of its own power. In its own literature, the NGLTF boasts of having "won countless victories for lesbians and gay men." Among their "accomplishments" they list the following: In 1974, they "successfully lobbied the American Psychiatric Association to remove homosexuality from its list of mental illnesses"; in 1975 they "obtained a U.S. Civil Service Commission

ruling that gay people can serve as federal employees"; in 1977, they "organized the first official White House meeting with gay activists"; in 1978 they "successfully lobbied the U.S. Public Health Service to stop certifying gay immigrants as 'psychopatic personalities.'"; in 1981 they launched a successful national campaign to defeat the anti-gay Family Protection Act"; in 1985 they "won a Supreme Court decision in *NGTF v. Oklahoma* overturning a law that prohibited gay teachers from discussing gay rights"; in 1987 they "secured House of Representatives passage of the Hate Crimes Statistics Act, the first federal law to address sexual orientation"; etc. In this light the NGLTF literature speaks of its "unparalleled clout." (All of these quotes come from a brochure of the National Gay and Lesbian Task Force "leading the fight for freedom".)

41. I agree with the National Gay and Lesbian Task Force's self-assessment. The other evidence of collective action vis a vis the state mentioned here is of a fabric with that assessment.

42. **Movement Infrastructure:** Even so, to say that the power of a group or subculture can only be measured in terms of its actions relative to the state is naive. Engagement in public policy typically emerges from the vitality of a social movement. Social movements provide the infrastructure for legal and political engagement. The size, coherence and strength of that infrastructure, then, is very relevant for a proper understanding of a community and its power.

43. According to my calculations from the *Encyclopedia of Associations* (Washington, D.C.: Gale Research, Inc.), there are presently 93 nationally-based gay and lesbian organizations in America today. These organizations range broadly in concern. As Urvashi Vaid, former executive

director of the NGLTF described them in the *New Republic* (May 10, 1993), "[t]here are now professional associations in every field -- legal student, minority, lesbian groups, sports leagues and cultural organizations providing support for every identity in the gay and lesbian world."

44. Most importantly, the number of such organizations has expanded dramatically over the past three decades. Only one such organization existed in the 1950s, 6 were founded in the 1960s, 40 were founded in the 1970s, and 44 were founded in the 1980s. Two more have been founded in the opening years of the 1990s.

45. These organizations have control over increasingly large financial resources. The Human Rights Campaign Fund, mentioned earlier, has a budget of 5.5 million dollars. The National Gay and Lesbian Task Force has a budget 3.3 million dollars (up from $687,750 in 1987). The Lambda Legal Defense and Education Fund has a budget of 1.8 million dollars (up from $677,360 in 1987). Indeed, twenty percent of the organizations listed in the *Encyclopedia of Associations* (N=19) have budgets of over $100,000 annually and the overwhelming trend among them is one of rapid growth.

46. In terms of cultural production, there are now, according to my count from *Magazines for Libraries* (6th edition, New York: R.R. Bowker) and *Ulrich's International Periodicals Directory* (32nd edition, New Providence, NJ: R.R. Bowker), 162 lesbians and gay magazines published in the United States. The ten largest of these have circulations totalling one million.

47. Again, there has been remarkable growth over the past several decades. Only one existed in the 1950s, 5 more were established in the 1960s, 69 more were established in

the 1970s, 73 more were established in the 1980s and 16 additional gay and lesbian magazines have been founded already in the 1990s.

48. The growing infrastructure for gay and lesbian concerns is reflected in the general publishing world as well. One small illustration came from a report in *Publishers Weekly* in its April 27, 1990 issue. *PW* reported that Alyson Publications of Boston had announced a new line of books written for the children of lesbian and gay parents. Said the publisher, "ten years ago it wouldn't have been feasible to start a line like this -- it would have been impossible to find the market. Now there are more stores that cater to the gay and lesbian market."

49. An infrastructure of lesbian and gay organization and activity has been firmly established on college and university campuses and in acadamia generally. In April 1991 (in the *Washington Post*), Martin Duberman, founder of the Center for Lesbian and Gay Studies at the Graduate Center of the City University of New York, described these developments as an "extraordinary flurry of activity." That activity has not abated: in 1991 the national Lesbian and Gay Studies Association was founded; there are now academic journals that focus on homosexuality (such as the *Journal of Homosexuality*); the National Gay and Lesbian Task Force lists 46 colleges and universities ("by no means exhaustive") with courses devoted to homosexuality or bi-sexuality; at many colleges and universities gay and lesbian student organizations exist and operate by student fees or from institutional funds; Columbia University Press as well as NAL Books and St. Martin's Press all have series devoted to gay/lesbian studies; there have been several annual national academic conferences devoted to gay studies held at major universities including the Ivy League (three at Yale;, [sic] one at Harvard); and the major professional associations

in the social sciences and humanities (including the American Political Science Association, the American Sociological Association, the American Historical Association, etc.) all have gay and lesbian caucuses or subcommittees to press the gay and lesbian agenda in their respective professions. These developments have quickly become part of mainstream academic inquiry. The editors of *Feminist Studies* note, for example, "the extraordinary rapid growth and acceptance of queer theory in the humanities."

50. In the public school system there has also been a dramatic opening up to the views, interests and concerns of the gay and lesbian community. As early as 1977, San Francisco public schools instituted curriculum "designed to 'sensitize' students to accept -- or at least tolerate -- homosexual lifestyles as just another way of living". Since then, the presentation of homosexuality has become common in sex education and multicultural curricula. Efforts have been underway (notably in San Francisco) to lift "homosexuality out of the closet and onto the pages of history, literature, art, math and science". According to one spokesman for the Bay Area Network of Gay and Lesbian Educators, "our intent is to raise consciousness that gay, lesbian and bi-sexual people are not included in the curriculum, and we want to see that that ends. Their contributions are an integral part of history." In New York City in 1985, the Harvey Milk School was founded. According to *Time*, it is a fully accredited high school for gays, lesbians, cross-dressers and transsexuals. It is part of the New York City *public* school matrix.

51. **Social and Economic Location:** The size, coherence and strength of a social movement or subculture is crucial for the establishment of claims, but organization by itself is not the only factor to consider. From the time of Edward Shils, social scientists have understood the

54. Another way to gauge the social location of the gay and lesbian movement is in terms of the homosexuals [sic] position in the class structure of American society. Though gays and lesbians can be found across the spectrum -- from rich to poor; well-educated to poorly educated -- in general the available evidence consistently suggests that *on average* gays and lesbians are better educated and have higher incomes than heterosexuals.

55. According to U.S. Census data from 1990, for example, the average annual household income of male homosexuals was $56,863 and female homosexuals was $44,793. This compares to an average annual household income of $47,012 for married heterosexuals and $37,602 for unmarried heterosexuals. (Cited in *USA Today*, April 12, 1993)

56. According to the same census data, 35 percent of male homosexuals and 38 percent of the female homosexuals had a college degree compared to 18 percent of the married heterosexuals and 13 percent of the unmarried heterosexuals.

57. The patterns represented by these figures comport with the patterns found in other surveys. According to a 1992 survey of 7,500 gay men and lesbians by Overlooked Opinions, a polling firm based in Chicago, gay male households have average incomes of $51,325 and the average lesbian household income is $45,927. This compares to an average household income for all Americans of $36,520. The median years of education for gays and lesbians is 15.7 years compared to 12.7 years for the American population as a whole. According to the survey, only 10 percent of lesbian households and 3 percent of gay male households include children. This, of course, would mean that homosexuals have considerably more discretionary income than heterosexual households.

58. It is also worth noting from the survey that homosexuals are more politically active than the population as a whole: 87 percent of gay males and 82 percent of lesbians said they voted in the last presidential election compared to about 50 percent of all eligible voters nationwide.

59. A survey of the readership of eight gay newspapers in 1988, conducted by Simmons Market Research Bureau (based in New York) found the same general pattern of high education and relative affluence of the homosexual community.

60. To the extent that the findings of these surveys are accurate, self-identified gay people are clearly living and operating in the "center" rather than the "periphery" of regional and national life.

61. Let me insert a caveat here, however. No study is methodologically perfect. These studies too have particular weaknesses in sampling design that call into question the generalizability of facts and figures. Even the U.S. census is less than perfect methodologically. Certainly more careful research on the socio-demographic profile of the gay and lesbian communities is called for. But the census and surveys should not be dismissed outright. Collectively they provide a strong indication of a socio-demographic pattern. The fact that a pattern is repeated rather than contradicted in a range of surveys provides a measure of confidence that such patterns may hold -- if not in the specifics, then perhaps in the general distribution. At the very least the data reliably describes a significant sector of the self-identified gay and lesbian population, those who would most likely be engaged in collective political and social action.

62. *A Note on the Badgett Study*: In this context it is worth commenting on an analysis of General Social Survey

(GSS) data from the National Opinion Research Center by M.V. Lee Badgett, referred to by Professor Sherrill in his testimony. The report is relevant because it seems to contradict the patterns described above. Professor Sherrill described this study as "extraordinary," providing "very substantial evidence of discrimination," that "as a group in society, gay people are economically disadvantaged." In fact in his testimony, Professor Sherrill over-interprets the findings of the Badgett study: he says that the study demonstrates "that lesbians earn slightly less than heterosexual women, certainly not more." In fact, the Badgett study is inconclusive regarding the experience of discrimination among lesbians. The evidence reported only supports the contention that men who have sex with other men earn less than those who have not done so.

63. To be sure, the Badgett analysis presently is at least as flawed methodologically (though for different reasons) as those surveys Professor Sherrill rejects.

64. There are two problems inherent in the data she used. a) Since the questions concerning sexual behavior were asked of only a subsample of the respondents in each year of the GSS, Badgett had to combine the data from three separate years of the survey in order to secure a large enough sample for statistical analysis. b) The GSS only has respondents indicate a broad category within which their incomes fall. Badgett's analysis required more precise assessments of yearly earnings, so she had to reconstruct the income variable by assigning each respondent an "average" income associated with the range he or she actually reported. Both of these practices impact upon the validity of the results.

65. Another problem centers on how she measured homosexuality in her analysis. Badgett was forced to come up with her own rather innovative approach to identifying

gay men, lesbians, and bisexuals within her sample. The GSS does not ask respondents to identify their sexual orientations, but it does have them report on the number of sexual contacts they have and with members of each sex. On the basis of responses given to these questions, Badgett identified four groups of "homosexuals." This roundabout way of identifying homosexuals is problematic for several reasons. First, it labels as homosexual all those who have ever had sexual contact with a member of the same sex rather than simply focussing upon those who are self-identified or currently practicing homosexuals. In studying discrimination against homosexuals in the workplace, it would be far more effective to study just those who have made their sexual orientations known in the workplace. Badgett herself owns up to this limitation. Yet another problem with her method of identifying homosexuals is that it hinges upon the number of different sexual partners an individual has had. Thus, those who qualified as "homosexual" in her classification were also those who exhibited a certain degree of promiscuity. In light of this fact, it may be that the income differentials she finds are due more to the general effects of sexual promiscuity than to supposed patterns of discrimination against gay man [sic], lesbians and bisexuals. This latter question can be addressed but the study is so poorly documented as it is that the reproduction and extension of her analysis is impossible.

66. As it stands now, the Badgett study is, at best, an interesting and suggestive indication -- worthy of follow-up. The problem is that hers, like the others, is an analysis that would not pass the blind review process common in refereed social science journals, at least not in the state it is in now. How Professor Sherrill can call this study in its present form "extraordinary" is beyond me. It is certainly misleading to construe Badgett's study as "very substantial evidence of discrimination."

67. **Recognition and Legitimacy:** The intensity of collective action, the strength of the movement infrastructure and the social location of the individuals and organizations making up the movement are all critically important sources and manifestations of power. The relative recognition and legitimatior of a group and its claims, however, is a measure of the group's indirect influence over culture.

68. Consider first the growing recognition and legitimacy of homosexuality and of gay and lesbian concerns are found in the amount of news coverage gays and lesbians receive. In the *New York Times*, for example, gay and lesbian concerns were covered 24 times a year during the 1960s. This grew to an average of 126 stories per year during the 1970s; 112 stories per year in the 1980s; and so far in the 1990s, 242 times per year on average.

69. In the *Washington Post*, gay and lesbian concerns were covered 48 times a year during the 1970s. This grew to an average 56 stories per year during the 1980s; and so far in the 1990s, 127 times per year on average.

70. So too, in an analysis of *Washington Post* editorials between 1977 and 1993 (N=61), 79 percent were favorable toward gay and lesbian concerns, 11 percent were unfavorable, and 10 percent were neutral.

71. Howard Kurtz, writing in the *Washington Post* (May 9, 1993), has characterized media coverage of homosexuality this way: "Homosexuals barely existed in the establishment press for years, or were portrayed with thinly disguised hostility, as perverts. *That has changed dramatically in the last five years as gay issues have surged to the top of the national agenda.* Now the unspoken pressure is to depict gays and lesbians sympathetically, although many Americans remain uncomfortable with open

displays of homosexuality and some of the movement's more radical elements." (Emphasis added)

72. The recognition of homosexuality and the legitimacy of gay rights have been established among various groups of elites outside of mainstream journalism as well. At a march for homosexual rights in Washington in 1987, according to the *New York Times* (October 11, 1987), "more than 1,000 elected officials, including 100 members of Congress, and other prominent civic, labor and religious leaders signed letters endorsing the march."

73. Public opinion surveys also demonstrate an increase in the legitimacy of claims made by homosexuals. To be sure, roughly three-fourths of the American population (as measured by the National Opinion Research Center data), have consistently maintained that homosexuality is "always wrong." Yet despite the consistent moral rejection of the practice of homosexuality, the majority of Americans favor certain civil liberties of homosexuals. Two-thirds (66%) in 1992 favored allowing homosexuals to teach in public schools; 71 percent favored allowing a book written by a homosexual to be kept in public libraries; and 78 percent favor allowing homosexuals to lecture in public. Civil libertarians like myself will be distressed that the numbers are not higher but the level of tolerance toward these civil liberties has consistently and clearly expanded in the past two decades (1973): up from 49 percent in the first case (teaching); up from 55 percent in the second case (library book); and up from 63 percent in the third case (public speech).

74. The trends revealed in these data are confirmed by other survey data. According to a fall, 1989 Gallup poll, 47 percent of all adults believe that homosexual relations between consenting adults should be legal. This figure increased from 33 percent in 1987. In the same poll, 71

percent of the respondents said that gays should have equal rights in job opportunities. Two years before, 59 percent opposed to equal job opportunities. Nearly 8 out of 10 (79%) said it is alright [sic] for homosexuals to be hired as salespersons (up from 71 percent in 1985 and 68 percent in 1977). Just more than half of all surveyed (56%) said that homosexuals should be hired as doctors, but again this was up from 52 percent in 1985 and 44 percent in 1977. Finally, only 42 percent thought that homosexuals should be hired as elementary school teachers, but here too this figure had increased from 36 percent in 1985 and 27 percent in 1977. (Reported in *Newsweek*, March 12, 1990)

75. The trend of increasing openness and tolerance toward homosexuals is even reinforced in the Michigan Election Survey's feeling thermometer. In 1984, the percent who rated their feelings toward homosexuals at the coldest (0) was 35 percent. In 1988 the number holding those feelings toward homosexuals decline to 30.5 and in 1992, the number decline yet again to 24 percent. The frozen tundra of "cold feelings" toward gays has clearly begun to thaw.

76. Not only do national public opinion data point to growing acceptance of the civil rights of homosexuals, but public opinion data from the residents of Colorado show this as well. A survey of Colorado citizens conducted in December, 1992 by Talmey-Drake found that 6 out of ten (59%) agreed that "homosexuals should be allowed to serve in the armed forces"; 73 percent disagreed with the statement that "homosexuals shouldn't be allowed to teach in the public schools"; 78 percent disagreed with the statement that "homosexual behavior should be against the law, even if it occurs between consenting adults"; 96 percent disagreed with the statement that "homosexuals should be required to wear an identification badge, so people who wanted to avoid associating with them would know who they are"; 72 percent disagreed that "landlords should be allowed to refuse to rent

to homosexuals"; and 68 percent agreed with the statement that "the average person is not nearly so prejudiced against homosexuals as many gay-rights activists would want people to believe."

77. Given the trends of the last two decades, there is every reason to believe that the level of recognition, legitimation and tolerance for gays and lesbians and their public concerns will continue to expand.

78. The cultural legitimation of homosexuality, or perhaps the cultural delegitimation of views hostile to homosexuality, have indeed changed dramatically. Dorothy Rabinowitz has caught the flavor of this when she observed in the *Wall Street Journal* (February 14, 1990) that "[c]ertain offenses, those of racism and homophobia in particular, now have such status that it is necessary only to be accused of them to be found guilty or at least irremediably tainted." In reference to the censuring of CBS commentator Andy Rooney for critical remarks he made about homosexuality, she said, "It needs no more than such an accusation to bring the capitulation of a large and powerful broadcast network."

79. Gay leaders themselves acknowledge the changes in recognition and legitimacy. As Tom Stoddard, executive director of the Lambda Legal Defense and Education Fund, has observed about these trends, "*The world has been genuinely transformed in two decades.* It is not possible to live in the United States and not be aware of gay people. That by itself is a revolution. (Quoted in *Newsweek*, March 12 1990, pg. 21) (Emphasis added)

80. **Summary:** Power is not a unitary or one-dimensional phenomenon. To measure power only in terms of the achievement of certain behavioral ends, or to suggest that formal political power is the only real or even relevant kind

of power to consider in a situation such as the one gays find themselves is disingenuous. Power is multidimensional, involving the mobilization of social, economic, legal and cultural resources toward a plodding realization of community commitments and ideals.

81. Power, in all of these dimensions, is also not static. This is why it is essential to understand all of these dimensions of power historically; in terms of the way they have changed over time.

82. In this light can it be said that gay and lesbians achieved all of their objectives? The answer is, obviously, no. Has their position and standing in American political, social and cultural life changed in recent decades in a manner that has at least brought them closer? Dramatically so.

83. The growth in organizational strength and presence in mainstream American society, the transformation of social and legal norms in American culture, and the increase of clout in the American political and judicial establishment is undeniable and (in my opinion) irreversible. These gains have been made not through magic nor by some natural evolutionary process but, in large part, by the sophisticated mobilization of resources based upon common interests and ideals. All of these developments outlined here, and others too, together demonstrate the spectacular growth in the public presence and power of the gay and lesbian community.

84. The view that gays and lesbians now have no political power is, in my professional judgement, not only untenable but utterly ridiculous. Such a view can only be sustained on the basis of a narrow and out-dated theoretical foundation, an ignoring of a wide range and voluminous body of empirical evidence, and a complete lack of

appreciation for the changing nature of power in history. In short, such a view is only sustainable on the basis of a weak, if not incompetent, social science.

85. Not to put too fine a point on it, such a view (that gay people are politically powerless) runs contrary to the convictions of many gay intellectual and political leaders themselves. I have quoted several sources already to this effect (in paragraphs 35, 38, 40, 48, and 79). Others concur.

86. Jonathan Rauch, for example, recently argued in *Reason*, that the victim model simply does not fit very well. "It's not true at the economic or the cultural level," he says. "Who enjoys more cultural influence in Hollywood today, gay people or fundamentalist Christians?" Elsewhere (the *New Republic* in May 1993) he wrote that the usefulness of the "standard political model [which] sees homosexuals as an oppressed minority who must fight for their liberation through political action" . . . "is drawing to a close." "[L]ife is not terrible for most gay people," he writes, "and it is becoming less terrible every year."

87. In a similar way, Andrew Sullivan, editor of the *New Republic*, has described gay people as "already prosperous, independent and on the brink of real integration".

88. Neither Rauch nor Sullivan, nor the gay leaders mentioned earlier would say that the integration of gay people into mainstream American society has been fully accomplished; that discrimination, acts of violence and civic intolerance of gays and lesbians have been fully eradicated -- not even close. But neither would these intellectuals deny the substantial and substantive changes that have occurred in the public and political fortunes of gay people.

Implications

89. Needless to say, those morally opposed to homosexuality have organized and mobilized a vast array of resources as well. It is because of the highly institutionalized and powerful mobilization of resources on both sides that this dispute is controversial and divisive. Each side perceives a threat to its own freedoms, and possibly even to its existence. Can democracy face up to this challenge?

90. At the foundation of any democratic society is the principle that the laws that order our lives together are legitimate only so long as they enjoy popular consent. Without such consent, nearly anything can happen. This is why cultural disputes are potentially the most volatile; sociologically speaking, cultural disputes provide the foundation and legitimation for violent confrontation. It is not that wide scale civil strife will occur in Colorado or in any other part of the country, but without serious and substantive argument over the core issues underlying Amendment 2, the present polarization could escalate into greater acts of hate and violence -- on both sides of this dispute. The history of the abortion controversy is testimony to just this; of what happens when debate is curtailed or shut down.

91. The question is, how and where can such consent be fashioned? The legal and political challenge is to create contexts where there is the greatest level of substantive debate among opponents so that persuasion may rule. As Andrew Sullivan (writing in the *New Republic* (May 10, 1993)), has put it,

> "however effective or comprehensive anti-discrimination laws are, they cannot reach far enough to tackle this issue; it is one

that can only be addressed person by person, life by life, heart by heart.

For those reasons, such legislation rarely touches the people most in need of it; those who live in communities where disapproval of homosexuality is so intense that the real obstacles to advancement remain impervious to the legal remedy."

92. The challenge before the court is to fashion a legal outcome that will foster the greatest level of open discussion and political will formation among the greatest number of people. The referendum procedure may or may not be the best forum for this but it is certainly one important and legitimate mechanism for generating substantive debate among a large number of people so deeply divided. Whatever the specific legal outcome, the challenge before the people of Colorado would then be to engage each other over their deepest differences as fellow citizens.

/s/
James Hunter

DEPOSITION OF JAMES HUNTER

[Dep., p. 60]

Q. Well, didn't the opponents of Amendment 2 succeed in winning the debate at the local level when they succeeded in getting municipal ordinances protecting --

A. That's right.

[Dep., p. 61]

Q. -- them against sexual orientation discrimination?

A. That's right.

Q. So you are saying that that shouldn't have been the end of the debate, that the.. we should take it to the state level and amend the constitution?

A. I would not have supported Amendment 2. I think that, my personal view is that the local ordinances were fine and that this represents -- at one level it's an escalation. But the tendency again in these kinds of disputes is to push them all up, and usually the process is fairly quick, where it goes right to the courts and debate is eliminated. And that's what's going on here.

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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

ORDER

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,

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.

It has been suggested to this court that a Rule 54(b) certification is necessary under the current posture of the case. This court wishes to continue with its policy of expedition in dealing with the present case and therefore determines that there is no just reason for delay on the judgment finding Amendment 2 unconstitutional on the grounds previously stated. The ruling by this court may and

ought to be appealed without waiting for ruling on other issues raised by plaintiffs.

SO ORDERED this 9th day of February, 1994.

BY THE COURT:

/s/
H. JEFFREY BAYLESS
District Court Judge