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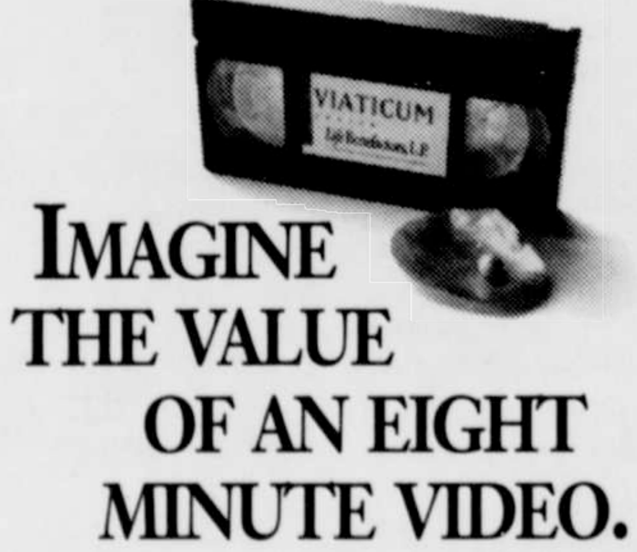

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national news

And now to wait

Amendment 2 has its day in the Supreme Court—but a verdict could be months away

▼

by Bob Roehr

The future of gay men and lesbians in the United States was argued before the U.S. Supreme Court on Oct. 10. The case is *Romer v. Evans*, regard ing the discriminatory Amendment 2 approved by 53 percent of Colorado voters in 1992 and subsequently declared unconstitutional by the Colorado Supreme Court.

Amendment 2 prohibits state and local governments and any of their agencies from granting "protected status based on homosexual, lesbian or bisexual orientation." It would invalidate protections for gay men and lesbians enacted by the cities of Denver, Boulder and Aspen.

The Colorado court ruled it unconstitutional because it discriminated against gay men and lesbians while erecting a higher barrier (a constitutional amendment) to future relief. In doing so it "fenced out" one particular group of people from the political process.

Colorado Solicitor General Timothy M. Tymkovich defended the amendment before the U.S. Supreme Court as an expression of popular will and the state's power to set its own policies.

"Is there any precedent in law?" quickly asked one justice. Tymkovich offered only one citation which was eviscerated by the justices.

"In all of U.S. history has there been another group so singled out?" asked Justice Sandra Day O'Connor. There was no satisfactory answer.

Justice Ruth Bader Ginsburg was troubled by the prohibition placed upon local government. "What is the rational basis for people outside of Aspen telling them what to do?"

She noted that local government is the level most familiar to most Americans and often the first to adopt new policies. She cited the historic example of women's suffrage, where many localities first extended the vote to women within their jurisdiction prior to adoption of the 19th Amendment to the U.S. Constitution, which granted women the vote in all elections.

Justice Stephen Breyer questioned the definition of "policy" within the amendment. Would it preclude a local police department from determining that there was a problem of "gay-bashing" and implementing a policy to deal with the problem?

Jean E. Dubofsky was the attorney who argued in opposition to Amendment 2. The former Colorado Supreme Court judge criticized the amendment for its "unique combination of breadth and depth.... It is targeting a group of people based on a particular characteristic."

"Why isn't it special protection?" queried Justice Antonin Scalia of the local ordinances.

"They are laws of general applicability which apply to all 'sexual orientation': homosexual, bisexual, heterosexual," replied Dubofsky. "I don't think there is such a thing as 'special rights.' "

PHOTO BY BOB ROEHR

Plaintiffs at an Oct. 10 Undo 2 rally

Observers of the court found all the justices unusually engaged in the questioning. They clearly recognized the importance of the case. There was a civility and comfort level afforded gay men and lesbians that had not been present in 1986, when the last major oral argument, the sodomy case of *Bowers v. Hardwick*, was before the court.

One possible indicator of the verdict might be found in a decision handed down by the court last fall. In a 5-4 split, it struck down an initiative-driven term limitation on the congressional delegation adopted by Arkansas voters.

But it is always difficult to predict a decision. The issue is a contentious one, and it is likely to take several months before an opinion comes forth.

The players soon were spinning their interpretations of the case to the media, which packed the marble front plaza of the court.

"They were asking questions about two different equal protection ideas," said Matt Coles, a participating attorney with the American Civil Liberties Union. "One was asking about excluding people from the political process. If the court decides the case on that basis, I think it will put an end to all the antigay initiatives we have seen around the country."

Coles continued, "The other thing the court was talking about was whether there is a rational basis. Justice Kennedy said it appears you have singled out gay people because you don't like them. If the court bases the decision on that idea, then I think it will bode very well for us in the military cases."

Kevin Tebedo is executive director of Colorado for Family Values, the group which pushed Amendment 2. He warned of dire consequences if the court strikes down the amendment.

"I think you are going to see any type of compulsive-addictive behavior that is similar to homosexuality—for instance pedophiles, polygamists, kleptomaniacs, compulsive gamblers—that chooses to form itself into a political lobby can then claim that they are fenced out of the political process."

But, he says, "if the court rules in favor of Amendment 2, you are going to see a number of states, both through their legislatures and through the initiative process, doing Amendment 2-type laws in their states."