NACCS vs. Colorado's Anti-GLB Amendment 2, 1992-1996

Opening Plenary Session: 50 Years of Activist Scholarship

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The National Association for Chicana and Chicano Studies (NACCS) 2022 Conference marked the 30th anniversary of NACCS initiating its joining of the Education Amicus Brief in 1994 in the lawsuit to the United States Supreme Court against the passage of the anti-Gay, Lesbian, and Bisexual Amendment 2 in Colorado in November 1992. This article presents the national precursors to Amendment 2 in Colorado, including some of the major groups promoting such amendments and propositions. I discuss the history of Amendment 2 (aka "Romer v. Evans") in Colorado, approved by the voters in November 1992, stayed by an injunction in January 1993, overturned by the Colorado Supreme Court in 1994, and found unconstitutional, based on the 14th Amendment, by the United States Supreme Court in 1996. I discuss the involvement by NACCS as an *Amicus* filer in the Education Amicus Brief, the NACCS boycott of Colorado and its aftermath, and examples of the current situation of the GLBTQIA+ community in Colorado.

Colorado's **"**No Protected Status for Sexual Orientation" amendment was on the Colorado November 3, 1992 ballot (Colorado 1992 ballot measures) with the single notation, "Prohibits laws banning discrimination of sexual orientation," a double negative enshrining legalized prejudicial treatment. It was an "initiated constitutional amendment" (Encyclopedia of American Politics). Amendment 2 sought to codify in the Colorado State Constitution the right to discriminate against gays, lesbians, and bisexuals (the terms used in the campaign, or GLB) including in such areas as employment and housing, with severe impacts also on

education from K-12 through college. The amendment was approved by a vote of 53.41% "Yes" votes and 46.59 % "No" votes.

Before Amendment 2 was passed by voters, anti-discrimination protections for GLB communities based on sexual orientation had been adopted in Denver, Boulder, and Aspen. For example, in the mountain town of Aspen, Municipal Code § 13-98 (1977) prohibited "discrimination in employment, housing and public accommodations on the basis of sexual orientation" (Romer v. Evans, U.S. Supreme Court, page 626). Also, Colorado Executive Order No. D0035 (December 10, 1990) prohibited employment discrimination for "all state employees, classified and exempt" on the basis of sexual orientation. Additionally, Colorado Insurance Code, § 10-3-1104, 4A C. R. S. (1992 Supp.) forbade "health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's sexual orientation." Two state colleges prohibited such discrimination. Metropolitan State College of Denver (now University) prohibited college sponsored social clubs from discriminating in membership on the basis of sexual orientation, and Colorado State University had an antidiscrimination policy encompassing sexual orientation.

From the perspective of NACCS, these two higher education institutions, among the few entities in Colorado at that time with some protection for the GLB community, represented one of the dangers Amendment 2 raised for the future of this community in Colorado education: Discrimination would have been allowed, and even encouraged, by the State Constitution against the GLB community, without such members having legal recourse. One of the major purposes and effects of Amendment 2 was to negate and even reverse anti-discrimination protections from the three city policies (Aspen, Boulder, and Denver) and from the other Colorado entities, including MSCD (now MSU Denver) and CSU Fort Collins.

Of special concern to NACCS, it became clear that the campaign in favor of Amendment 2 was largely successful in using racial and ethnic minorities against the GLB community, as if the Chicana/o community was one entity, and the GLB members were a different entity, segmented from each other, de-racialized and de-ethnicized. Such a stance purposely ignored that the GLB community is an inherent part of any civic society, including the Chicana/o and

African American communities, the two largest racial and ethnic minority groups in Colorado. An overt manifestation of the effectiveness of this strategy was the refusal by the Colorado Civil Rights Division to advocate for the GLB community. Seemingly counter to the purpose of the Civil Rights Division to protect the marginalized, its leaders supported Amendment 2.

During the trial over Amendment 2 in the Colorado Supreme Court, Thomas Duran, "supervisor for all regional offices of the Colorado Civil Rights Commission… supported Amendment 2 [and] told the court that laws prohibiting discrimination based on sexual orientation dilute 'respect and resources available for enforcement of other civil rights laws.'" He testified that personal religious beliefs of Coloradans must be protected against infringements by sexual orientation anti-discrimination laws and agreed it would be "okay" to fire someone for being gay. In addition, former Chair of the Colorado Civil Rights Commission and supporter of Amendment 2, Ignacio Rodriguez, testified, "there is no empirical evidence that gays and lesbians experience discrimination as a group. In justifying his view, he also noted, 'I don't consider the group a class. I consider it a special interest group.' He stated including sexual orientation in civil rights laws would weaken and dilute those civil rights protections that had been earned by [minorities] over the years" (Goldberg, 1075-1076).

The campaign for Amendment 2 stressed its intention against "special rights"—a ubiquitous term throughout the campaign—for "lesbians and gay men" to persuade voters that providing such protection would diminish the "special rights" for racial and ethnic minorities, a presumption that the pro-Amendment 2 campaigners favored such "special rights" for Latino and African American communities, for example. This tactic was addressed in Suzanne B. Goldberg's 1994 article, "Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2":

> The Colorado Amendment 2 campaign was successful largely because it centered on the "No Special Rights" theme. By characterizing protection against sexual orientation discrimination as "special rights" for lesbians and gay men, the movement succeeded in appealing to voters who cared little about homosexuality, but who held a general aversion to civil rights protections for any group. The misrepresentation of civil rights as protective laws which benefit only minority groups (hence the term

> "special rights") has long been used as a strategy to attack those laws. After the success of the "special rights" rhetoric in Colorado, other state organizers used the same strategy (page 1059).

The terms “minority or protected status” and “quota preferences” were prominent in the ballot language:

> Shall there be an amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination? (BALLOTPEDIA, Encyclopedia of State Ballots.)

The placement of “discrimination,” following the charged “protected status [and] quota preferences” terms, meant that a vote favoring Amendment 2 would also prohibit GLB community members from filing a charge against discrimination, whether or not that was the voter’s intent. Immediately following was the statement of what the Amendment would provide:

> 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.
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> This Section of the Constitution shall be in all respects self-executing. (Evans *v.* Romer, 882 P.2d 1335)

Amendment 2 was a Constitutional Amendment, a change and addition to the Colorado State Constitution; this is different from a “proposition.” Both are referred to, or decided by, a vote of the citizens of the state. However, a “Constitutional Amendment” can only be changed by another vote of the citizens,

whereas a “proposition” can be changed or even removed and expunged by the Colorado State Legislature. The Legislature acting on its own can submit or refer a proposition to the citizen voters by a simple majority of the legislators, but a two-thirds majority vote within the Legislature is needed to refer a Constitutional Amendment to the voters. The Amendment 2 backers gathered sufficient signatures to refer it to the voters. By proposing it as a Constitutional Amendment rather than a proposition, Amendment 2 backers were intent on establishing it firmly into Colorado law and making it subsequently extremely difficult to remove.

The campaign in favor of Amendment 2 began in earnest in May, 1992, when the supporters filed the petition. Following the voter approval on November 3, 1992, “The secretary of state certified the results on December 16, 1992, as required by article V, section 1, of the state constitution” (Evans v. Romer, Section I). Even before the Secretary of State certified the results, on November 12 a lawsuit in Denver District Court was filed “to enjoin the enforcement of Amendment 2 claiming that the amendment was unconstitutional” (Section I). The lawsuit was filed by Richard G. Evans, eight other individuals, and the cities of Denver, Boulder, Aspen, and the Aspen City Council. “On January 15, 1993, the Colorado District Court issued a preliminary injunction preventing state officials from enforcing the amendment. On July 19, 1993, the Colorado Supreme Court affirmed the District Court's issuance of the preliminary injunction and held that the amendment infringed on plaintiffs' fundamental right to participate equally in the political process” (Grauerholz, page 846).

On December 14, 1993, almost one year after he had issued his initial injunction prohibiting Amendment 2 from becoming law, Colorado District Court Judge Jeffrey Bayless declared Amendment 2 unconstitutional. Following that decision, the pro-Amendment 2 side appealed Judge Bayless’ decision to the Colorado Supreme Court, which heard the arguments during 1994. On October 11, 1994, nearly two years after Amendment 2 was approved by voters, the Court upheld Judge Bayless’ decision and declared Amendment 2 unconstitutional. It was a very strong repudiation of the amendment, refuting every argument the pro-Amendment 2 side had presented in trial. The Court based much of its ruling on the “Equal Protection Clause of the United States Constitution [which] protects the fundamental right to participate equally in the political process," declaring Amendment 2 would have infringed on this right of an “independently

identifiable class of persons," gays and lesbians (Justia U.S. Law, Evans v. Romer, 1994, pages 1-3). The Court summarized in its ruling the six arguments of the pro-Amendment 2 side:

> At trial the defendants offered six "compelling" state interests: (1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; (5) preventing government from subsidizing the political objectives of a special interest group; and (6) promoting the physical and psychological well-being *1340 of Colorado children (Justia U.S. Law, Section I).

A review of all six "'compelling' state interests" argued by the pro-Amendment 2 backers is beyond the scope of this NACCS article. However, the attempt by the pro-Amendment 2 backers to use racial and ethnic minorities against the GLB community was considered by the Court and was of special concern to the NACCS involvement in the case. This "state interest" is referred to by the Court as item #3, above: "(3) preserving the ability of the state to remedy discrimination against suspect classes." The pro-Amendment 2 side argued in court that invalidating it would harm the State's fiscal ability to ensure civil rights for those who are in a "minority status, [receive] quota preferences, protected status [and can claim] discrimination" based on their minority status, including as racial and ethnic minorities. However, the Court declared the following:

> Assuming that the state has some legitimate interest in preserving fiscal resources for the enforcement of civil rights laws intended to protect suspect classes, and… recognizing that combating discrimination against racial minorities and women may constitute a compelling governmental interest… the evidence presented indicates that Amendment 2 is not necessary to achieve these goals. (Evans v. Romer, Part B)

The pro-Amendment 2 side's approach therefore was to use "racial minorities and women" to serve as a wedge against gays and lesbians to promote the passage of Amendment 2 and then to further employ them as a ruse to ensure the injunction

against it was overturned by the State Supreme Court. However, the Court declared, "we conclude that defendants' asserted interest in preserving the fiscal resources of state and local governments for the exclusive use of enforcing civil rights laws intended to protect suspect classes does not constitute a compelling state interest." The Court concluded on this, the third of six asserted "state's interests" arguments, by declaring that, "The governmental interest in insuring adequate resources for the enforcement of civil rights laws designed to protect suspect classes from discrimination need not be accomplished by denying the right of gay men, lesbians, and bisexuals from participating equally in the political process." The Colorado Supreme Court ruled on October 11, 1994, nearly two years after Amendment 2 was approved by voters, that Amendment 2 was an unconstitutional infringement on the rights of gays, lesbians, and bisexuals, refuting the six suppositions the pro-Amendment 2 side had put forth.

During and following 1994, NACS (then National Association for Chicano Studies) decided that the Association should join in supporting the anti-Amendment 2 petitioners. It was determined at the 1993 conference in San Jose, California during the Business Meeting, where NACS resolutions would be introduced, that Colorado should be boycotted as a show of support for the gay, lesbian, and bisexual communities. By this time, a national boycott of Colorado, dubbed then "The Hate State" for Amendment 2, had been called and was gaining momentum. This NACS resolution was introduced in the Business Meeting since at that time resolutions could be offered from the floor. This boycott resulted in the cancelation of the 1994 NACS national conference, since the Colorado Foco was the only NACS state or region considering a proposal to host a conference (NACCS Noticias).

Following the 1993 San Jose, California NACS conference, the Coordinating Committee, or NACS Board, communicated among themselves how best to advance the wishes and intent of the membership, which had been expressed during the Business Meeting: to boycott Colorado, *and* to engage actively in the struggle against Amendment 2. During this period, the idea was advanced of joining in an Amicus Brief (Friend of the Court) should the battle move to the United States Supreme Court for resolution. The recommendation was then developed that the Coordinating Committee, or Board, would draft a statement to the principal lawyers who were directing the lawsuit to the Colorado

Supreme Court and subsequently organizing the lawsuit to the United States Supreme Court. The Coordinating Committee would assist, but the drafting of our offer and request to the lead legal team was assigned to Dr. Yolanda Chavez Leyva, Lesbian Caucus Chair, at the University of Arizona, and to Dr. Luis Torres, NACS General Coordinator, then at the University of Southern Colorado.

The Colorado Supreme Court ruling of October 11, 1994 roughly coincided with the NACS Coordinating Committee midyear meeting. That meeting was held in Seattle, Washington, in preparation for the following national conference, scheduled in Spokane, Washington March 29—April 1, 1995. At that Coordinating Committee meeting in Seattle, the decision was made for NACCS to donate $1,000 to the legal fund against Amendment 2. Luis Torres, then General Coordinator, or NACS Chair, had been communicating with Ms. Jean Dubofsky, Esq., lead lawyer for the anti-Amendment 2 side, before the Seattle meeting and subsequently informed her that the Coordinating Committee had decided to donate the funds. The amount was quite modest, considering the inordinate expenses to prosecute the lawsuits to the U.S. Supreme Court, and NACS was struggling with finances, but the Coordinating Committee was resolute the donation was necessary as *Amicus*.

For NACS to be admitted as an *Amicus*, or Friend, of the forthcoming Education Brief, Drs. Chavez Leyva and Torres had to explain in a written statement why NACS should be allowed to join. We had to explain whether NACS had a history of being active in combating discrimination against the gay, lesbian, and bisexual communities. That Dr. Chavez Leyva was the Chair of the NACS Lesbian Caucus served us well in this regard, as the Caucus and the Chair position demonstrated such a history.

During at least two in-person conferences with Ms. Jean Dubofsky, she informed Luis Torres that involvement by NACS was highly significant because we would be the only association representing people of color in the Education Brief. This was very important to their legal strategy because the pro-Amendment 2 side had been so effective in driving a wedge between the GLB communities, on the one hand, and people of color, on the other; so NACS would serve as a strong counterpoint to the pro-Amendment 2 side's legal argument.

NACS would also be one of only two higher-education associations in the Education Brief.

NACCS as *Amicus* in Education Brief to the United States Supreme Court

The Education Brief, with NACCS as *Amicus*, to the United States Supreme Court was against Amendment 2 and therefore against the case specifically known as Romer vs. Evans. ["NACS" had changed to "NACCS," just before the Brief was filed.] NACCS had joined with the petitioners against the case beginning in 1994, as both sides were proceeding toward a U.S. Supreme Court hearing. The case was heard in the U.S. Supreme Court during the session which began for the October term, 1995. The case was identified as "No. 94-1039 Romer vs. Evans." Roy Romer (D) was Governor of Colorado, so it was his duty to file on behalf of the state against the Colorado Supreme Court's ruling of 1993, which had decided against Amendment 2. The oral argument was heard by the Court on October 10, 1995. Their opinion was announced May 20, 1996.

Several associations, organizations, groups, and individuals filed *amicus curiae* briefs (friend of the court, in singular) both against and for Amendment 2. Several filed *for* the anti-Amendment 2 side, which meant they were *opposed to* Amendment 2, since *for* meant they supported retaining the Colorado Supreme Court ruling striking down Amendment 2. One brief was from national civil rights groups of color, including the Asian American Legal Defense and Education Fund, NAACP Legal Defense and Education Fund, and the Puerto Rican Legal Defense and Education Fund, among others. Another brief was joined by the Mexican American Legal Defense and Education Fund, and the Women's Legal Defense Fund. A third was by psychologists and psychiatrists, including The American Psychology Association, The National Association of Social Workers, and The Colorado Psychological Association.

Several *amici* (friends, in plural) filed *for* the pro-Amendment 2 petitioners, which meant they were *in favor of* Amendment 2 and so *against* the Colorado Supreme Court ruling. For example, a brief was filed by the Oregon Citizens Alliance, No Special Rights Committee and Stop Special Rights—PAC, and another was by a Colorado for Family Values representative. Other *Amici curiae* in favor of Amendment 2 were filed by the Attorneys General for Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and

Virginia. Others were filed for or against Amendment 2, signifying the national breadth of interest this issue generated.

The brief NACCS engaged in as *amicus curiae* was the Education brief, filed by six major education associations (seven with the NEA affiliate, CEA):

> National Education Association, and its affiliate Colorado Education Association (CEA);
> American Federation of Teachers, AFL-CIO;
> American Association of University Professors (AAUP);
> Association for Supervision and Curriculum Development;
> Council of the Great City Schools;
> National Association for Chicana and Chicano Studies.

These six groups were joined together by their special relationship with education, whether K—12 or higher education. Two groups, NACCS and AAUP, emphasized higher education; as Amendment 2 states, its reach was to all Colorado state "branches or departments, [and] its agencies, political subdivisions, municipalities or school districts." The "school districts" are particularly for K—12, but higher education institutions were included through the Colorado Department of Higher Education as one of the "branches or departments" of Colorado.

The Education Brief has three sections: 1) Interest of *Amici Curiae;* 2) Introduction and Summary of Argument; 3) Argument. In the first section the *amici* established their standing for filing. As the American Association of University Professors (AAUP) stated in its self-description, "Since 1976, AAUP has condemned discrimination in the academic community on the basis of sexual orientation. The organization seeks adoption of similar policies by colleges and universities." The Council of the Great City Schools in the brief noted it "is a coalition of some 50 of the nation's largest urban public school systems. Its members' inner-city schools serve about six million children (13.5 percent of the nation's total elementary and secondary school enrollment)." The Council states, "One of the central missions of these schools is to create educational opportunities for youth whose background or status would otherwise doom them to a second-class future. That includes students no matter their gender or sexual orientation" (Education Brief, page 3).

The paragraph for NACCS was drafted jointly by the Chair of the Lesbian Caucus, Dr. Yolanda Chavez Leyva, and the Chair of NACCS, Dr. Luis Torres. It

was edited, for length and linguistic uniformity with the other statements, by the anti-Amendment 2 lawyers for the case. The NACCS contribution to the amicus brief was very similar in language and tone to those of the additional *amici.* From Luis Torres' personal memory, the opportunity to join in the brief was dependent for the *amici* on this particular brief to focus on education with with the associations national previous engagement in anti-discrimination efforts in support of the GLB community. Each of the *amici* were provided one paragraph, of roughly equal length, to introduce their associations at the beginning of the brief, with the joint arguments against Amendment 2 following, at length. The NACCS passage reads as follows:

> The National Association for Chicana and Chicano Studies ("NACCS"), with a membership of approximately 2,000, is the oldest and largest organization bringing together Chicana and Chicano academics, students, and community members from across the nation and across disciplinary lines. NACCS confronts and challenges structures of inequality based on race, class, gender, and sexuality. As an organization historically concerned with the quality of life of all Chicanas and Chicanos, NACCS asserts that discrimination against any members of the community is discrimination against all. As an academic community with firsthand experience of discrimination and prejudice in society and throughout education, NACCS strongly believes that academic development and freedom depend on a climate of mutual respect and acceptance of diversity.

Of special note regarding NACCS' standing for serving as an *amicus* was the sentence, "NACCS confronts and challenges structures of inequality based on race, class, gender, and sexuality," noting the association's inherent opposition to Amendment 2. Following the NACCS statement, a summary paragraph demonstrated the similarity of purpose for the six *amici*:

> Because *amici* are opposed to discrimination on the basis of sexual orientation, because *amici* believe that public school districts must be able to prohibit such discrimination and otherwise provide for the needs of gay and lesbian students if they are to fulfill their educational mission, and because *amici* share an institutional commitment to the educational mission of the public schools, *amici* have a substantial interest in the outcome of this case.

The second section of the brief introduced and summarized the legal arguments concerning Amendment 2's impact on education. It notes, "As organizations concerned with the quality of public education, *amici* file this brief in order to provide this Court with a perspective on the impact of Amendment 2 that it might not otherwise receive. Specifically, we shall demonstrate why Amendment 2 significantly would impair the ability of the public schools to fulfill their educational mission." The scope of the damage Amendment 2 would have done throughout Colorado, and in the rest of the country, is shown in the Brief's statement: "Based upon what is known about the incidence of homosexuality in the general population, however, it can be assumed that there are students in almost every classroom in the country who are gay or lesbian" (pages 5-6).

The "Argument" section consists of two sections. In Section I, the Brief advocates for schools to address as their mission the educational needs of all students, including gay and lesbian students. The Amendment 2 wording stressed "orientation" in the heading and body of the text; but the Brief's "Argument" section refers to a belief supported by research that this "orientation" possibly "becomes fixed before puberty, quite possibly by the age of five or six" (page 8), calling into question the term "orientation." Granting Coloradans the right to engage in "invidious discrimination against the members of one minority group" undermines the schools' ability to teach all students about respect for "those who are different."

While students from racial and ethnic minority groups might realize they are different from the larger society and therefore reviled, they benefit somewhat from membership within their own group, from which they receive some solace. For gay and lesbian students, rejection is particularly acute because they "usually discover their sexual orientation in complete isolation" without a support group, so they internalize the fact of being despised alone (page 10), often ending up rejected even from their own families. As Hetrick and Martin are quoted in the brief, while "Blacks, Jews, and Hispanics are not thrown out of their families or religions at adolescence for being black, Jewish, or Hispanic[,] homosexual adolescents are" (*Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, pages 25, 29).

This first passage of the "Argument" section further notes that "One study of gay adolescents found that nearly half of the subjects had left

their home at least once," not of their own accord but as "pushaways" or "throwaways" (page 14). The alienation becomes so extreme that "suicide is the leading cause of death among gay and lesbian youth," with 20 percent having attempted suicide (page 15). In higher education, where one might presume a more tolerant, if not accepting, environment, gay and lesbian students were considered four times as likely as the general student population to be victims of physical attacks (page 17). This passage concludes asserting schools must ensure that "regardless of race, sex, religion, ethnic origin, disability, or any other distinguishing characteristic—such as sexual orientation—all people should be judged according to their individual merit rather than on the basis of invidious stereotypes."

Passage II of the Argument asserts that "Amendment 2 undermines the ability of the public schools to meet the needs of gay and lesbian students and to teach all students the broader lesson of tolerance." The brief notes that "education-related organizations such as *amici"* who filed this Education Brief (including NACCS) attempt to meet the needs of gay and lesbian students. This implies Amendment 2, if allowed to endure, could invalidate such efforts, including by prohibiting such programs as in-service training for teachers to provide counseling for gay and lesbian students (21). The amendment would place "gay and lesbian teachers [who] reveal their sexual orientation" at risk of dismissal from their teaching careers, despite that they could serve as role models to gay and lesbian students (page 22).

The City of Denver had enacted an ordinance prohibiting discrimination based on sexual orientation—one of the targets of Amendment 2—but even with such protection, gay and lesbian teachers in Denver Public Schools reported apprehension to mentor gay and lesbian students, fearing reprisal despite the ordinance. With Amendment 2, such counseling would have placed these teachers at heightened risk. This Education Brief ends by declaring that with Amendment 2, "the State officially sanctions discrimination," with the pernicious effect that it serves as prologue to discrimination against other groups seen as different.

U.S. Supreme Court Decision on Romer v. Evans, 517 U.S. 620 (1996)

The U.S. Supreme Court ruled against Amendment 2 on May 20, 1996, on a vote of 6-3. Following its introductory paragraph summarizing the case, it held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process noting

> …. On remand, the State advanced various arguments in an effort to show that Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient…. We granted certiorari, 513 U. S. 1146 (1995), and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court" (pages 625-626).

The State of Colorado and the pro-Amendment 2 advocates engaged as their "principal argument" that Amendment 2 merely places Gays and Lesbians in the same position as all other persons "by denying them special rights," but the Court stated that they "rejected as implausible" this contorted assertion. The Amendment would have placed a specific legal burden or "disability upon those persons alone" of facing discrimination without legal protection in "public and private transactions" (page 621). The Court stated, "Amendment 2 fails, indeed defies," the Fourteenth Amendment's equal protection of a "suspect class" in ensuring that a "legitimate legislative end" of a state does not violate such protection.

The Court addressed the six rationales the State had asserted and responded that, "the amendment cannot be explained by reference to those reasons; the amendment raises the inevitable inference that it is born of animosity toward the class that it affects." In the Majority Opinion, Justice Kennedy stressed the Equal Protection Clause of the Fourteenth Amendment, and noted that before Amendment 2, some ordinances protecting gays, lesbians, and bisexuals had been passed in Colorado:

> [T]he cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public

> accommodations, and health and welfare services" offering protection to "persons discriminated against by reason of their sexual orientation," that is, homosexuals, lesbians, or bisexuals (page 624).

He pointedly supported and affirmed the legal rationales established by the Colorado Supreme Court in rejecting Amendment 2, as discussed above. Of particular interest to NACCS is the passage that notes two specific higher education institutions that had enacted protections for gays, lesbians, and bisexuals, statutes which would have been repealed by Amendment 2, as follows:

> …various prOVISIOns [sic] prohibiting discrimination based on sexual orientation at state colleges.26
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> "26 Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation.

(Note: In 2012, Metropolitan State College of Denver was renamed Metropolitan State University of Denver.)

In a decisive rebuttal of the Amendment, Justice Kennedy affirmed the Colorado Supreme Court's decisions and expressed the dire position facing the affected groups:

> So much is evident from the ordinances the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

Beyond upholding the rights of gays, lesbians, and bisexuals to be protected from discrimination by businesses and commerce, the Court further upheld the right of the State to ensure protections by and in government entities. The Court stated that Amendment 2 would have "rescinded" such directives as the

> Colorado Executive Order D0035 (1990), which forbids employment discrimination against "'all state employees, classified and exempt' on the basis of sexual orientation." 854 P. 2d, at 1284. Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges" (page 630).

The Court summarized the case by asserting, "Amendment 2 confounds [the] normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence" (634).

Three of the nine Supreme Court Justices dissented—Scalia, Rehnquist, and Thomas—and would have upheld Amendment 2. However, in conclusion, the six majority members of the Court affirmed that Amendment 2 cannot be upheld:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.
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> It is so ordered (page 636).

Aftermath: Amendment 2 Defeated; Colorado—but no other state or region—Boycotted

Thirty years after Amendment 2 was passed in Colorado, NACCS should look back over the years and be proud of our involvement in successfully defeating the viciously discriminatory anti-GLB Amendment 2. When the GLB community in Colorado was facing one of the worst such laws in the country, NACCS stood with the Chicana/o and other GLB community members and advocated on their behalf, consequences be damned. We signed on when the pro side had almost all of the political and social momentum, supported by powerful figures and with exceptional funding. Of all of the higher education associations and organizations and alliances and societies in the United States, NACCS was one of only two higher education groups to sign on as *amicus* to the education Amicus Brief to the

U.S. Supreme Court—the American Association of University Professors the other. The involvement by NACCS was crucial because we negated and even countermanded the pro-Amendment 2 use of racial and ethnic minorities in Colorado against the GLB community.

The conclusion of Amendment 2 for NACCS was the resultant boycott of Colorado, as explained above, that at the 1993 conference in San Jose, California during the Business Meeting, a resolution was introduced from the floor to boycott Colorado. While the Colorado Foco had not officially submitted a proposal to host the 1994 conference, there had been discussion of doing so and subsequent steps taken. Following the 1993 conference, no other region offered to host a 1994 conference. Amendment 2 was never implemented in Colorado, neither shortly after the vote, when it was "stayed" by a judge, nor during the appeal to the U.S. Supreme Court. Denver—where a conference in 1994 would have been held.

Following the 1994 boycott, the 1995 conference was held in Spokane, Washington, with the following, in 1996, in Chicago, followed by the 1997 conference in Sacramento, California (NACCS Conference Archives). The 1997 conference ushered in a string of NACCS conferences held in states with anti-GLB and other malicious propositions and laws, but no corresponding boycotts: Colorado was ostracized and shunned, while California, Utah, Texas, Florida, and Mexico were embraced despite analogous laws.

On November 8, 1994, the same year of the Colorado boycott, California passed the ruthless anti-immigrant Proposition 187, approved by a vote of 59% to 41%. It would have "prohibited the undocumented from accessing basic public services such as non-emergency health care and both primary and secondary education," therefore targeting even children in education (Proposition 187 is Approved in California). It was "stayed" by a judge but "was held up in the appeals process until 1999." The NACCS 1997 conference in Sacramento was held in the middle of the 1994-1999 Proposition 187 legal disputes.

Almost concurrent with Prop 187, the Ron Unz "Proposition 227, the 'English Language in Public Schools Initiative Statute,' was adopted by voters in California in June 1998. It went into effect 60 days later…. [It] requires all public school instruction to be in English… [and] allows parents and guardians to sue to enforce the law" (Lohman, "Effects of California Bilingual Education Proposition"). Proposition 227 effectively ended bilingual education, with some exceptions, and was in effect for 18 years, until repealed by Proposition 58 in

2016 (Sanchez). (Colorado defeated its counterpart, Amendment 31, in 2002, the Ron Unz-led bill introduced in Colorado following California's passing of Proposition 227.) However, NACCS did not boycott California over Proposition 187 or over Proposition 227.

In 2000, California also passed Proposition 22, the anti-GLB "Definition of Marriage Initiative." A "Yes" vote "supported defining marriage between a man and a woman in the California Family Code." It passed with a 61.35% "Yes" vote. This anti-GLB Proposition, negating GLB marriages, was in effect until 2008 when courts overruled it (California Proposition 22). "Shortly before the court struck down Proposition 22, California Proposition 8 qualified for the ballot. The goal of Proposition 8's supporters was similar to the goals of Proposition 22 supporters. Proposition 8 amended the California Constitution, whereas Proposition 22 was a state statute. Proposition 8 went on to win at the polls in November 2008" (California Proposition 22). NACCS did not call for a boycott of California over Proposition 22 or Proposition 8.

Continuing with the differential treatment of boycotting Colorado but not other states, Texas had an anti-sodomy law against "homosexual conduct." In 1998, in the case "Lawrence vs. Texas," four deputies arrested Mr. Lawrence for engaging in sex with another man. The "two men, Tyron Garner and John Lawrence, were arrested, held overnight, charged, and convicted for violating Texas penal code section 21.06(a)," also known as the "Homosexual Conduct" law. The case was argued in March of 2003, and the decision overturning the conviction issued June 2003. NACCS held its 1998 conference in Texas despite that the case against Texas' "anti-sodomy law" was still pending.

While same-sex marriage was illegal in Utah, NACCS held its conference in the state. Similarly, Florida's anti-GLB "Defense of Marriage Act" defined "marriage as between a man and a woman," was not declared unconstitutional until 2013. Florida also banned gay adoption of children until 2008, with the issue still unsettled in Florida despite that "courts [having] ruled that it was unconstitutional to forbid gay adoption" (Gay Marriage Laws in Florida). Despite these laws, in 2005 the NACCS conference was held in Miami, Florida.

Mexico as a "region" of NACCS provides another example. During the 1998 NACCS conference in Mexico City, the NACCS Joto Caucus set out to have a welcoming reception in one of the smaller ballrooms in their hotel. They were summarily stopped from having that reception by hotel staff. Members of the Joto Caucus came to the NACCS headquarters hotel near the Zocalo, by my

recollection (Luis Torres) distraught. This situation was representative of anti-GLB laws in Mexico. Same-sex marriage was not allowed until 2015, and even then, with extra processes, such as request of an injunction, more onerous than for heterosexual couples (Masci, David, et. al.) Despite such anti-GLB laws, NACCS held its 2006 Conference in Guadalajara.

Conclusion:

The very successful involvement by NACCS in the anti-Amendment 2 struggle in Colorado was admirable and exhibited resolve and vision, entering the conflict at a very low point for the GLB community in the state, finally proving victorious. However, following that victory, with the boycott of Colorado and the subsequent failure to boycott at least four other states—California, Utah, Texas, and Florida—and the Mexico region, NACCS exhibited discrimination against Colorado. It was not the boycott itself that was problematic. Rather, the dilemma that I believe still haunts NACCS was the failure to treat those four other states and one region as Colorado had been treated.

In this aftermath, Colorado improved a great deal in relation to GLBTQIA+ rights. This growth is demonstrated in two telling examples. The Governor of Colorado, Jared Polis, was noted in 2021 as "the first openly gay man in the United States to be elected governor" when he was elected in 2018 (Polis, 1st openly gay governor elected). He is married to Marlon Reis, and they have adopted two children. Also, in 2019, the Colorado Legislature passed a legislative bill, HB19-1192, mandating Multicultural Studies (MCS) in K-12, requiring both cultural infusion in K-12 curricula and a graduation requirement class in MCS. The preamble paragraph for HB19-1192, "Inclusion of American Minorities in Teaching Civil Government," reads in part,

> Concerning the inclusion of matters relating to American minorities in the teaching of social contributions in civil government in public schools, and, in connection therewith, establishing the history, culture, social contributions, and civil government in education commission to make recommendations to include the history, culture, and social contributions of American Indians, Latinos, African Americans, and Asian Americans, the lesbian, gay, bisexual, and transgender individuals within these minority groups… and the intersectionality of significant social and cultural features within these communities (Colorado HB19-1192).

Colorado's election of Governor Jared Polis and the GLBT inclusion in the Multicultural Studies bill demonstrate the growth in Colorado since Amendment 2, now supporting GLBT rights. The efforts by many people and groups, including significantly by NACCS, assisted both the GLBT community in particular and Colorado in general in their evolution and progress.

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