

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROY ROMER, GOVERNOR OF COLORADO, ET AL.,

Petitioner v. RICHARD G. EVANS, ET AL.

CASE NO: No. 94-1039

PLACE: Washington, D.C.

DATE: Tuesday, October 10, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROY ROMER, GOVERNOR OF :

4 COLORADO, ET AL., :

5 Petitioners :

6 v. : No. 94-1039

7 RICHARD G. EVANS, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, October 10, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 TIMOTHY M. TYMKOVICH, ESQ., Solicitor General of Colorado,
16 Denver, Colorado; on behalf of the Petitioners.

17 JEAN E. DUBOFSKY, ESQ., Boulder, Colorado; on behalf of
18 the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-1039, Roy Romer v. Richard G. Evans.

5 Mr. Tymkovich.

6 ORAL ARGUMENT OF TIMOTHY M. TYMKOVICH

7 ON BEHALF OF THE PETITIONERS

8 MR. TYMKOVICH: Mr. Chief Justice and may it
9 please the Court:

10 This case involves a challenge to the authority
11 of a State to allocate certain law-making power among its
12 State and local governments. Colorado's Amendment 2
13 reserves to the State the decision of whether to extend
14 special protections under State law on the basis of
15 homosexual or bisexual conduct or orientation.

16 The sole question here is whether in this facial
17 challenge that statewide reservation of authority should
18 be nullified under this Court's prior holdings in James v.
19 Valtierra and Hunter v. Erickson.

20 That question can be authoritatively resolved
21 for two core reasons. First, the logic and holding of
22 James is indistinguishable and controls here. Secondly,
23 the rationality of the substantive policy judgment that
24 has so far motivated Congress and other States in deciding
25 not to extend title VII protections or other -- to

1 homosexuals and bisexuals similarly supports the decision
2 of Colorado to reserve that question to itself on a
3 statewide basis.

4 QUESTION: Well, Mr. Tymkovich --

5 QUESTION: It may be, counsel, that we have to
6 reach that question, but it seems to me there is a
7 predicate or a preliminary matter that we ought to discuss
8 at some point during your oral argument.

9 Usually when we have an equal protection
10 question we measure the objective of the legislature
11 against the class that is adopted, against the statutory
12 classification.

13 Here, the classification seems to be adopted for
14 its own sake. I've never seen a case like this. Is there
15 any precedent that you can cite to the Court where we've
16 upheld a law such as this?

17 MR. TYMKOVICH: Your Honor, in James v.
18 Valtierra the Court was presented with a question
19 involving a State constitutional amendment that also
20 identified a classification -- in that case, low-income
21 persons -- and in analyzing the question there, the Court
22 fundamentally looked at whether Hunter v. Erickson should
23 extend beyond the specific racial context in which it was
24 decided.

25 QUESTION: But the whole point in James was that

1 we knew that it was low-income housing, and we could
2 measure the need, the importance, the objectives of the
3 legislature to control low-cost housing against the
4 classification that was adopted.

5 Here, the classification is just adopted for its
6 own sake, with reference to all purposes of the law, so
7 James doesn't work.

8 MR. TYMKOVICH: The classification in James did
9 involve a reference to a specific subset of persons, an
10 identifiable group under the theory of the Colorado
11 supreme court.

12 QUESTION: I know it adopted a theory of a
13 group, but it was with reference to a specific legislative
14 objective -- low-cost housing.

15 Here, the classification is adopted to fence
16 out, in the Colorado supreme court's words, the class for
17 all purposes, and I've never seen a statute like that.

18 MR. TYMKOVICH: Your Honor, the objective here
19 was to resolve an issue of whether or not to extend
20 special protections to homosexuals and bisexuals, so the
21 issue resolved here --

22 QUESTION: Well, Mr. Tymkovich, the language of
23 the amendment I guess has never been actually interpreted
24 by the Colorado courts.

25 MR. TYMKOVICH: The Colorado --

1 QUESTION: Has it been construed or interpreted
2 as yet, in your view?

3 MR. TYMKOVICH: Your Honor, this is a facial
4 challenge, and the provision was enjoined before it ever
5 went into effect.

6 QUESTION: Right.

7 MR. TYMKOVICH: For bases of this appeal, the
8 Colorado court did make an interpretation that at least to
9 the extent that it preempted local laws and State
10 provisions, that's all the farther it went.

11 QUESTION: Well, does it mean that homosexuals
12 are not covered by Colorado's laws of general
13 applicability?

14 MR. TYMKOVICH: No, it does not. In the --

15 QUESTION: How do we know that? I mean, the
16 literal language would indicate that, for example, a
17 public library could refuse to allow books to be borrowed
18 by homosexuals and there would be no relief from that,
19 apparently.

20 MR. TYMKOVICH: There are a couple of reasons.
21 First, in the second opinion of the Colorado supreme
22 court, what I'll call Evans 2, the Colorado supreme court
23 did, in footnote 9 of that opinion, make reference to some
24 general laws of general applicability and found that those
25 would not be displaced by Amendment 2. Secondly, the --

1 QUESTION: Does it displace courts in Colorado?
2 Can a court hear a 1983 case in Colorado --

3 MR. TYMKOVICH: Absolutely.

4 QUESTION: -- dealing with discrimination --

5 MR. TYMKOVICH: Yes, it may. There --

6 QUESTION: -- if there's a homosexual plaintiff?

7 MR. TYMKOVICH: It absolutely changes no
8 provisions under Federal law in access to the court or
9 vindication of one's equal protection rights, nor does it
10 affect the State --

11 QUESTION: Well, how do we know that? I mean, I
12 don't read anything in the opinion that tells me what the
13 thing means.

14 MR. TYMKOVICH: The construction that we have
15 offered is well supported by the legislative history and
16 the intent of the proponents. We think that the law
17 clearly on its face refers to State enactments and State
18 policies and does not displace any Federal law or policy.

19 The ballot analysis which we presented in our
20 appendix to the petition makes it clear that this was not
21 intended to extend beyond State and local laws, so it's
22 our view that under the Supremacy Clause as well as under
23 a plain interpretation of the amendment, that Federal law
24 would not be disrupted. Moreover --

25 QUESTION: Mr. Tymkovich, even focusing on State

1 law alone, Federal law is of course supreme.

2 MR. TYMKOVICH: Yes.

3 QUESTION: And as Justice Kennedy pointed out,
4 James v. Valtierra dealt with one issue, low-cost housing.
5 There were dozens of other ways in which to improve the
6 status of the poor, to fight against the blight of
7 poverty.

8 But here, it's everything -- thou shalt not have
9 access to the ordinary legislative process for anything
10 that will improve the condition of this particular
11 group -- and I would like to know whether in all of U.S.
12 history there has been any legislation like this that
13 earmarks a group and says, you will not be able to appeal
14 to your State legislature to improve your status. You
15 will need a constitutional change to do that.

16 MR. TYMKOVICH: Your Honor, it's not
17 unprecedented in the sense that it's a preemptive law. It
18 is unusual to the extent that two strands of the law come
19 together, but the Court's cases have made it clear that
20 it's appropriate to withdraw authority over certain issues
21 from a local level to a higher level of State government.

22 QUESTION: Mr. Tymkovich, what about laws
23 prohibiting bigamy, or prohibiting homosexuality, or
24 homosexual conduct?

25 Incidentally, how do you interpret the bisexual

1 orientation language, homosexual, lesbian, or bisexual
2 orientation? Does that require any conduct, or is it just
3 a disposition?

4 MR. TYMKOVICH: It's unclear from this text.
5 However, the reason that that language is in Amendment 2
6 is because this was a plain response to certain laws that
7 had been enacted by State and local government that used
8 the term bisexual, but it could include either conduct or
9 orientation. Again, it's unclear how you determine --

10 QUESTION: I want to know what you mean by --
11 what is meant by -- if all orientation means is someone
12 who engages in homosexual, lesbian, or bisexual acts, then
13 you have plenty of precedent in response to your question,
14 namely State laws that absolutely criminalize such
15 activity -- bigamy, homosexuality --

16 MR. TYMKOVICH: That's right, the --

17 QUESTION: Colorado has no law that prohibits
18 consensual homosexual conduct.

19 MR. TYMKOVICH: No. Colorado repealed its
20 sodomy law in 1972, but to answer --

21 QUESTION: Well --

22 MR. TYMKOVICH: -- Justice Scalia's question, it
23 is unclear whether conduct defines the class. Many courts
24 have so held in looking at the issue of a classification
25 involving --

1 QUESTION: Are you suggesting --

2 QUESTION: You have no position on it? You have
3 no position on it?

4 MR. TYMKOVICH: Yes. We believe that conduct is
5 the best indicator of --

6 QUESTION: Well, is it the sole indicator? Are
7 you representing to this Court that Colorado's position is
8 that the class defining characteristic is conduct as
9 opposed to preference or proclivity or whatnot?

10 MR. TYMKOVICH: No, Your Honor, because that was
11 immaterial to the litigation below.

12 There was an attempt by the respondents to prove
13 a suspect class --

14 QUESTION: Well then we have to do one of two
15 things. We have to assume that orientation means
16 something more than conduct, or if there were a serious
17 question, I suppose we would have to send it back and ask
18 the courts of Colorado to tell us, but is there a serious
19 question?

20 MR. TYMKOVICH: I don't think that there's a
21 serious question that --

22 QUESTION: So that orientation means something
23 more than conduct, and we have to assume that in ruling on
24 this challenge, don't we?

25 MR. TYMKOVICH: I think that that doesn't change

1 the legal position of the State with respect to this
2 classification.

3 QUESTION: May I go back to one point that you
4 have made, and you've made it more than once about the --
5 I guess about the legal position of the State.

6 You've referred to the issue as the
7 permissibility of withdrawing subject matter from
8 political consideration at a certain level. You said it
9 has been reserved for a higher level of political action.

10 It seems to me that there are two things wrong
11 with that characterization. One of them has already been
12 brought up, and that is, this is not merely a reservation
13 for this particular subject to be dealt with, for example,
14 by statewide referendum. It is in fact a provision that
15 no law may be made addressing, or addressing for
16 protective purposes this kind of discrimination.

17 The second thing that seems to me inaccurate
18 about the characterization you're giving us is that this
19 is not merely a reservation of a subject matter. That is
20 not the subject of the claim. The claim is that there is
21 a discrimination in the reservation of the subject matter,
22 or a discrimination in the provision for eligibility, or
23 exercise of legislative power.

24 It seems to me that as you characterize it, it
25 would sound like a due process challenge, but in fact it's

1 an equal protection challenge, because there's a
2 discrimination involved. Isn't that correct?

3 MR. TYMKOVICH: Your Honor, there is a
4 classification involved, but there is no invidious
5 discrimination. All the fact that the law --

6 QUESTION: What does invidious mean?

7 MR. TYMKOVICH: I think it means an arbitrary or
8 irrational classification, and that is not the case here.
9 I think we've shown that there are reasons for the
10 classification.

11 QUESTION: But in any case, you recognize that
12 this is not the same problem that might be raised if a
13 certain subject matter, e.g., discrimination, were
14 reserved for legislative action at the State level rather
15 than local level. This is a different problem, isn't it?

16 MR. TYMKOVICH: I think it's an equal protection
17 problem, but the question is, does it impinge on a suspect
18 class here --

19 QUESTION: Right, but it's --

20 MR. TYMKOVICH: -- or has there been some type
21 of fundamental --

22 QUESTION: -- a different problem from a mere
23 reservation of a broad spectrum of action for political
24 action at one level rather than another. It's a different
25 problem from that, is it not?

1 MR. TYMKOVICH: No, Your Honor, because of the
2 way the lower court has --

3 QUESTION: Well, are you saying -- I'm sorry.

4 MR. TYMKOVICH: -- has characterized the
5 fundamental right here.

6 QUESTION: Well, are you saying then -- maybe
7 this is what you're saying, that if the equal protection
8 challenge is in fact recognized or vindicated here, that
9 there is no way to prevent this from in effect ballooning
10 into a due process challenge, that if they win this, then
11 a different kind of claim will also succeed, i.e., a claim
12 that a certain subject matter, discrimination or not, must
13 be dealt with for purposes of Federal law at a certain
14 level of government? Is that your argument?

15 MR. TYMKOVICH: No, Your Honor. We don't
16 think --

17 QUESTION: It's not a slippery slope argument.
18 You're not saying we go from -- if an equal protection
19 challenge wins here, a due process challenge necessarily
20 wins too. You're not saying that.

21 MR. TYMKOVICH: There's been no due process
22 challenge in this case --

23 QUESTION: But that's not what you're arguing.

24 MR. TYMKOVICH: -- and there is --

25 QUESTION: But that's not what you're arguing,

1 is that --

2 MR. TYMKOVICH: That's correct. There is a
3 slippery --

4 QUESTION: But you said the ban extends to State
5 legislation as well as to local legislation here. It's
6 not a question of who can do it, but the State itself
7 can't do it through the ordinary legislative process. It
8 will take a constitutional change.

9 MR. TYMKOVICH: Well, the initiative is the
10 ordinary political process in our State. We've had many
11 repeals in other substantive matters on our statewide
12 ballot. We had four on the -- four repeal measures on the
13 ballot the same year that Amendment 2 was enacted.

14 QUESTION: Mr. Tymkovich, I was trying to think
15 of something comparable to this, and what occurred to me
16 is that this political means of going at the local level
17 first is familiar in American politics.

18 In fact, it was the way that the suffragists
19 worked. When they were unable to achieve the vote
20 statewide, they did it on a cities first approach, and I
21 take it from what you are arguing that if there had been a
22 referendum that said no local ordinance can give women the
23 vote, that that would have been constitutional.

24 MR. TYMKOVICH: No, Your Honor. I think that
25 that --

1 QUESTION: What's the difference?

2 MR. TYMKOVICH: -- classification would be
3 analyzed under this Court's equal protection jurisprudence
4 on a suspect --

5 QUESTION: Well, cast your mind back to the days
6 before the Nineteenth Amendment.

7 (Laughter.)

8 MR. TYMKOVICH: I think the Court would apply
9 the traditional equal protection analysis and --

10 QUESTION: And what would have happened?

11 MR. TYMKOVICH: They would have determined
12 whether or not there was a fundamental right to vote that
13 had been impinged on or was --

14 QUESTION: But there was no right to vote for
15 women.

16 MR. TYMKOVICH: Right, or under the Fourteenth
17 Amendment, or whether women were a suspect class entitled
18 to some heightened scrutiny in the circumstances.

19 QUESTION: And if they weren't?

20 MR. TYMKOVICH: If they weren't, the Court
21 would --

22 QUESTION: Then it would have been
23 constitutional.

24 MR. TYMKOVICH: -- enact a rational basis type
25 of review.

1 QUESTION: Yes, and that's what you're urging
2 here.

3 MR. TYMKOVICH: Yes. We're urging for this
4 classification, that the Court engage in a rational basis
5 type of review.

6 No court has found homosexual orientation or
7 conduct to be a suspect classification. Therefore, the
8 traditional equal protection model should be applied in
9 this case.

10 QUESTION: Mr. Tymkovich, what is now required
11 under Colorado law, assuming that the constitutionality of
12 this is upheld, in order to change that provision? It
13 would be what, a statewide referendum?

14 MR. TYMKOVICH: That's right, Your Honor. There
15 would be an initiative, or a referred measure from our
16 State legislature, and it would be placed on the ballot in
17 the same fashion that the Amendment 2 was placed on the
18 ballot in the first instance, so there would be that mere
19 opportunity for the opponents of Amendment 2, just like
20 there were for the proponents.

21 And to further answer Justice Ginsburg's
22 question, what the respondents here are saying is that
23 those who oppose certain type of special protections here
24 cannot get their policy preference vindicated through the
25 legislative process unless they are able to successfully

1 preempt or repeal such laws at the local level.

2 QUESTION: When you talk about special
3 protection, this brings me back to an earlier question
4 about discrimination in libraries. What -- how do you
5 interpret the term, minority status quota preferences
6 protected status? You mean -- what does that mean?

7 MR. TYMKOVICH: Protected status would be a
8 particular affirmative positive piece of legislation that
9 granted some type of protection --

10 QUESTION: Special protection beyond what --

11 MR. TYMKOVICH: Beyond the Fourteenth Amendment
12 baseline.

13 QUESTION: So why wouldn't that have been your
14 answer to the library hypothetical that was produced
15 earlier? Any -- no homosexual can be treated differently
16 from other people. He simply cannot be given special
17 protection by reason of that status.

18 MR. TYMKOVICH: That's right. Amendment 2 is
19 simply a Fourteenth Amendment --

20 QUESTION: May I ask how that works in the
21 public accommodation area?

22 If a hotel or a restaurant -- at common law you
23 get some kind of an innkeeper's duty to take everybody in.
24 Could an innkeeper refuse accommodations to a homosexual
25 who was not engaging in any homosexual conduct but had

1 admitted that he had that type of tendency? Could an
2 innkeeper under -- in Colorado just say, I'm sorry, we
3 don't rent rooms to people like you?

4 MR. TYMKOVICH: To the extent there was some
5 tort law of general applicability in those circumstances
6 about innkeeper's duty, we don't think that Amendment 2
7 would knock that out. To the extent --

8 QUESTION: So you would say the public
9 accommodations protection is still available to
10 homosexuals.

11 MR. TYMKOVICH: Amendment 2 would carve out any
12 special protections in the public accommodation area that
13 had been extended to homosexuals --

14 QUESTION: What would the rule be in Colorado?
15 How do you understand the law there? Now, would a
16 homosexual have a right to be served in a restaurant?

17 MR. TYMKOVICH: A homosexual would not have any
18 claim of discrimination or special liability theory in a
19 private setting after Amendment 2.

20 QUESTION: Even in the public accommodation
21 area.

22 MR. TYMKOVICH: Unless the Court -- and again,
23 we haven't had a full construction of Amendment 2 yet from
24 our State courts. Unless a State court construed the
25 innkeeper's duty to be a law of general applicability

1 to --

2 QUESTION: Do you know what the law of Colorado
3 is on that point?

4 MR. TYMKOVICH: I do not. I have not
5 encountered that, Your Honor.

6 QUESTION: So we don't know whether homosexuals
7 have a right to be served or not.

8 MR. TYMKOVICH: That will be a question for the
9 State courts interpreting Amendment 2.

10 QUESTION: But if they do have a right to be
11 served, would that be an affirmative right, then, as in
12 the distinction Justice Scalia was drawing, or would that
13 be just being treated like everybody else?

14 MR. TYMKOVICH: I think it would be treated just
15 like any other characteristic or classification that has
16 not gotten the special benefits of the civil rights law.

17 QUESTION: And being -- having the right not to
18 be refused a job or to rent on that ground is a special
19 right.

20 MR. TYMKOVICH: Unless --

21 QUESTION: It's not being just like everybody
22 else.

23 MR. TYMKOVICH: That would bring it into the
24 range of private choice and private arrangements, unless
25 there is some particular law that would disable that

1 ability by private --

2 QUESTION: But there can't be such a particular
3 law in Colorado. I don't understand.

4 MR. TYMKOVICH: Unless Amendment 2 is repealed,
5 or there is some general provision that might apply.

6 QUESTION: And one last question. What is the
7 rational basis for this statute?

8 MR. TYMKOVICH: The purpose of this statute was
9 to preempt State and local laws that extended special
10 protections. It was a response to political activism by a
11 political group that wanted to seek special affirmative
12 protections under the law.

13 QUESTION: Well, it went farther, because there
14 were political groups that had already -- as I understand
15 it, Aspen had a protective statute of some kind.

16 MR. TYMKOVICH: That's correct, Your Honor.

17 QUESTION: And it's -- what is the rational
18 basis for the people outside of Aspen telling the people
19 in Aspen they cannot have that statute?

20 MR. TYMKOVICH: Amendment 2 covers a range of
21 circumstances, not just the preemption of the local
22 ordinances, but it did do that. It also served as a --

23 QUESTION: What is the rational basis for the
24 people outside of Aspen telling the people in Aspen they
25 cannot have this nondiscriminatory provision?

1 MR. TYMKOVICH: The rationale is any law of
2 general preemption that wants to make a substantive
3 decision, and the people here, the rational basis for that
4 substantive decision in our view was a political response
5 to what the people might have perceived as laws going too
6 far or being too intrusive.

7 What this does is --

8 QUESTION: Well, the State of Virginia has a
9 very broad State preemption doctrine. Local governments
10 do not have the power in Virginia that they do in many
11 other places. I suppose the rational basis for that is
12 just that the people generally would prefer to have the
13 rules set by the State at large rather than by local
14 governments.

15 MR. TYMKOVICH: That's correct, Your Honor, and
16 there's nothing wrong, especially in this area of civil
17 rights and statewide protections, in making that an issue
18 of statewide concern, and that's simply what Colorado
19 was --

20 QUESTION: But Mr. Tymkovich, doesn't that go
21 back to the problem I tried to raise earlier?

22 You're saying that as a general matter certain
23 laws can be determined as subject to action at one
24 political level and not at others, but isn't the question
25 here is, what is the rational basis for determining that

1 affirmative protection for homosexuals cannot be dealt
2 with at a certain level, whereas affirmative protection
3 for the aged, for the handicapped, and so on, can be?

4 Isn't that what the rational basis has to
5 address, and how does your answer to Justice Stevens
6 address it?

7 MR. TYMKOVICH: Your Honor, that's a
8 quintessential political judgment on how you provide
9 relative protection to relative groups.

10 QUESTION: Well, it's a judgment that is made
11 politically, but that doesn't state a rational basis.

12 I mean, if we were saying -- if we were asking
13 you this question, why should discrimination be dealt with
14 in Colorado at the State level rather than the local
15 level, or at the constitutional level, or whatnot, is that
16 a denial of any constitutional right, and you said, no,
17 that's a political choice. Colorado -- the people of
18 Colorado can decide what level to deal with this problem.

19 That would, it seems to me, answer a substantive
20 due process challenge, but that's not the question that's
21 being asked here. The question that's being asked here
22 is, why is discrimination against one group dealt with
23 under State law differently from discrimination against
24 other groups, and your rational basis answer, it seems to
25 me, has got to go to a justification for the

1 classification. It isn't enough simply to say, oh, well,
2 that's what politics decided.

3 MR. TYMKOVICH: Your Honor, that's not my
4 response. I think there are some particular discrete
5 reasons also, and this is to answer Justice Ginsburg's
6 question also.

7 This issue was seen as particularly desirable
8 for a statewide uniform determination. There's a question
9 about the desirability of each local jurisdiction dealing
10 with this issue, which I think raises some very
11 fundamental and sensitive cultural, moral, political
12 concerns for our State.

13 QUESTION: Well, it does, but are you getting
14 any further than simply the answer, that's what they
15 wanted, that's the result of the political process?

16 I don't see in your answer the kind of
17 justification independent merely of majority will, which
18 an equal protection classification question calls for.

19 MR. TYMKOVICH: Your Honor, in addition to
20 statewide uniformity, we've also advanced some reasons
21 that show how Amendment 2 advances other liberty
22 interests, and there are competing liberty interests that
23 are, in fact --

24 QUESTION: What's the liberty interest that it
25 advances?

1 MR. TYMKOVICH: It promotes a zone of autonomy.
2 The State supreme court and the trial court found that
3 religious liberty interests were advanced here,
4 associational liberties were advanced here, and the Court
5 simply made a determination below that they were not
6 narrowly tailored, so --

7 QUESTION: Mr. Tymkovich, if this is an ordinary
8 equal protection challenge and there's no heightened
9 scrutiny, isn't it an adequate answer to Justice Souter's
10 question to say this is the only area in which we've had a
11 problem?

12 If localities started passing special laws
13 giving favored treatment to people with blue eyes, we
14 might have a statewide referendum on that as well? Isn't
15 one step at a time a normal response to equal protection?

16 MR. TYMKOVICH: That's exactly what happened
17 here, and the court --

18 QUESTION: Well, what is the problem? I mean,
19 what is the problem that you supposedly have been having?

20 MR. TYMKOVICH: I think the problem that the
21 voters saw, they were presented with an opportunity to
22 preempt and make a decision at a statewide level for laws
23 that raise particular and sensitive liberty concerns.

24 QUESTION: State -- State subdivisions giving
25 preferences which the majority of the people in the State

1 did not think desirable for social reasons, isn't that the
2 problem that was seen?

3 MR. TYMKOVICH: That's right.

4 QUESTION: And if they should start giving
5 preferences for some other reason that the majority of the
6 State did not consider desirable -- let's say, bigamy,
7 special preferences to bigamist couples, there would be a
8 law on that subject as well.

9 Isn't your answer, this is the only area where
10 the people apparently saw a problem, which is enough for
11 equal protection?

12 MR. TYMKOVICH: It is, and this is an area where
13 there have been piecemeal additions of special
14 protections. We've had --

15 QUESTION: What is the special preference at
16 stake here? What is the special preference that a
17 homosexual gets?

18 MR. TYMKOVICH: I think it creates a cause of
19 action on the basis of the characteristic that's not
20 available to the general population at large.

21 Homosexuals are entitled to every other
22 protection of the civil rights laws, the criminal laws,
23 the --

24 QUESTION: You've just said that in -- apart
25 from whatever the common law might be, with this ordinance

1 on -- with this amendment on the books, a restaurant owner
2 can say, sorry, I don't want to serve gay people, and what
3 about -- take a scarce resource. Think of a public
4 hospital that has a kidney dialysis machine, and the
5 hospital says, we have to limit this, and one group that
6 we're going to keep out, we're not going to have any gay,
7 any lesbian person use this -- use this facility.

8 Now, there would be, under this amendment, what
9 recourse?

10 MR. TYMKOVICH: Well, first of all there's
11 Federal law that may preempt, and secondly, there is an
12 opportunity, as we construe Amendment 2, for the State to
13 enact a policy that would treat all citizens the same in
14 those circumstances rather than carve out a special --

15 QUESTION: But let's just have the law as it is
16 right now. There's a scarce resource. There's a basis --
17 there has to be some rules about who can use it and who
18 can't. That's the rule that the public hospital sets.
19 Under this amendment, that's okay, right?

20 MR. TYMKOVICH: In this facial challenge, we
21 don't know how the court is going to construe other
22 potentially applicable State laws.

23 QUESTION: How -- I do have one question on that
24 point which I'd like to ask.

25 The statute says, no agency shall adopt or

1 enforce any policy whereby homosexual conduct, or
2 whatever, orientation, shall be the basis of any claim of
3 discrimination.

4 So if a police department says, there's been a
5 lot of gay-bashing. It's our policy. Stop it. If the
6 head librarian says, you're making gays sit -- you're
7 being mean to them and not letting them in. Stop it. If
8 the health department says the same thing, if the
9 insurance commissioner says the same thing, doesn't this
10 word policy cover that, and if it doesn't cover it, what
11 is it about?

12 MR. TYMKOVICH: The government agencies that
13 you've indicated could enact a general nonbias policy or
14 require --

15 QUESTION: No, no. What they say is, they put
16 up regulation 14.2. There's been gay-bashing here. Stop
17 it. They put it more politely, but that's what they mean.

18 MR. TYMKOVICH: Amendment 2 would not prohibit
19 that.

20 QUESTION: It would not prohibit that.

21 MR. TYMKOVICH: It would not prohibit --

22 QUESTION: Then what does the word policy
23 prohibit?

24 MR. TYMKOVICH: Policy prohibits the enactment
25 of some special entitlement --

1 QUESTION: No, but give me an example. What
2 could it possibly be? What is policy, if it isn't the
3 policy of the department saying, do not discriminate
4 against gays?

5 QUESTION: Mr. Tymkovich, I assume in your State
6 you're not allowed to bash nongays either, are you?

7 MR. TYMKOVICH: No. The criminal law is --

8 QUESTION: So prohibiting the bashing of gays
9 would not be a special protection, would it? It would
10 just be enforcing the general law.

11 MR. TYMKOVICH: Yes, and Amendment 2 does
12 nothing to restrict the applicable --

13 QUESTION: Isn't that the response to Justice --

14 QUESTION: But does it --

15 MR. TYMKOVICH: That's right.

16 QUESTION: Fine.

17 (Laughter.)

18 QUESTION: But does it prevent -- what -- give
19 me an example of what it prevents. Does it prevent the
20 police department, the librarian, the dozens of State
21 agencies from putting up a piece of paper that says,
22 policy: it is our policy in this department not to
23 discriminate against gays.

24 You're saying it doesn't prohibit that. Then
25 what does it prohibit?

1 MR. TYMKOVICH: It prohibits any type of special
2 protection or a liability claim that somebody might have
3 under that policy.

4 QUESTION: It seems to me that your answer is
5 inconsistent to what the supreme court of Colorado said.
6 It said health insurance discrimination regulations are
7 void.

8 MR. TYMKOVICH: The health --

9 QUESTION: That's -- based on sexual
10 orientation.

11 MR. TYMKOVICH: The health -- that regulation
12 did carve out what would be construed as special
13 protection --

14 QUESTION: That's inconsistent with the answer
15 you gave to Justice Breyer.

16 MR. TYMKOVICH: I don't think so, Your Honor,
17 because I thought he was talking about a law of general
18 applica --

19 QUESTION: No. Look, suppose Boulder, Colorado
20 says, it is our policy in Boulder not to discriminate
21 against gays. They call it Boulder Regulation 14.2. Is
22 that forbidden by this?

23 MR. TYMKOVICH: Yes, it would to the extent --

24 QUESTION: All right. Now, suppose the police
25 department does exactly the same thing. Is that forbidden

1 by this?

2 MR. TYMKOVICH: The police department would be
3 governed by a rule of general applica --

4 QUESTION: So the police department --

5 MR. TYMKOVICH: They would not be able to --

6 QUESTION: I don't understand. So is the city
7 of Colorado. They're all governed by, they can't
8 discriminate arbitrarily. My point is, suppose that the
9 police department says exactly the same thing. You say
10 that's not forbidden.

11 MR. TYMKOVICH: That's correct.

12 QUESTION: Okay.

13 MR. TYMKOVICH: Your Honor, may I reserve the
14 balance of my time for rebuttal?

15 QUESTION: Yes. Thank you, Mr. Tymkovich.

16 Ms. Dubofsky, we'll hear from you.

17 ORAL ARGUMENT OF JEAN E. DUBOFSKY

18 ON BEHALF OF THE RESPONDENTS

19 MS. DUBOFSKY: Mr. Chief Justice, and may it
20 please the Court:

21 Let me begin with how Amendment 2 should be
22 construed and then discuss how our legal theories relate
23 to its unique combination of breadth and selectivity.

24 Amendment 2 is vertically broad in that it
25 prohibits all levels of government in the State of

1 Colorado from ever providing any opportunity for one to
2 seek protection from discrimination on the basis of gay
3 orientation.

4 QUESTION: Well, when you say all levels of
5 government in Colorado, Ms. Dubofsky, you don't include
6 the people by referendum, I take it, or the people by
7 initiative.

8 MS. DUBOFSKY: No, we do not.

9 QUESTION: And I have one more very specific
10 question. What about the courts? Can the courts
11 interpret a statute that prohibits unreasonable denial of
12 public accommodations to include gays by a specific
13 judgment that --

14 MS. DUBOFSKY: The --

15 QUESTION: -- deals with the rights of gay
16 people?

17 MS. DUBOFSKY: The State has conceded that
18 Amendment 2 is unconstitutional to the degree it would
19 prohibit such a claim based upon Federal law since 1983.

20 QUESTION: No, no, no, I meant State courts
21 interpreting State public accommodation laws.

22 MS. DUBOFSKY: Our theory is that Amendment 2 on
23 its face prohibits a State court from recognizing such a
24 claim, but that particular interpretation of the amendment
25 is not necessary for this Court to find that Amendment 2

1 is unconstitutional.

2 QUESTION: Thank you, and that particular
3 interpretation has not been given by the supreme court of
4 Colorado.

5 MS. DUBOFSKY: That's right.

6 QUESTION: It has not.

7 MS. DUBOFSKY: That's right. The Colorado
8 supreme court interpreted the amendment, and it said it
9 was doing this as a minimum, because that was all that was
10 necessary in order to find the amendment unconstitutional.

11 It interpreted the amendment to mean that State
12 and local governments are barred from promulgating and
13 enforcing rules that declare discrimination against gay
14 people by both government and private actors to be
15 arbitrary, so that would include Justice Breyer's general
16 policy suggestion with respect to the police department.

17 QUESTION: What do we do about, counsel for the
18 other side said, no, it doesn't forbid the police
19 department from having a rule saying don't discriminate
20 against gays. It doesn't forbid any of these agencies
21 from having such a rule.

22 MS. DUBOFSKY: The Colorado supreme court
23 interpretation of this amendment is authoritative for
24 purposes of this argument, I believe, and the Colorado
25 supreme court --

1 QUESTION: Where does it say that in the
2 Colorado supreme court's opinion?

3 MS. DUBOFSKY: It says that on page B-3,
4 D-24 --

5 QUESTION: Of the white appendix, or the --

6 MS. DUBOFSKY: Yes, in the white appendix.
7 B-3, D-24, and D-25.

8 QUESTION: D as in does?

9 MS. DUBOFSKY: D as in David, or does, yes.

10 QUESTION: David, yes.

11 MS. DUBOFSKY: And the way in which the Colorado
12 supreme court says that is by giving examples of the types
13 of provisions that would be repealed by the amendment, or
14 precluded from enactment in the future.

15 QUESTION: B-3? What does it say on B-3 that
16 says that?

17 QUESTION: Is it B --

18 QUESTION: It -- B-3 -- you said B as in --

19 MS. DUBOFSKY: B as in boy.

20 QUESTION: Boy. It seems to me it says the
21 effect, the ultimate effect is to prohibit any government
22 entity from adopting similar or more protective statutes,
23 regulations, or orders in the future.

24 MS. DUBOFSKY: Yes, and it refers back to the
25 first sentence. It says, the immediate objective of

1 Amendment 2 is at a minimum to repeal existing statutes,
2 regulations, ordinances, and policies.

3 Then on pages --

4 QUESTION: Wait, that barred discrimination
5 based on sexual orientation. I assume that that means
6 special provisions giving special protection --

7 MS. DUBOFSKY: Well --

8 QUESTION: -- as opposed to a general law that
9 says you have to, not just accept homosexuals, but all
10 citizens have to be accommodated at hotels.

11 MS. DUBOFSKY: That's correct. There are
12 general laws that say --

13 QUESTION: As opposed to a special law that says
14 a private homeowner who wants to rent a room -- you know,
15 the mom and a family that wants to do bed and breakfast
16 cannot discriminate in the people it accepts. Although it
17 has no obligation to take the public at large, it can
18 decide to take only Irishmen if it wants, but it cannot
19 discriminate on the basis of homosexuality. I thought
20 that's the kind of thought the court is referring to here.

21 MS. DUBOFSKY: The Colorado supreme court is
22 referring to?

23 QUESTION: Yes.

24 MS. DUBOFSKY: No, I don't think so. I think
25 it's referring to the general ordinances that were

1 preempted by Amendment 2, and in Colorado those general
2 ordinances either have specific exceptions for exactly the
3 type of example you gave, or they have never been enforced
4 to have someone in the Mrs. Murphy's boardinghouse
5 situation required to accept someone who does --

6 QUESTION: You mean no general laws can be
7 applied to homosexuals now? They can be bashed, they can
8 be murdered, they -- all sorts of things. Is that what it
9 means?

10 MS. DUBOFSKY: We think it can mean that, but we
11 don't think the Colorado supreme court found it necessary
12 to go that far in its interpretation --

13 QUESTION: I --

14 MS. DUBOFSKY: -- and we're not arguing that it
15 needs to be interpreted that broadly in order to find
16 Amendment 2 unconstitutional.

17 QUESTION: I don't think the Colorado supreme
18 court did interpret it that broadly. I think they
19 interpreted it to refer to special protections accorded to
20 homosexuals and not to the public at large.

21 MS. DUBOFSKY: I think we're having trouble a
22 little bit with semantics.

23 One of the difficulties is the use of the words
24 special protection in this case. I don't think there is
25 such a thing as special rights or special protections. I

1 think there's a right which everyone has to be free from
2 arbitrary discrimination.

3 QUESTION: No, but if I go and ask a homeowner
4 to take me in on bed and breakfast and the homeowner says,
5 I don't like Italians, that's my tough luck, unless
6 there's a law against it. It's that person's house, and
7 that person is entitled not to like Italians and not to
8 rent rooms to Italians.

9 That's fine, unless there's a law against it,
10 and you can have such a law prohibiting the rental of
11 rooms, or refusal to rental on the basis of racial
12 discrimination or on the basis of homosexuality, if you
13 want to make that a category, and I think that this law
14 says, no special protection on that basis. Why isn't that
15 a special protection, one that is not given to everyone?

16 QUESTION: At D-24 and D-25 there's some
17 particular examples. Wasn't that --

18 MS. DUBOFSKY: That's right, D-24 --

19 QUESTION: Colleges, State colleges, the
20 insurance example.

21 MS. DUBOFSKY: That's right. That's right, and
22 all of those particular laws say that there shall be no
23 discrimination on the basis of sexual orientation. They
24 apply to everyone. They're laws of general applicability.

25 Amendment 2 preempts those laws, or precludes or

1 bars those laws only on the basis that they provide
2 protection for people on the basis of gay sexual
3 orientation.

4 QUESTION: Yes, but you -- but they are laws
5 that provide special protection for that particular
6 category of person, which they don't provide to people at
7 large. You can refuse to hire someone because you don't
8 like the way he combs his hair. There's no law that says
9 combing of hair is not a proper basis of discrimination.
10 If you don't like that, you can refuse to hire him.
11 Special protection is given by this law which they cite by
12 reason of homosexual orientation or conduct.

13 MS. DUBOFSKY: Well, in Colorado --

14 QUESTION: Is that not special?

15 MS. DUBOFSKY: In Colorado, there is a law which
16 says one cannot be terminated from employment for any
17 legal off-duty conduct, and gives one the basis for a
18 claim. If your employer doesn't like the way you comb
19 your hair, that was an improper reason for terminating
20 your employment.

21 QUESTION: Does a State college -- can a State
22 university decide not to admit a student under generally
23 applicable law because it doesn't like the way he combs
24 his hair?

25 MS. DUBOFSKY: That's a question I'm not sure I

1 know the answer to, but I think --

2 QUESTION: I mean, can State universities
3 discriminate arbitrarily? Can State insurance
4 commissioners discriminate arbitrarily? I would assume
5 not. I mean --

6 MS. DUBOFSKY: I don't think they can
7 discriminate arbitrarily, no. They shouldn't be able to.

8 QUESTION: Let me put it to you this way.
9 Suppose there's a Colorado ordinance, or city ordinance
10 which said you cannot bar people from public
11 accommodations for any arbitrary or unreasonable reason.
12 Could a court in Colorado find that barring -- after this
13 amendment, could a court in Colorado find that it was
14 unreasonable or arbitrary to bar a person from public
15 accommodations by reason of sexual orientation?

16 MS. DUBOFSKY: I think a court could find that,
17 yes.

18 QUESTION: Despite the provision under the
19 Constitution that says no preferences should be given?

20 MS. DUBOFSKY: Well, it depends upon whether the
21 court is referring to more general equal protection law on
22 a Federal level.

23 QUESTION: No, no. It's talking about
24 interpreting a statute that says you cannot deny for an
25 arbitrary or unreasonable -- on the basis of an arbitrary

1 unreasonable criterion.

2 MS. DUBOFSKY: If that criteria in the
3 particular case is because the person who was denied that
4 benefit is a gay person, then I think under Amendment 2
5 the court would not be able to provide relief.

6 Now, we don't think that this Court needs to
7 resolve that type of a specific issue, the application of
8 Amendment 2, in order to find Amendment 2
9 unconstitutional.

10 QUESTION: But isn't the very purpose of this
11 ordinance to say, it's not arbitrary to leave out of a
12 catalog of protection against discrimination, it's not
13 arbitrary to leave out homosexual, lesbian -- persons of
14 homosexual, lesbian, or bisexual orientation?

15 MS. DUBOFSKY: Amendment 2 if interpreted at its
16 broadest would authorize that type of discrimination.

17 QUESTION: But even on a narrower
18 interpretation, even for example if Amendment 2 didn't
19 touch courts, wouldn't it be very difficult for the courts
20 of Colorado to say that that was an irrational or an
21 arbitrary basis for discrimination with Amendment 2 on the
22 books, even if Amendment 2 was narrowly construed?

23 MS. DUBOFSKY: Yes, it would be, I believe --

24 QUESTION: Yes.

25 MS. DUBOFSKY: -- and we argue in our brief that

1 Amendment 2 would prevent a court from providing a remedy
2 in these circumstances. We think it does on its face.
3 However, the Colorado supreme court --

4 QUESTION: Because it refers to departments of
5 the government.

6 MS. DUBOFSKY: Absolutely.

7 QUESTION: Yes.

8 MS. DUBOFSKY: But the Colorado supreme court
9 didn't think it was necessary to go that far in order to
10 find the amendment unconstitutional.

11 QUESTION: Well, we really don't have a
12 definitive interpretation, I guess, of how far this
13 amendment would go. I think the arguments and responses
14 this morning are illustrative of the fact that we're not
15 sure.

16 MS. DUBOFSKY: I think we do have a definitive
17 interpretation from the Colorado supreme court. It's at
18 pages D-25 and D-24, actually --

19 QUESTION: Yes.

20 MS. DUBOFSKY: -- and that's where the Court --

21
22 QUESTION: I looked at that, and I just thought
23 that that wasn't definitive. There are still questions
24 about how far it would go and the extent to which it
25 reaches courts, and so forth and so on.

1 MS. DUBOFSKY: One of the difficulties with this
2 amendment is that you have no idea what type of general
3 rule might be necessary in the future to prevent arbitrary
4 discrimination against gay people.

5 QUESTION: Well, isn't it your position,
6 Ms. Dubofsky, that you can sustain the Colorado supreme
7 court's decision overthrowing the statute by taking just
8 what the Colorado supreme court said was the minimum
9 meaning?

10 MS. DUBOFSKY: Yes, that's correct.

11 QUESTION: And so you don't have to get beyond
12 that, in your view, in order to uphold your position.

13 MS. DUBOFSKY: That's correct.

14 QUESTION: And this is a facial challenge.

15 MS. DUBOFSKY: And this is a facial challenge,
16 that's right.

17 QUESTION: Which means that you take the
18 position that there are no applications in which the
19 statute can be constitutional.

20 MS. DUBOFSKY: Well, we would here because we
21 think the minimal interpretation here is sufficient to
22 find the amendment unconstitutional.

23 QUESTION: Which means there are no applications
24 that would be constitutional.

25 MS. DUBOFSKY: It doesn't necessarily mean that

1 there are no applications that would be constitutional.

2 QUESTION: I think it does if it --

3 MS. DUBOFSKY: It just means that those are
4 irrelevant.

5 QUESTION: Well, that's not what our case law
6 involving facial challenges says. If you wanted to wait
7 for an as-applied challenge, you might pick an
8 unconstitutional situation and litigate that, but when you
9 challenge it on your -- on its face, you are saying that
10 in all of its applications it is invalid.

11 MS. DUBOFSKY: We're saying that the minimal
12 interpretation that the Colorado supreme court gave to
13 this in all of its applications is invalid. Because there
14 may be other types of applications of this amendment, we
15 don't have to deal with those in this particular facial
16 challenge because they're basically irrelevant.

17 QUESTION: Ms. Dubofsky, do I understand
18 correctly that what you're saying about what the Colorado
19 supreme court said, at a minimum this amendment
20 immediately repeals all of the laws that are listed, and
21 this group of people cannot be reinstated into this group
22 of laws without a constitutional amendment, and that is
23 what you say is unconstitutional --

24 MS. DUBOFSKY: Or --

25 QUESTION: -- under Federal equal protection?

1 MS. DUBOFSKY: Or any other laws of general
2 prophylactic rules. There's a difference between general
3 prophylactic rules that prevent arbitrary discrimination
4 such as the rules or statutes that are listed there, but
5 that's not an exhaustive list, and the application or, you
6 know, case-by-case determination of whether a particular
7 denial of admission to a hotel, let's say, is covered by
8 Amendment 2.

9 QUESTION: But these rules on 24 and 25 don't,
10 as I understand them, prohibit arbitrary discrimination.
11 They prohibit discrimination just on particular grounds --
12 race, sex, homosexual orientation, not how you comb your
13 hair.

14 MS. DUBOFSKY: No, they -- it's not homosexual
15 orientation, it's sexual orientation in general.

16 QUESTION: Ah.

17 MS. DUBOFSKY: The laws that Amendment 2 deals
18 with, all are laws that apply to everyone. Amendment 2
19 only --

20 QUESTION: They do apply to everyone, but they
21 only apply for certain reasons. They are not laws that
22 say, no arbitrary discrimination. You can discriminate on
23 very arbitrary bases, just not those particular bases
24 listed. Isn't that right?

25 MS. DUBOFSKY: That could be right. It depends

1 upon the circumstance.

2 But what I'm really trying to point out is that
3 rules such as general -- the Boulder ordinance, let's say,
4 or the State insurance statute, presume that certain types
5 of discrimination can be arbitrary. They're general
6 prophylactic rules.

7 Most of our civil rights laws in this country
8 are effectively enforced by general prophylactic rules.
9 If we had to rely on an individual case-by-case
10 enforcement, I don't think we'd have very much civil
11 rights law enforcement.

12 QUESTION: Is there a principle in Colorado law,
13 as in many laws -- let me explain what I'm thinking --
14 simply that if a private person can often act arbitrarily,
15 often, and you tell that person that they can't
16 discriminate against gays, you've given gays a special
17 protection, all right, but governments by and large cannot
18 act arbitrarily anyway. Is there such a principle in
19 Colorado law?

20 MS. DUBOFSKY: Yes, there is.

21 QUESTION: Is there an administrative procedures
22 act, for example, in Colorado?

23 MS. DUBOFSKY: Yes. There's generally a
24 principle that government cannot act in an arbitrary
25 fashion, that governmental services are available to

1 everyone.

2 QUESTION: So that's why you say, or you think
3 the Colorado supreme court is saying that this law or
4 policy, if it means anything, means that Colorado cannot
5 enforce that nonarbitrary principle anyway through rules
6 and regulations.

7 MS. DUBOFSKY: That's correct.

8 QUESTION: Let me ask you, counsel, getting away
9 from the wording in the provisions of this amendment,
10 suppose that Colorado is concerned that one city has
11 passed an ordinance giving preference to gays in
12 employment hiring, and for any number of reasons the
13 citizens of Colorado do not want that. Some people say
14 they want uniform laws because it's easier on employers.

15 Could the citizens of Colorado by referendum
16 repeal that ordinance?

17 MS. DUBOFSKY: Yes, they could repeal that
18 ordinance.

19 QUESTION: Without any constitutional objection?

20 MS. DUBOFSKY: I think that's correct.

21 QUESTION: Could they also provide that no such
22 ordinance shall be adopted in the future?

23 MS. DUBOFSKY: That's where it gets more
24 difficult. That's where our political participation
25 argument comes to play, that by disabling a government

1 from responding to a need for a particular benefit, the
2 type of protection that -- it depends upon the
3 circumstances.

4 QUESTION: Well, it would seem a little odd that
5 there could be an ordinance enacted, then repealed by the
6 referendum, then the ordinance is enacted again, then
7 repealed -- it just goes back and forth. That seems a
8 little odd.

9 QUESTION: Ms. Dubofsky, could Colorado adopt a
10 law that says any law in our State dealing with
11 discrimination on any ground has to be passed at the State
12 level?

13 MS. DUBOFSKY: It could. The problem --

14 QUESTION: That would be valid.

15 MS. DUBOFSKY: Well, it may be. There are other
16 problems with dealing with civil rights protections and
17 generally, but let's say they passed Amendment 2 but it
18 didn't target gay people. It simply said that no one can
19 obtain any protection from discrimination, arbitrary
20 discrimination for any reason.

21 That would not present the problem that
22 Amendment 2 presents. Amendment 2 is very selective. It
23 targets only one group of people, and that's where it
24 encounters equal protection difficulties.

25 The State may be able to rearrange its process

1 in any number of ways. It just can't do it in a way that
2 prevents one particular group.

3 QUESTION: Ms. --

4 QUESTION: But the -- I'm sorry.

5 QUESTION: Go on.

6 QUESTION: No.

7 QUESTION: That's all right.

8 What group does it target? I'm asking you the
9 same question I asked the Attorney General. How do you
10 read the statute when it refers to sexual orientation,
11 homosexual, lesbian, or bisexual orientation, conduct,
12 practices, or relationships?

13 Suppose a person who, let's say, has a tendency
14 to homosexual conduct, but has never engaged in homosexual
15 conduct, is that person -- would an ordinance that relates
16 to that person be covered by this?

17 MS. DUBOFSKY: Yes. The Colorado supreme court
18 did interpret this initiative in this regard. It said
19 that homosexual conduct was subsumed within homosexual
20 orientation, and --

21 QUESTION: Well, I'm sure it is, but what else?
22 I mean, that's the problem. What else?

23 MS. DUBOFSKY: I don't understand what you mean
24 by what else.

25 QUESTION: Beyond homosexual conduct.

1 MS. DUBOFSKY: Well, heterosexual people are not
2 identified exclusively by heterosexual conduct. In the
3 same fashion, homosexual people are not defined
4 exclusively by homosexual conduct. It doesn't mean that
5 heterosexual people don't have a heterosexual orientation.
6 Homosexual people have a homosexual orientation.

7 QUESTION: Well, are you saying, then, that
8 orientation identifies a group beyond the identification
9 of -- by reference to specific homosexual conduct?

10 MS. DUBOFSKY: Yes, it does.

11 QUESTION: Okay. So it's a broader category.

12 MS. DUBOFSKY: Yes.

13 QUESTION: Okay.

14 MS. DUBOFSKY: And that's what the Colorado
15 supreme court --

16 QUESTION: Both words are used -- both words are
17 used in the amendment.

18 MS. DUBOFSKY: Both words are used in the
19 amendment, but the Colorado supreme court said that
20 homosexual orientation is broader than homosexual conduct
21 and that -- the State had been arguing that, well, we'll
22 just sever out the language, homosexual orientation, from
23 Amendment 2. The Colorado supreme court said no, you
24 can't sever this amendment --

25 QUESTION: Well, what if I thought that there's

1 a problem with orientation but not a problem with the
2 others, do you win or lose on this facial challenge?

3 MS. DUBOFSKY: If you thought there was a
4 problem with targeting people based on their homosexual --

5 QUESTION: -- orientation, people who do not
6 engage in conduct of the sort, but have a tendency in that
7 direction.

8 MS. DUBOFSKY: Well, I'm not quite sure what you
9 mean by problem. Do you mean --

10 QUESTION: Suppose I find that it would be valid
11 to have such a law directed at conduct --

12 MS. DUBOFSKY: Yes.

13 QUESTION: -- but not at -- directed at
14 something other than conduct.

15 MS. DUBOFSKY: No, we don't lose, because this
16 law's --

17 QUESTION: Why don't you lose? This is a facial
18 challenge. You say it has no valid applications.

19 MS. DUBOFSKY: This law is much broader than
20 that, and the minimal interpretation given by the Colorado
21 supreme court is that the law covers homosexual
22 orientation as well as conduct, and that they are not
23 severable.

24 QUESTION: Well --

25 QUESTION: But isn't the breadth that you would

1 rely on not that it covers orientation rather than just
2 conduct, but that it in effect fences people out of a
3 political process?

4 MS. DUBOFSKY: That's correct.

5 QUESTION: And I guess that takes me back to
6 your answer to, I guess it was Justice O'Connor, in which
7 you said the constitutional defect was the manner in
8 which, or a general constitutional defect would be
9 targeting homosexuals.

10 MS. DUBOFSKY: Yes.

11 QUESTION: That's not really your position, is
12 it, because if there were an ordinance -- let's say there
13 were an ordinance in a given city saying there will be no
14 discrimination based on age, handicap, or sexual
15 orientation, and there were a political move in that city
16 to repeal the reference to sexual orientation, that would
17 be targeted at homosexuals, but it would not run afoul of
18 what I understand your position to be here, is that
19 correct?

20 MS. DUBOFSKY: I'm not certain I understand what
21 you're driving at.

22 QUESTION: Look, if -- you've got an ordinance
23 in a city that says no discrimination based on age,
24 handicap, or sexual orientation. There's a political move
25 in the city to repeal the reference to sexual orientation.

1 It succeeds.

2 MS. DUBOFSKY: Yes.

3 QUESTION: Is that a violation of equal
4 protection?

5 MS. DUBOFSKY: No.

6 QUESTION: Okay.

7 QUESTION: Ms. Dubofsky, supposing that in
8 Colorado, shortly before the enactment of this ordinance,
9 there had been agitation, say, by dissident Mormon sects
10 to repeal the prohibition against polygamy that I assume
11 Colorado has, and so there's a referendum that says -- the
12 Colorado constitution says polygamy will always be a
13 felony in the State of Colorado, now, does that fence out
14 these people who would like to see polygamy allowed?

15 MS. DUBOFSKY: Not necessarily, because that's
16 really dealing with much more of a discrete issue. It's
17 not a restructuring of the political process.

18 QUESTION: But there -- well, there -- it's
19 certainly restructured, if they were agitating before the
20 legislature to try to get a prohibition against polygamy
21 repealed. It certainly fences them out there. They now
22 have to go to a referendum just like your clients do.

23 MS. DUBOFSKY: That's correct, but the
24 particular issue involved is having to do with the
25 identity of the group of people who are engaging in

1 polygamy, and it's prohibiting polygamy.

2 The best way I can answer that question is to
3 say, if you substituted bigamists or polygamists into the
4 language of Amendment 2, then you would have a problem, as
5 we point out, but here --

6 QUESTION: What sort of a problem would you
7 have?

8 MS. DUBOFSKY: You would have a problem of
9 denying people the fundamental right to participate in the
10 political process.

11 QUESTION: Well, so then you say that Colorado
12 cannot say in its constitution either polygamy or bigamy
13 will always be a felony.

14 MS. DUBOFSKY: They could say that in their
15 constitution, yes.

16 QUESTION: Well, would it be valid, under your
17 theory of the Federal Constitution?

18 MS. DUBOFSKY: To have that in the --

19 QUESTION: Yes.

20 MS. DUBOFSKY: -- Colorado constitution? Yes,
21 it would.

22 QUESTION: Well then, why is that different from
23 this case?

24 MS. DUBOFSKY: That is different from this case
25 because this case is targeting a particular group of

1 people on a personal characteristic, and --

2 QUESTION: Well, but surely the dissident sects
3 that want to practice polygamy are a particular group of
4 people, too.

5 MS. DUBOFSKY: That's correct. What they're not
6 being deprived of is a whole category of laws that provide
7 them a benefit, the opportunity to seek protection from
8 discrimination or a similar --

9 QUESTION: Well, but maybe this is essential to
10 their religion.

11 MS. DUBOFSKY: Well, then it would come under a
12 whole different way of analyzing the issue, and that would
13 be whether it deprived them of a First Amendment --

14 QUESTION: Ms. Dubofsky, do you contend that --
15 are you asking us to overrule Bowers v. Hardwick?

16 MS. DUBOFSKY: No, I am not.

17 QUESTION: Well, there we said that you could
18 make homosexual conduct criminal. Why can a State not
19 take a step short of that and say, we're not going to make
20 it criminal, but on the other hand, we certainly don't
21 want to encourage it, and therefore we will neither have a
22 State law giving it special protection, nor will we allow
23 any municipalities to give it special protection.

24 It seems to me the legitimacy of the one follows
25 from the legitimacy of the other. If you can criminalize

1 it, surely you can take that latter step, can't you?

2 MS. DUBOFSKY: What you've done is deprived
3 people, based on their homosexual orientation, of a whole
4 opportunity to seek protection from discrimination, which
5 is a very different thing.

6 QUESTION: So do you do it when you throw them
7 in jail for a felony?

8 MS. DUBOFSKY: No --

9 QUESTION: I'm not talking about orientation,
10 now. I'm talking about conduct. If we have held it
11 constitutional to make the conduct criminal, how could it
12 be unconstitutional to go so much short of that?

13 We don't want to get into the hassle of
14 intrusion into private life, and all of that, that that
15 requires. We're not going to criminalize it. On the
16 other hand, we do not think it is conduct that ought to be
17 encouraged, and therefore we will not allow any special
18 protections for it, neither at the State level, nor
19 locally.

20 Doesn't -- if the one is constitutional, must
21 not the other one be?

22 MS. DUBOFSKY: If homosexuals were put into the
23 language of Amendment 2 only in terms of, those people who
24 engage in homosexual conduct shall not be entitled to ever
25 seek protection under the civil rights laws, we would say

1 that is unconstitutional. That's a very different thing
2 from saying that you can criminalize homosexual sodomy.

3 QUESTION: But isn't it also true that this law
4 applies to this class of people even if they abstain from
5 the prohibited conduct?

6 MS. DUBOFSKY: That's correct, and it also could
7 apply to people who aren't gay, but who may be perceived
8 to be gay and are discriminated against on that basis.

9 QUESTION: Ms. Dubofsky, if we could go back to
10 the question Justice Kennedy was asking, I take it your
11 answer to him was, your objection is to the permanency,
12 the bar to access to the political process to get
13 something changed.

14 MS. DUBOFSKY: That's correct.

15 QUESTION: But you're not objecting to the State
16 saying, we repeal all existing ordinances.

17 MS. DUBOFSKY: That's correct, and that's
18 because the case law and the fundamental right to
19 political participation says a simple repealer is all
20 right.

21 QUESTION: Then how do you answer Justice
22 Kennedy's further question, well, isn't the State entitled
23 to end a ping pong game? The locality passes it, the
24 State repeals it. The locality passes it again, the State
25 repeals it again.

1 MS. DUBOFSKY: The constitutional bar, in
2 effect, to ever adopting a protection of any sort, or an
3 opportunity to seek protection from discrimination, is a
4 very different type of barrier than a simple repealer and
5 reenactment, because it means that if the group is going
6 to ever obtain any protection, it has to amend the State
7 constitution first.

8 QUESTION: Yes, but wouldn't you say that it
9 could end the ping pong ball that way if it ends it with
10 respect to all protection against private discrimination?

11 MS. DUBOFSKY: That's correct, it could.

12 QUESTION: That would not be an equal protection
13 problem.

14 MS. DUBOFSKY: That's right. That's right.

15 QUESTION: So you're saying, if I understand
16 you, you just can't end the ping pong ball for this
17 particular group.

18 MS. DUBOFSKY: That's correct, or any particular
19 group.

20 QUESTION: Right. Right.

21 MS. DUBOFSKY: It doesn't matter who the group
22 is --

23 QUESTION: Yes. Yes.

24 MS. DUBOFSKY: -- you just can't do it this way.

25 QUESTION: But you can end the game.

1 MS. DUBOFSKY: That's correct, you can end the
2 game. If the State wants to repeal and prohibit any civil
3 rights protections for anybody at any level of the
4 government in the future, and do it for everyone --

5 QUESTION: May I ask you a rather elementary
6 question I should know? Did the State file an answer in
7 this case?

8 MS. DUBOFSKY: Did the State file an answer in
9 this case?

10 QUESTION: Yes.

11 MS. DUBOFSKY: Yes.

12 QUESTION: They did file an answer.

13 MS. DUBOFSKY: Yes.

14 QUESTION: I couldn't find it --

15 MS. DUBOFSKY: And we tried the case.

16 QUESTION: Thank you, Ms. Dubofsky.

17 MS. DUBOFSKY: Thank you.

18 QUESTION: Mr. Tymkovich, you have 1 minute
19 remaining.

20 REBUTTAL ARGUMENT OF TIMOTHY M. TYMKOVICH

21 ON BEHALF OF THE PETITIONERS

22 MR. TYMKOVICH: Your Honor, the Colorado supreme
23 court rule basically holds that preemption is
24 unconstitutional. It says that with respect to this
25 issue -- this issue, not the people. This issue -- it

1 must be resolved at the local level, and that people who
2 oppose the substantive policy --

3 QUESTION: Well, excuse me, I don't see where it
4 said preemption was unconstitutional, as distinct from
5 saying, preemption for one identifiable group was
6 unconstitutional.

7 MR. TYMKOVICH: It's preemption of this issue
8 that affects a group, and in James the Court told us it's
9 permissible --

10 QUESTION: Well, it doesn't -- it doesn't -- the
11 ordinance speaks both in terms of issue, i.e., basis for
12 claim, and group. I mean, it refers to both, doesn't it?
13 You can't have one without the other, the way the
14 ordinance is --

15 MR. TYMKOVICH: It's an issue that affects a
16 group, like in James, and like in Gregory v. Ashcroft,
17 where we had an age restriction in the State.

18 QUESTION: Well, isn't in effect defined in
19 terms of the group under traditional equal protection
20 analysis, which looks to the intent of the enacting body?

21 MR. TYMKOVICH: Right, and then there would be
22 the question --

23 QUESTION: Okay.

24 MR. TYMKOVICH: -- of whether a rational basis
25 supports that.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. --
2 MR. TYMKOVICH: In this case --
3 CHIEF JUSTICE REHNQUIST: Thank you,
4 Mr. Tymkovich.

5 The case is submitted.

6 (Whereupon, at 11:01 a.m., the case in the
7 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ROY ROMER, GOVERNOR OF COLORADO, ET AL., Petitioner v. RICHARD G. EVANS, ET AL.

CASE NO.: 94-1039

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)