No. 94-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado and the STATE OF COLORADO,
Petitioners,
v.
RICHARD G. EVANS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE ARC, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY, AND THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES IN SUPPORT OF RESPONDENTS

JAMES W. ELLIS
Counsel of Record
MAUREEN A. SANDERS
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

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INTEREST OF AMICI

Amici are national organizations concerned with the interests of citizens who have disabilities. *Amici* have participated in numerous cases before this Court, most relevantly *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Heller v. Doe*, 113 S. Ct. 2637

(1993). *Amici* are concerned about the shaping of this Court's equal protection doctrine for cases involving groups that have not been recognized as "suspect," but where the challenged laws are the product of invidiously discriminatory motivation.

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals working in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary organization of psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes, and treatment of mental disabilities.

THE ARC (formerly the Association for Retarded Citizens of the United States) is an association of parents, family members, professionals, and persons with mental retardation devoted to promoting the interests of people with mental retardation and their families.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS (NAPAS), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy agencies (P & As). P & As are mandated under the Development Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*) and related statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1994 alone, P & As served well over 600,000 individuals through a variety of mechanisms: individual case representation, information and referral services, and education efforts. NAPAS provides P & As with training and technical assistance and represents their interests before the Executive and Legislative Branches of Government.

THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY (NARPA) is a national organization which addresses both mental health and mental retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and mental retardation services.

THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES (ANCOR) represents more than 660 agencies nationwide that together support more than 50,000 people with mental retardation and other disabilities. Most of our members operate community residences and support people in their own homes. About 85 percent of ANCOR members are nonprofit agencies. The remainder are proprietary agencies or are unincorporated family care homes. Cleburne Living Center is a member of ANCOR.

SUMMARY OF ARGUMENT

Amici recognize that the grant of certiorari in this case does not address the issue of whether Respondents are entitled to designation as a "suspect" or "semi-suspect" class. But the focus of Petitioners' argument on the scope of "independently identifiable groups," Pet. Br. at 34-38, raises the question of what characteristic of Respondents might entitle them to careful evaluation of the rationality or irrationality of the Colorado constitutional amendment.

A close reading of this Court's opinions implementing the test of rationality reveals substantially greater skepticism in cases of discriminatory laws that are the product of invidious motivation. This skepticism is present—and warranted—regardless of the so-called tier at which the Court announces the case is to be considered. *Amici* reject the contention that there is a "fourth tier," or that there is more than one rational basis test. But this Court's deference under that test is not limitless when the challenger has demonstrated that the law was invidiously motivated. In that regard, we believe that a careful analy-

sis of the *Cleburne* case is central to a fair understanding of this Court's equal protection jurisprudence.

Amici's experience in confronting discrimination against people with mental disabilities has taught us that different groups experience different forms of invidious discrimination. We are particularly concerned that Petitioners' rigidly mechanical reading of this Court's use of "tiers" to explain its equal protection cases is a misreading of those decisions. This misreading renders the result in cases like *Cleburne* inexplicable. The tiers are a tool for distinguishing cases that call for deference from those meriting more careful analysis. Petitioners' conceptualization of the tiers as the entirety of equal protection law, rather than as a tool, would also mean that the protection of the equal protection clause will increasingly be reserved for those who need it least.

It is our experience that combating patterns of bias has also taken a different course for different groups. But in each instance, an important step has been the development of protective legislation to supplant constitutional litigation as the principal source of redress. The Colorado provision at issue in this case is not only invidiously motivated, but seeks to preclude the potential for evolution in public attitudes from producing legislative enactments prohibiting discrimination. Therefore, this Court should declare the Colorado provision unconstitutional, even without applying heightened scrutiny, because it violates equal protection under any test.

ARGUMENT

I. THE EVOLUTION OF EQUAL PROTECTION ANALYSIS REFLECTS THIS COURT'S CONCERN THAT DISFAVORED GROUPS NOT BE HARMED BY LAWS ARISING FROM INVIDIOUS MOTIVATION.

Petitioners demand that this Court afford Colorado's discriminatory provision the most sweeping deference because the case does not involve a "suspect" or "quasi-suspect" class. Pet. Br. at 16. This insistence on an unanalytical deference is supported by a mere recitation of the fact that Respondents are not among the groups officially recognized as suspect classes. *Id.* at 17. Remarkably, the only case cited in support of this claim to the most deferential treatment is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), a case in which the Court declined to recognize people with mental retardation as a semi-suspect class, but hardly a case that can be held up as a model of uninquisitive deference to state rationalizations for its discriminatory action.

Amici believe that it may be unnecessary for this Court to reach the issue addressed by the Colorado Supreme Court concerning the nature and scope of the fundamental right to participate equally in the political process. If a law is unconstitutional under the rational basis test, it becomes unnecessary for the Court to decide whether the case warranted heightened scrutiny. The Colorado constitutional amendment cannot survive rational basis scrutiny when the implementation of that test involves the kind of analysis employed in *Cleburne*. And *amici* believe that the factors that led to the invalidation of the Cleburne ordinance have equivalent counterparts in this case.

The central failing of Petitioners' analysis is that it reads this Court's cases as erecting a rigid and conceptually crude system of "tiers," with the assignment of a case to a particular tier being essentially outcome determinative. While the assignment of a case to a level of

review does have important analytical consequences, the equal protection cases are less simplistic and mechanical than Petitioners appear to believe.

Amici believe that the system of tiers is a tool involving shifting burdens and presumptions that the Court has found useful in implementing the Equal Protection Clause's prohibition on discriminatory state action. But the Court has never indicated that it intended the tiers to be a substitute for actual analysis of potentially invidious [1] laws. Petitioners have mistaken a device in aid of the Court's analysis for the analysis itself.

A. This Court's invention of "tiers" was not a product of some independent desire for a stratified system, but rather a concern that, while it was important to give latitude to the elected branches of government, deference should not be extended to invidiously motivated laws.

It has long been recognized that the central teaching of the Equal Protection clause is that our Constitution will not tolerate invidious discrimination by state actors. But since "most laws differentiate in some fashion between classes of persons," *Nordlinger v. Hahn,* 112 S. Ct. 2326, 2331 (1992), this Court has formulated its equal protection doctrines to require judges, in most cases, to defer to the policy choices of the politically responsive branches of state and federal governments. Thus, noninvidious discrimination by government officials has been deemed consistent with the equal protection principle so long as it meets an undemanding test of rationality. The paradigm model of this deferential approach is *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955). The implementation of this deferential test has acted as a check against any tendency by judges to second-guess the correctness or wisdom of political judgments by elected officials, and thus it has left room for majoritarian processes to govern on the overwhelming majority of public issues, unimpeded by the judiciary.

The obverse of this deferential approach applies when the law in question involves either central constitutional rights or employs classifications especially likely to reflect an invidious intent to disadvantage a group because of who they are. Deference to legislative judgments is not required or appropriate where there is "reason to infer antipathy." *FCC v. Beach Communications,* 113 S. Ct. 2096, 2101 (1993) (quoting *Vance v. Bradley,* 440 U.S. 93, 97 (1979)). In such circumstances, legislative enactments and the motivations behind them are scrutinized far more skeptically.

This dichotomy between occasions appropriate for deference and those circumstances requiring skepticism has been explained as analysis of equal protection claims on different "tiers." The conceptual source of this approach is traced to *U.S. v. Carolene Products,* 304 U.S. 144, 152 n.4 (1938), and in particular to its reference to "discrete and insular minorities." The implementation of this doctrine began when racial classifications were held to merit "strict" scrutiny. At this level, the Court analyzed the state's true purpose, required the state to demonstrate a compelling governmental interest, and insisted that it show that no less drastic means could have been em-

[1] As used by *amici,* the term invidious refers to a law motivated principally by an intent to disadvantage or exclude a group of individuals, not because of a position they take but rather because of who they are. Invidious motivation may arise from irrational fear of the group, *see, e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. at 448, from false stereotypes about group members and their appropriate role in society, *see, e.g., Mississippi University for Women v. Hogan,* 458 U.S. 718, 725 (1982), the group's political unpopularity, *see, e.g., U.S. Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973), a desire to keep the group separate from the rest of society, *see, e.g., Brown v. Board of Education,* 347 U.S. 483, 494 (1954), or from concerns derived from the anticipated effects of private prejudice against the group, impermissibly effectuated by the state, *see, e.g., Palmore v. Sidotti,* 466 U.S. 429, 433 (1984).

ployed to accomplish that purpose. In subsequent cases, a few other groups who shared some of the characteristics of racial minorities were granted similar recognition, *see, e.g., Graham v. Richardson,* 402 U.S. 365 (1971), while advocates for other groups had their claims rejected, *see, e.g., Dandridge v. Williams,* 397 U.S. 471 (1970).

The system of tiers became somewhat more complicated when the Court held that gender discrimination cases would be evaluated at a "middle" tier of "intermediate" or "heightened" scrutiny. *Craig v. Boren,* 429 U.S. 190 (1976). At this level, the real purposes of the legislature are analyzed to determine whether the law is "substantially related" to the achievement of "important governmental objectives." 429 U.S. at 197. While the Court has been less than comprehensive in detailing guidelines for implementing this test for "semi-suspect" groups, it seems clear that one feature it shares with strict scrutiny is a focus on real legislative purpose, as contrasted to hypothetical rationales which may have been concocted solely for the purpose of appearing "rational" to the adjudicators of the law's constitutionality.

Over the years, individual Justices have expressed varying degrees of ambivalence about the accuracy with which the tier system describes the actual process by which the Court evaluates equal protection cases. *See, e.g., San Antonio School Dist. v. Rodriquez,* 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) ("Court's decisions in the field of equal protection defy [the] easy categorization" of a two-tier system); *Cleburne,* 473 U.S. at 451 (Stevens, J., concurring) ("I have never been persuaded that these so called 'standards' adequately explain the decisional process."); *Craig v. Boren,* 429 U.S. at 210 (fn.) (Powell, J., concurring) (tiers are "viewed by many as a result-oriented substitute for more critical analysis"). Nonetheless, the Court's majority has continued to find the tier system a useful device for explaining its decisions, and for providing guidance to lower courts.

The Court has also resisted recognizing a proliferation of new suspect classes. Perhaps concerned that a mechanical application of the criteria of suspectness would require protection of numerous groups from the legislative process, *see, e.g., Sugarman v. Dougall,* 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting), the Court has not recognized additional "discrete and insular minorities" in the last two decades. Indeed, several of this Court's decisions can be read, in part, as admonitions to lower courts against the proliferation of new suspect classes. *See, e.g., Cleburne,* 473 U.S. at 442.[2]

But while resisting the recognition of additional groups entitled to recognition as suspect or semi-suspect, the Court's decisions have taken care to scrutinize with some care (albeit less than "heightened scrutiny") the rationality of another group of laws. These are cases involving legislation that appeared to be motivated by antipathy to groups disfavored because of social or political unpopularity or based on false stereotypes about the characteristics of the group's members.[3]

A principal example is *Cleburne.* In that case, frequently cited by Petitioners and their supporting *amici,* this Court addressed a law that arose from intentional,

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[2] This feature of *Cleburne* is particularly noticeable since the discussion of middle tier was unnecessary for the resolution of the dispute, given the fact that the Court had determined that the ordinance in question lacked a rational basis. *See generally Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501 (1985).

[3] Professor Lusky's definition of discrete and insular minorities might prove helpful in visualizing those groups—whether denominated as suspect classes or not—who may elicit invidiously motivated discrimination: "groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power." Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence,* 82 Columbia L. Rev. 1093, 1105 n.72 (1982). Such a definition would encompass both people with disabilities and Respondents.

invidious discrimination against a group that had not received "suspect" designation. We believe that a proper understanding of *Cleburne* is essential for the proper resolution of this case, and that this, in turn, requires more refined analysis of the role of invidious state motivation in this Court's equal protection jurisprudence.

B. Invidiously motivated laws are evaluated more skeptically, regardless of the "tier" to which the case is assigned.

From the beginning of modern equal protection doctrine, racial minorities have served as the paradigm model for evaluating whether other groups are entitled to solicitous judicial attention when they complain of unconstitutional discrimination. A number of the decisions over the last thirty years that have evaluated claims for "suspect" status have focused on the strengths and weaknesses of analogies to the status of racial minorities. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677, 685-86 (1973) (plurality opinion); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976).

But in reality, what leads the Court to skepticism about a discriminatory law's constitutionality is not a mechanical gauging of the precision of the analogy between the disadvantaged group and racial minorities. Rather, the Court's cases reveal that laws are viewed more skeptically when they appear to be irrational or when they are insufficiently justified products of invidious discrimination. A careful reading of these cases indicates that the identification of a suspect (or quasi-suspect) class in a case leads the Court to shift away from the presumption of constitutionality, but the use (or lack) of that label is not outcome determinative in itself.

For example, in *Cleburne,* the Court declined to recognize people with mental retardation as a semi-suspect class, even though major elements of the analogy to racial minorities were striking. For example, people with mental

retardation have suffered a history of discriminatory and harmful treatment that five Justices described as "grotesque." 473 U.S. at 454 (Stevens, J., concurring); *id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part). There was also ample evidence that vestiges of that history remained on the nation's statute books, such as the Cleburne ordinance itself. Mental retardation is an immutable characteristic, and thus there was no reason to fear extension of judicial protection to a group of citizens whose only defining characteristic was that they had "los[t] a legislative battle." Lewis F. Powell, Jr., *Carolene Products Revisited,* 82 Columbia L. Rev. 1087, 1090 (1982). *Cf. Williamson v. Lee Optical,* 348 U.S. 483 (1955).

Nonetheless, the Court declined to recognize people with mental retardation formally as a semi-suspect class for two related reasons. The first was that although members of the group itself were not able to seek political influence effectively, advocates on their behalf had obtained a number of favorable laws on several topics. Second, and perhaps more important, was the fact that the trait of mental retardation was not presumptively irrelevant to legitimate legislative goals. *See* James W. Ellis, *On the "Usefulness" of Suspect Classifications,* 3 Constitutional Commentary 375 (1986). Taken together, these factors meant that the Court would not automatically presume (and direct lower courts invariably to presume) that any laws that treated people with mental retardation differently because of their mental limitations were *presumptively* unconstitutional.

But having declined to make such a categorical presumption, and while not "purport[ing] to apply a different standard" than the rational basis test, *Heller v. Doe,* 113 S. Ct. 2637, 2643 (1993), the Court unanimously held the Cleburne ordinance to be a violation of the equal protection clause. It carefully sorted out the asserted rationales for the law, and identified some as insufficiently

connected to the ordinance's provisions, while concluding that others, which were deemed to be the real motives, were constitutionally impermissible. Part IV of the *Cleburne* decision is hardly a model of deference, as suggested by Petitioners and supporting *amici* in this case. *See also Equality Foundation of Greater Cincinnati v. City of Cincinnati,* 94-3855/3973, 1995 WL 276248 at *6 (6th Cir. May 12, 1995). Rather, the Court carefully evaluated the law's rationality in light of the fact that there was ample "reason to infer antipathy." *FCC v. Beach Communications,* 113 S. Ct. at 2101. Both the majority and concurring opinions made clear that the law was evaluated under this standard and was found to be constitutionally inadequate.

Although the result in *Heller,* 113 S. Ct. 2637, was unfavorable to people with mental retardation, the Court's methodology was not markedly different. The statute in *Heller,* treated people with mental retardation and people with mental illness differently. It was evaluated under the rational basis test because a claim for heightened scrutiny based on the fundamental right to be free from physical confinement had not been argued in the courts below. 113 S. Ct. at 2642. Nonetheless, the level of deference involved in the evaluation of the law was certainly finite. Both the majority and dissenting opinions inquired with some care whether there was "some footing in the realities of the subject addressed by the legislation." 113 S. Ct. at 2643. Justice Kennedy's majority opinion, citing to numerous clinical authorities and studies, concluded that Kentucky had sufficiently rational reasons for treating the two groups differently. Justice Souter's dissenting opinion, also explicitly utilizing the rational basis test of *Cleburne,* and also upon careful consideration of the clinical and scientific literature, concluded that the state's justification for denying to people with mental retardation the rights afforded to people with mental illnesses was not sufficiently reasonable. *See, e.g.,* 113 S. Ct. at 2652-56. Although the state in *Heller* was not required to demonstrate that its discriminatory effect was substantially related to the achievement of an important governmental objective, neither did the Court indicate a willingness to accept just any rationalization for the different treatment of the two groups.

Amici disagree with the result in *Heller,* and also believe that the Kentucky statute would not have survived heightened scrutiny had the predicate for the appropriate standard been established in the court below. It is clear, however, that the majority concluded that even if the Kentucky legislature was mistaken about some of its factual premises (e.g. the prevalence of involuntary medication in mental retardation institutions), and even if the legislature indulged in some unfortunate stereotyping about people with mental retardation and their families, it did not act out of invidious motivation toward the group it was disadvantaging. *Amici* do not disagree with this reading of the case. We believe that the correct and most reasonable explanation for the difference between the *Cleburne* and *Heller* results was the absence of invidious motivation in the latter case.

A similar concern about invidious motivation can be found in other cases in which the Court has struck down laws under the test of rationality. For example, in *U.S. Department of Agriculture v. Moreno,* 413 U.S. 528, the Court did not appear to have given serious consideration to declaring "hippies" a suspect class, but nonetheless struck down the discriminatory law. "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional *desire to harm a politically unpopular group* cannot constitute" a sufficient governmental interest. 413 U.S. at 534 (emphasis added).[4]

[4] A similar analysis of cases in which the rational basis test was employed more deferentially reveals none in which the Court was offered persuasive reason to infer antipathy against the disadvantaged group in the enactment of the challenged law.

Some have speculated that the Court has fashioned a fourth tier between *Craig* and *Lee Optical,* or that the rational basis test itself is somehow evolving. *Amici* find no support for either interpretation in the text of the Court's opinions. Rather, it seems clear that the Court is saying two important things. First, the existence of some invidiously discriminatory legislation directed at a particular group, coexisting with other, rational, legislation, will not be enough to require that all laws using the classification be presumed to be unconstitutional. In that way, legislators retain "the latitude necessary both to pursue policies designed [to benefit the group], and to freely and efficiently engage in activities that burden [the group] in what is essentially an incidental manner." *Cleburne,* 473 U.S. at 446. But the Court's decisions also teach that the ordinarily deferential posture of the test of rationality does not constitute a blank check for invidiously discriminatory laws based on archaic and false stereotypes or masking a true motivation "to harm a politically unpopular group." *Cleburne,* 473 U.S. at 447 (quoting *Moreno*). Nor will this test permit a law to give direct or indirect effect to private biases against the group. *Cleburne,* 473 U.S. at 448 (citing *Palmore v. Sidotti,* 466 U.S. 429, 433 (1984)).

Whether a group is designated as suspect or not is not the essence of this Court's equal protection review, but rather is only a useful tool in its implementation. At the heart of the inquiry is whether a law is sufficiently closely tied to legitimate governmental purposes. The function of the "suspect" or "semi-suspect" label is principally to shift the Court's focus away from the ordinary presumption of constitutionality. That, of course, is no small matter. But even when that presumption is not shifted through the identification of "suspectness," it will be overcome if the challenger demonstrates facts indicating that a particular law was impermissibly motivated or insufficiently connected to legitimate governmental ends. A law which lacks a legitimate purpose or an adequate nexus to such

a purpose overcomes the presumption of constitutionality even without the designation of overall "suspectness." [5]

While *amici* continue to believe that the *Cleburne* decision was mistaken in declining to recognize people with mental retardation as a semi-suspect class, we consider the Court's overall approach sensible. First, it recognizes that some forms of discrimination, notably racial and gender bias, are so likely to be invidious and irrational that the equal protection clause should be read to erect a strong presumption of unconstitutionality. Second, it avoids creating an unreasonably large number of categories of presumptively unconstitutional laws by avoiding a proliferation of "suspect" groups. But it also recognizes that irrational and invidiously motivated laws are not limited to those that are visited upon the handful of groups that the Court has chosen to recognize as suspect. While the laws in this final category will not be presumed at the outset to be violations of the Constitution, neither will they receive an automatic "pass" from a Court whose blind adherence to a formulaic approach requires it to ignore their true motivation.

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[5] Part of the confusion about this Court's implementation of the system of tiers may result from the simple fact that laws that invidiously discriminate against groups that are not "suspect" or "semi-suspect" are relatively rare. This may be why cases like *Moreno* and *Cleburne* have seemed abberational to some. But while invidious laws are much more likely to be directed against groups that have suffered a history of pervasive discrimination, are politically disenfranchised, etc., the match between this Court's criteria for overall "footnote four" recognition and the existence of such laws is imperfect. *Moreno, Cleburne,* and the case at bar are clear examples of laws that invidiously discriminate against groups that have not been deemed to require recognition as suspect across the board.

II. DIFFERENT GROUPS IN CONTEMPORARY SOCIETY ENCOUNTER INVIDIOUS DISCRIMINATION IN DIFFERENT WAYS, AND THIS COURT MUST BE SENSITIVE TO THESE DIFFERENCES IN ASCERTAINING WHETHER LEGISLATION VIOLATES THE EQUAL PROTECTION CLAUSE.

Although invidious discrimination against any disfavored group can produce legislation that is irrational or laws that are insufficiently connected to an important governmental interest, different groups clearly experience discrimination in different ways. As this Court's decisions reveal, these differences are an essential, if sometimes unspoken, part of the equal protection calculus, regardless of the "tier" of analysis that has been announced.

A. Neither Respondents nor people with disabilities are merely an "identifiable group."

Petitioners have devoted considerable attention to the scope of the Colorado Supreme Court's ruling. In particular, they express a concern that extending protection to any "independently identifiable group" would limit the states' ability to regulate "a boy scout troop" or "a group of tax protestors." Pet. Br. at 34-35. *Amici* do not address the merits of the claim to a fundamental right in this case. Nonetheless, it is important to recognize that the groups encompassed in *amici's* reading of this Court's rational basis cases involving invidious discrimination are substantially narrower in scope than Petitioners envision. They are also more limited than the concept of "identifiable groups" potentially cognizable in unrelated contexts, such as legislative gerrymandering. *See, e.g., Davis v. Bandemer,* 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

It is essential to recognize that neither the people who wanted to live in the group home in *Cleburne* nor Respondents in this case are merely a self-identified interest group or political faction. Each is a group whose claim merits the careful attention of this Court because they

were singled out by the state for discriminatory treatment because of who they are, and not because of a political position they have taken or a club they have chosen to join. It is that "singling out" that renders the discrimination invidious, and thus wholly unlike the cases of factions whose identity derives principally from the fact that they were losers in a political dispute. *Cf. Williamson v. Lee Optical,* 348 U.S. 483 (1955).

B. Groups which experience substantial invidious discrimination, but which have not been designated as "suspect," are in particular need of judicial protection from irrational laws.

One unintended consequence of the Court's reluctance to recognize suspect groups, if it were implemented in a rigidified and inflexible fashion, is that with the passage of time the Court's heightened scrutiny of invidious legislation would be reserved for those groups who will need it least. This paradoxical situation could result from the fact that the recognition of groups which have long been acknowledged as suspect occurred at a time when an abundance of legislation singled them out for unfavorable treatment. But over the course of time and with the evolution of public attitudes and tolerance, invidious laws directed against those groups are now enacted much less frequently.

For example, prejudice against racial minorities remains a critical national concern, and the persistent, enduring effects of previous official discrimination are central to our understanding of that problem. But official state actions consciously intended to harm or disadvantage members of those minorities are now encountered far less frequently than they were 40 or 50 years ago when this Court began subjecting them to the presumption of unconstitutionality. The dynamic of how these changes took place is both familiar and complex. Many of the laws simply fell to constitutional challenges. But those judicial decisions also contributed to changes in

public attitudes that allowed the political system to develop its own antidotes to open, public bigotry. In this way, the Court's decisions helped make room for legislative protection of minorities, and laws barring public and private acts of racial discrimination are now nearly ubiquitous. The relatively infrequent cases of direct racial discrimination by the state that are litigated under the Constitution continue to merit and receive this Court's strictest scrutiny. *See, e.g., Powers v. Ohio,* 499 U.S. 400 (1991). But today, the vast majority of cases alleging racial bias are adjudicated within the statutory framework, requiring far fewer constitutional interpretations from the judiciary.

It has been observed that while all prejudice has common roots and features, in combating such bias each group confronts a somewhat different legal template.[6] For example, the sustained effort in this Court to allow women to realize the promise of the equal protection clause began two or three decades after its racial counterpart. And while *de facto* bias and prejudice may have eroded no less slowly than was true for racial minorities, statutory protections were enacted earlier in the process. (This difference may have been a product of the existence of models of civil rights legislation already enacted for racial minorities, and may also have benefitted from the fact that women constitute a majority of the electorate.) But despite such differences, the result is similar: the vast majority of gender discrimination cases today are litigated under statutory protections rather than requiring numerous interpretations of the *Craig* test.

The template for people with disabilities is different from either race or gender. The official discrimination and maltreatment of people with disabilities suffered was aptly described as "grotesque," *Cleburne,* 473 U.S. at 454

[6] Catherine A. MacKinnon, *Reflections on Sex Equality Under Law,* 100 Yale L.J. 1281, 1299 (1991).

(Stevens, J. concurring).[7] Recognition of the unacceptability of this kind of discrimination has come slowly,[8] but some legislative protections, albeit imperfect and incomplete, have been enacted. *See, e.g.,* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1988). Today, disputes over entitlement to public education are far more likely to be resolved under statutes than as constitutional claims. *Compare Mills v. Board of Education of District of Columbia,* 348 F.Supp. 866 (D.D.C. 1972), *with Florence County School District Four v. Carter,* 114 S. Ct. 361 (1993). And attempts by communities to exclude citizens with disabilities, which once would have produced constitutional challenges, are now more likely to be litigated as statutory as well. *Compare City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), *with City of Edmonds v. Oxford House,* 115 S. Ct. 1776 (1995).

For people with disabilities, constitutional protection against discrimination by governmental actors remains crucial even in light of these legislative developments, because the scope of the statutory protections is incomplete. The equal protection doctrine that applies to people with disabilities is also important because, unlike racial

[7] *See, e.g., State ex rel. Beattie v. Board of Education,* 172 N.W. 153, 154 (Wis. 1919) (child with a disability could be excluded from school because he "produces a depressing and nauseating effect upon the teachers and school children"); 1920 Miss. Laws 288, 294 (chancery courts given jurisdiction over individuals in "the higher grades and varieties of mental inferiority which renders the subjects unfit for citizenship"). A fuller sampling of such discriminatory statutes is set forth in the *Amicus Curiae* Brief of the American Association on Mental Deficiency, et al., in the *Cleburne* case, No. 84-468, at Appendix B. *See also* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration,* 64 Temple L. Rev. 393, 399-414 (1991) (citing numerous examples).

[8] *See generally* Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (1993).

and gender civil rights laws, the statutory protections for people with disabilities remain controversial and vulnerable to attack in the political arena.[9] Thus when a constitutional challenge is brought against a law that invidiously discriminates against people with mental retardation, it remains essential that the Court not defer to the kind of legislative motivation it uncovered and rejected in *Cleburne*.

III. THE COURT SHOULD BE PARTICULARLY SKEPTICAL OF INVIDIOUSLY MOTIVATED DISCRIMINATORY LAWS WHICH ATTEMPT TO PREVENT ENACTMENT OF LEGISLATION ADDRESSING THE DISCRIMINATION ITSELF.

While it is not part of the formal structure of rationality review, the case law seems to suggest that this Court is not unmindful of what it is that the invidiously discriminatory law attempts to do. Even when there was not a fundamental right involved, the nature of the discriminatory deprivation appears to be an informal part of the calculus, particularly when it is intertwined with, and illuminates, the invidious motivation itself. For example, it may not be totally irrelevant to the *Cleburne* analysis that the city was attempting to exclude citizens with mental retardation totally from living in the community.

In the case at bar, the challenged Colorado constitutional amendment discriminates against a group on the basis of blatantly invidious motivation.[10] But it also has

[9] *See, e.g.*, Statement of Rep. Philip M. Crane, February 14, 1995, 141 Congressional Record, No. 29, E338-39 ("The Americans with Disabilities Act"); *Senate Regulatory Reform Group Targets 10 Worst Laws*, National Journal's Congress Daily, January 26, 1995 (suggesting a need to restrict the definition of disability in the ADA).

[10] The tone of the rhetoric in the campaign that led to the enactment of the provision and the motivation behind it are revealed, e.g., in the proponents' own account of the dispute. *See* Stephen Bransford, *Gay Politics vs. Colorado and America: The Inside Story of Amendment 2* (1994).

the explicitly intended effect of preventing the consideration and development of legislatively enacted approaches to the problem of discrimination. Such an artificial short-circuiting of the political process, engendered by the proponents' fear that statutory protections may be enacted as public attitudes evolve, is precisely the kind of discriminatory law to which this Court should not blindly defer.

CONCLUSION

For the aforementioned reasons, *amici* urge affirmance of the judgment of the Colorado Supreme Court.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
MAUREEN A. SANDERS
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

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