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Evans v. Romer, 882 P.2d 1335 (Colo. 1994)

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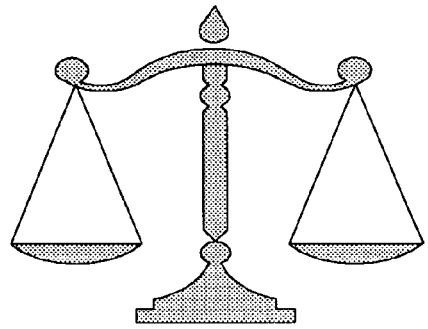
Courtwatch



Evans v. Romer

882 P.2d 1335 (Colo. 1994)

In 1992, Colorado voters passed a referendum, popularly known as Amendment 2, which barred all state and local governmental entities, from enacting, adopting or enforcing, any anti-discrimination law or policy based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Amendment 2 also nullified any existing anti-discrimination laws or policies based on sexual orientation. Several parties, including the Boulder Valley School District and the cities of Denver, Boulder and Aspen, filed suit against the Governor and the State challenging the constitutionality of the voter initiative and seeking to enjoin its enforcement.

On October 11, 1994, the Colorado Supreme Court, affirming the decision of the district court, upheld a permanent injunction against Amendment 2. Stating that any amendment which seeks to exclude an "independently identifiable class of persons" from equal participation in the political process must be subject to strict judicial scrutiny, the court held that Amendment 2 was not narrowly tailored to serve any compelling governmental interest. The court further held that Amendment 2 was neither severable nor a valid exercise of a state's reserved powers under the Tenth Amendment of the United States Constitution.

In seeking to show that Amendment 2 was narrowly tailored to serve compelling state interests, the State of Colorado had argued that the amendment served the government's interest in: 1) protecting the sanctity of religious, familial, and personal privacy; 2) seeing that limited resources are dedicated to the enforcement of civil rights laws intended to protect suspect classes, rather than having a portion of those resources diverted to the enforcement of laws intended to protect gay men, lesbians, and bisexuals; 3) allowing the people themselves to establish public, social and moral norms; 4) preventing the state from supporting the political objectives of a special interest group; and 5) deterring factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government.

The Colorado Supreme Court rejected each of these arguments posited by the State, finding some of these interests to be less than compelling, or that the Amendment was not narrowly tailored to serve those interests. It further found the fourth and fifth interests set forth

by the State to be meritless. "Political debate, even if characterized as 'factionalism'. . ." the court reminded the defendants, "is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy."

A dissenting opinion authored by Justice Erickson argued that the majority had essentially established a new substantive due process right disguised as a previously unrecognized "fundamental right" in order to (erroneously) apply a strict scrutiny standard of review. Justice Erickson maintained that at least three compelling state interests (religious privacy, promoting state-wide uniformity, and preserving the ability of the state to allocate scarce resources for traditionally suspect classes) would satisfy a less stringent rational basis standard of review.

The United States Supreme Court granted certiorari on February 21, 1995, and oral arguments were heard on October 10, 1995. *See*, 64 U.S.L.W. 3279, Oct. 17, 1995 (summary of oral arguments presented). At this writing, the decision of the Supreme Court is still being awaited.

- submitted by Kristin Long