

LEGAL

Good news you can use

A federal district court in Ohio makes a stunning decision about a discriminatory ordinance

by Geoffrey Wren

A United States district court in Ohio has issued an important decision in a case arising from enactment of a ballot measure similar to Measure 13. The case, *Equality Foundation vs. City of Cincinnati*, offers a textbook study of how Measure 13 violates the federal Constitution.

The case has its roots in enactment of civil rights ordinances by the Cincinnati City Council which forbade sexual orientation discrimination in public and private employment.

In response, a group called Equal Rights Not Special Rights put "Issue 3" on the ballot to amend the city's charter. The measure barred the city from taking action to protect sexual minorities from discrimination, and it nullified the city's existing ordinances. Sixty-two percent of the voters passed it in 1993.

The Equality Foundation of Greater Cincinnati sued the city in federal court to stop enforcement of Issue 3. Equal Rights Not Special Rights joined the city as a defendant.

Given the frequent hostility to sexual minorities in the federal courts, the district court's decision is stunning for its breadth, sensitivity and vision. The court began with its "findings of fact." These included findings that homosexuals comprise between 5 and 13 percent of the population; sexual orientation is a characteristic distinct from sexual conduct or behavior; sexual orientation is "a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding" with members of the same sex; homosexuality is set at an early age; homosexuality "bears no relation to an individual's ability to perform, contribute to, or participate in society"; and gay men, lesbians and bisexuals have "suffered a history of pervasive, irrational and invidious discrimination...in all facets of society in general."

Applying these findings, the court held that Issue 3 violated the 14th Amendment to the U.S. Constitution because it unconstitutionally discriminated against lesbians, gay men and bisexuals and because it violated their fundamental right of political participation.

The 14th Amendment requires that states and their political subdivisions accord all citizens the "equal protection of the laws." Certain laws or other government action which classify groups of people discriminatorily violate the Equal Protection Clause.

To determine whether a particular government classification unconstitutionally discriminates, the court must first decide what level of "scrutiny" should apply to the classification.

The degree of scrutiny answers the question of what justification the government must show to protect its classification against constitutional attack. At one end is "strict scrutiny." Such scrutiny requires the proof that the government has a compelling reason for its law or other action.

At the other end is "rational basis" review. Under the rational basis test, almost any justification one can articulate with a straight face will insulate a law against constitutional attack.

The federal district court did not apply strict scrutiny. Instead, it applied an intermediate test: "quasi-suspect scrutiny." In reaching this decision, the court emphasized that sexual minorities have suffered a history of invidious discrimination based on group identity, and that those targeted by Issue 3—lesbians, gay men and bisexuals—had no control over whether they belonged to the targeted group. The court also rejected the notion that sexual orientation is a matter of behavior as opposed to status.

Quasi-suspect scrutiny required the city to show that an important government interest justified Issue 3. The defendants, particularly Equal Rights Not Special Rights, advanced a host of justifications. The court rejected all of them. In particular, the court held that Issue 3 was not a legitimate expression of community morality.

Even better, the court went on to hold that Issue 3 could not even pass rational basis review. The court, in other words, essentially held that the defendants offered nothing more than laughable justifications.

Separate from its decision that Issue 3 unconstitutionally discriminated against gay men, lesbians and bisexuals as a class, the court also held that the measure violated their fundamental right of equal participation in the political process.

Last year, the Colorado Supreme Court applied this reasoning in *Evans vs. Romer* to hold that the state's Amendment 2, another discriminatory measure, violated the 14th Amendment. The argument basi-

cally holds that a law which forbids a legislative body from enacting civil rights protections for a particular class of citizens unconstitutionally denies that class the right to seek help from the legislative body, i.e., to petition for redress of grievances.

The court in *Equality Foundation* went a step further than the Colorado court and held that Issue 3 also violated the plaintiffs' First Amendment rights of freedom of speech and association. Given the breadth of the court's decision, one can read it to stand for a powerful proposition: A representative democracy cannot tolerate a law which disables citizens from seeking the help of their representatives.

If Ballot Measure 13 passes, civil rights attorneys will challenge it in court. They will make many, if not all, of the arguments embraced by the court in *Equality Foundation*. Rights advocates are optimistic that the courts would strike the measure down.

Optimism about judicial action is fine, but no one should let it stand in the way of action to defeat Ballot Measure 13 at the polls. *Equality Foundation* is one decision by one judge in one part of the country, and that decision is now on appeal. No one knows how the U.S. Supreme Court would rule on a measure like 13.

Perhaps more importantly, a victory at the polls may send a more powerful message than any judicial decision. Lawyers and judges often speak in a voice the Oregon Citizens Alliance does not hear. The electorate speaks in a voice the OCA cannot ignore.



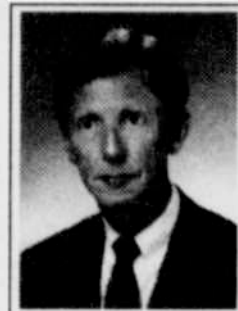
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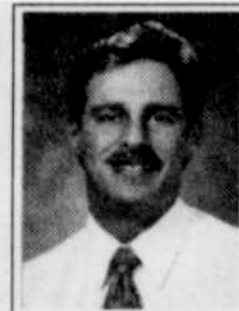
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