

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CITIZENS FOR EQUAL PROTECTION,
etc., et al.,

Plaintiffs,

v.

ATTORNEY GENERAL JON BRUNING,
in his official capacity, GOVERNOR
MICHAEL O. JOHANNNS, in his official
capacity,

Defendants.

CASE NO. 4:03CV3155

**DEFENDANTS' REPLY BRIEF
IN SUPPORT OF
MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' defeat in the political battle over recognition of same-sex relationships does not constitute a cognizable injury for Article III standing purposes, and it is not "punishment" within the meaning of bill of attainder doctrine. There is no civil right to win a political battle. There is also no civil right to control the terms on which a political battle will be fought, i.e., on a local or even employer-by-employer level rather than on a state-wide voter initiative level. When persons seek social and political change, they run the risk that their efforts will fail. Plaintiffs began seeking social and political change regarding recognition of same-sex relationships long before Section 29 was ever imagined. Their work, and that of similar organizations in Hawaii, Alaska, and Vermont created the political climate in which Section 29 was proposed. Plaintiffs had the right and the freedom to seek social and political change, and they still do. But they do not have a constitutional right to

win or to force the battle to be fought on their terms. Nor do they have a constitutional right to overturn a political defeat through the federal courts.

Plaintiffs' theory of a constitutional injury or punishment based solely upon political disability is so insubstantial that they are unable to make their arguments without relying upon the substantive impact of Section 29's prohibition of legal recognition of same-sex couples. But since their Complaint explicitly denies a claim of a right to legal recognition of same-sex relationships in this litigation, they cannot rely upon the absence of such legal recognition to support their claim of injury or punishment.

ARGUMENT

I.

LOSING A POLITICAL BATTLE DOES NOT CREATE ARTICLE III STANDING

Under Plaintiffs' view of the Article III case or controversy requirement, any time advocates for social change are rebuffed by a constitutional amendment, they have suffered a constitutional injury. In addition, any citizen who disagrees with any state constitutional provision has standing to challenge it in federal court simply by alleging that the mere existence of the constitutional provision under attack discourages him from advocating for future legislation that might be held to violate the state constitution. In effect, Plaintiffs are asking this court for an advisory opinion on Section 29 based upon nothing more than an abstract, generalized grievance arising from the loss of a political battle. See Complaint, ¶¶ 8, 10 (alleging long-standing efforts to bring about change in legal recognition of same-sex relationships). Plaintiffs share this "grievance" with every Nebraska citizen who disagrees with Section 29 and who supports *future* laws or policies

that might be held to violate Section 29 in *future* litigation in the Nebraska courts. As this discussion will bear out, Plaintiffs' claims go against the heart of the proper role of federal courts under Article III of the United States Constitution.

The Supreme Court gave careful instruction regarding an Article III court's power to hear cases and controversies in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). After an extensive review of the vital principles that lie behind the standing requirements of Article III courts, the Supreme Court emphasized that standing is a critical requirement that should not be considered lightly:

Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

Id. at 476.

A. Plaintiffs' Equal Protection Claims Amount to No More than Generalized Grievances.

Plaintiffs have carefully crafted their alleged injuries in this case to explicitly disclaim any reliance upon the denial of “legal recognition of their relationships,” and assert only that Section 29 “den[ies] them an equal footing from which to seek those protections.” Plaintiffs’ Brief in Opposition to Motion to Dismiss at 1-2 (“Opposition Br.”).¹ By limiting their complaint in this manner, Plaintiffs voluntarily relinquish any standing on the basis of the sexual orientation of their members, and can claim only such standing as would be common to any Nebraska resident who is ideologically opposed to Section 29, and who would wish to enact contrary legislation. In fact, one of the purposes for the standing requirement, explained by the Supreme Court in *Valley Forge*, addresses the result of allowing such a generalized harm to suffice for standing:

The “standing” requirement . . . assures an actual factual setting in which the litigant asserts a claim of injury in fact, [and as such,] a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

Valley Forge, 454 U.S. at 472. Allowing Plaintiffs standing here would afford any Nebraska resident the right to challenge by lawsuit (rather than through appropriate legislative measures) any constitutional provision found disagreeable.

¹Because Nebraska law confers no legal recognition or benefits upon unmarried *opposite-sex* couples, Plaintiffs and their members have suffered no injury in the denial of benefits, and are thus unable to articulate any injury related to the benefits themselves.

Plaintiffs have not alleged that all of those who oppose Section 29, either now or at the time of its adoption, share a common “sexual orientation.” Nor have plaintiffs alleged that gay and lesbian persons opposed to Section 29 suffer different or greater political injury than heterosexual persons opposed to Section 29.² It is clearly evident that the injury alleged by Plaintiffs does not hinge upon the sexual orientation of any individual. Thus, the injury alleged by Plaintiffs is neither specific to Plaintiffs nor related to sexual orientation.³ As such, Plaintiffs complaint should be dismissed for lack of standing in that it asserts only a generalized grievance common to all Nebraska citizens who support legal recognition for same-sex couples.

In *Valley Forge*, the plaintiffs challenged a federal government conveyance of surplus property to the Valley Forge Christian Center without cost (finding 100% public benefit allowance). *Id.* at 468. The plaintiffs filed suit in federal court, alleging that unconstitutional use of government property provided a sufficient injury-in-fact to establish standing under Article III. *Id.* at 469. The Supreme Court reversed the Third Circuit’s

²Under Plaintiffs’ argument, it could also be alleged that the definition of marriage itself, also enshrined in Section 29, is unconstitutional in that it precludes advocates of same-sex “marriage” from accomplishing their objective through legislative channels, while those supporting traditional marriage have already obtained governmental recognition of their unions. While Plaintiffs attempt to narrow the scope of this litigation, its broad implications should be recognized.

³It should be noted that Plaintiffs, as three non-profit organizations, have no independent “sexual orientation,” and do not assert that all of their members are homosexual. Complaint, ¶¶ 8-10. They can assert a constitutional claim based on sexual orientation only in a representative capacity on behalf of some of their members. See *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263-64 (1977). In that case, the Court noted that a corporation has no racial identity and thus cannot sue in its own capacity. There, the Court refrained from any discussion as to whether the corporation could sue on behalf of its members, in that individual members of a racial minority were a named party to the lawsuit. *Id.*

decision which had allowed the plaintiffs standing, not as taxpayers, but as “‘citizens,’ claiming ‘injury in fact’ to their shared individuated right to a government that ‘shall make no law respecting the establishment of religion.’” *Id.* at 470 (quoting *Americans United v. U.S. Dept. of HEW*, 619 F.2d 252, 261 (1980)) (internal quotation marks omitted). In response to such contrived “citizen standing,” the Court held that it has “refrained from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.” *Id.* at 475 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)).

The Court regarded the plaintiffs in *Valley Forge* as having only a stake as taxpayers because their only claim was that the Constitution had been violated – plaintiffs did not identify “any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.” *Id.* at 487.

But the important point in the Supreme Court’s discussion for the purposes of the Plaintiffs’ claim in the present case is the Court’s *disapproval* of the Third Circuit’s rationale for conferring standing – that being “the conviction that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege ‘distinct and palpable injury to himself, . . . that is likely to be redressed if the requested relief is granted.’” *Id.* at 488 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)) (internal quotation marks and citation omitted). In other words, the Court rejected forming an exception to the stringent standing requirements where important rights, such as those under the Establishment Clause, are at stake. If the Establishment Clause allowed an exception, “there would be no principled basis for confining [that] exception to

litigants relying on the Establishment Clause.” *Id.* at 489. The “exception [to the standing requirement, then, would derive] from the idea that the judicial power requires nothing more for its invocation than important issues and able litigants. *Id.* at 490.

The Plaintiffs’ Equal Protection claim likewise does not deserve an exception to the rule. Plaintiffs have not shown that they, or any member of their respective associations or organizations have been *directly* harmed by Section 29, other than their generalized objection shared with all Nebraska voters who support legal recognition of same-sex relationships.

Again, Plaintiffs’ claim is only that they have been denied *political access*. But Plaintiffs do not allege that they are legally prohibited from lobbying for social and political change. Plaintiffs do not allege that they have been barred or banned from any legislative hall or forum. Consequently, Plaintiffs’ assertion of injury regarding the Attorney General’s opinion (declaring that proposed domestic partner legislation would be unconstitutional, see Opposition Br. at 18) is insufficient to confer injury-in-fact because Plaintiffs do not have a right to succeed in their lobbying efforts unless they have a constitutional right to their objective. They have chosen not to assert that right. Complaint, ¶ 4.

B. Standing Requires a Specific Injury Not Present Here.

- 1. The Supreme Court has never held that the loss of *general political power* amounts to sufficient harm to warrant Article III standing.**

Whether standing requirements have been met “often turns on the nature and source of the claim asserted.” *Raines, Director, Office Management and Budget v. Byrd*,

521 U.S. 811, 818 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal citation omitted). For example, the Court was careful in *Gratz v. Hamacher*, 123 S. Ct. 2411 (2003), to say,

“the ‘injury in fact’ in an equal protection case *of this variety* is a denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . And *in the context* of a challenge to a *set-aside* program, the ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.”

Id. at 2423 (quoting *Northeastern Fla. Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993)) (alteration in original) (emphasis added). Thus, although the Court found a “barrier” in a set-aside case concerning contracts or seats for college admission, standing is not necessarily conferred, *per se*, whenever a Plaintiff asserts a barrier has been imposed. There must be a causal connection between the alleged barrier and a *particularized* object the Plaintiff has a legitimate right to obtain. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing requires “an invasion of a legally protected interest”). The facts and circumstances of each case are of vital importance. In the present case, Plaintiffs’ equal protection claim is most analogous to the claim asserted in *Raines*.

Raines is analogous to the case at bar because the plaintiffs in *Raines* alleged a loss of general political power when the 104th Congress passed the Line Item Veto Act, and the President signed the Act into law. *Raines*, 521 U.S. at 821. The plaintiffs in *Raines* lacked the requisite standing because they were unable to comply with the Court’s requirement of “strict compliance with th[e] jurisdictional standing requirement.” *Id.* at 819. They alleged

that their *future* votes would be “less ‘effective’ than before, and that the ‘meaning’ and ‘integrity’ of their vote ha[d] changed.” *Id.* at 825. But the Supreme Court disagreed because the plaintiffs had suffered no direct, personal harm. *Id.* at 821. The Court found that the particular members of Congress that brought suit suffered a harm no different than any other Member of Congress would have. The claim amounted to an “institutional injury,” *id.*, that would damage all Members of Congress on an equal basis. *Id.*

The Court made the crux of the issue clear, and that point highlights the distinction between cases cited by Plaintiffs, such as *Northeastern Fla. Chapter* and *Gratz*, *supra*, and cases such as *Raines* or the case at bar:

[A]ppellees do not claim that they have been deprived of something to which they *personally* are entitled – such as their seats as Members of Congress after their constituents had elected *them*. Rather, appellees’ claim of standing is based on *a loss of political power, not loss of any private right*, which would make the injury more concrete.

Id. (emphasis added). Standing requires that the plaintiff asserting a claim have an *actual* right to the object of the litigation. In *Raines*, being denied a seat in Congress would have conveyed standing, but the plaintiffs could only claim a general loss of political power. In the case at bar, Plaintiffs allege their political access has been hindered in general—not that anyone in their named associations or organizations has actually been forbidden the right to vote or enact legislation. Absent a claim of a right to legal recognition of same-sex relationships, Plaintiffs cannot allege a personal deprivation of something to which they have a right. *Id.*; *Lujan*, 504 U.S. at 560. As in *Raines*, Plaintiffs’ allegation that Section 29 minimizes their ability to exercise political power is insufficient to confer standing.

2. Plaintiffs' cases do not establish generalized standing to challenge any law that allegedly violates the Equal Protection Clause.

Plaintiffs cite a litany of cases in an attempt to support the proposition that “the injury in fact requirement is satisfied by the imposition of an unequal barrier and that the ultimate denial of the benefits need not be alleged.” Opposition Br. at 9. Standing remains, however, a particularly factual inquiry which “*often turns on the nature and source of the claim asserted.*” *Raines*, 521 U.S. at 818 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasis added)). None of the standing cases relied on by Plaintiffs is even remotely similar to the facts of the instant case, nor did any of those cases uphold Article III standing where the injury alleged was merely a generalized political grievance such as the political advocacy discouragement pleaded by Plaintiffs in this case.

Specifically, even where an allegedly unconstitutional barrier exists, standing requires a showing that the plaintiff has suffered an injury which is “concrete and actual or imminent, not conjectural or hypothetical.” Each of the cases cited by Plaintiffs arises with respect to a limited governmental resource that is allocated on a competitive basis – governmental contracts, an elected office, or admission to a state university. Opposition Br. at 9-13. The injury suffered by an individual denied the chance to compete on equal terms for one of these limited governmental benefits is not the same as that suffered by an organization that loses a battle for general social and political change.

In *Northeastern Fla. Chapter*, 508 U.S. 656, the plaintiffs sought access to compete for the 10% of city contracts which had been set-aside for minority-owned businesses.

While the Court held it was not necessary that the plaintiffs demonstrate they would have been awarded the contracts but for the set-aside, there were, in fact, a limited number of actual city contracts for which the plaintiffs desired to compete. In contrast, there are no “domestic partner benefits” which have been set-aside for opposite-sex couples in the present case, and for which Plaintiffs have been denied the opportunity to lobby. In the context of *Northeastern Florida Chapter*, the Nebraska Legislature has not set aside specific domestic partner benefits for unmarried opposite-sex couples which would give the Plaintiffs standing to challenge the exclusion of unmarried same-sex couples. In essence, Plaintiffs in this case are seeking to compete for a benefit which does not exist.

Each of the other cases argued by the Plaintiffs reveals a similar fallacy. In *Turner v. Fouche*, 396 U.S. 346 (1970), the plaintiffs alleged that they had been denied their right to be considered for a specific, competitive position on the school board. While the Court did not require that plaintiffs demonstrate that they would have been elected but for the discriminatory provision, it goes without saying that had there been no school board, plaintiffs would have suffered no injury sufficient to support a lawsuit.

In *Clements v. Fashing*, 457 U.S. 957 (1982), the Texas Constitution required certain state office-holders to resign their positions before announcing their candidacy for another office. In an equal protection challenge to those constitutional provisions, the Court found standing on behalf of four plaintiffs who were current Texas officeholders and who were “qualified under Texas law to be a candidate for higher judicial office.” Though plaintiffs in that case had not yet announced their candidacy, due to the automatic resignation of their current positions which the announcement would have triggered, the Court found those

current officeholders had standing to challenge the constitutional provisions which barred them from competing for existing positions.

In the same way, *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), involved a medical school applicant who had been twice rejected for a competitive slot in the incoming class of 100 students. In the plaintiff's equal protection challenge to the minority set-asides in the medical school admission policy, the Court found that the plaintiff's injury consisted of the fact that he had been denied the chance to compete for 16 of the 100 places in the class. Once again, however, the plaintiff in *Bakke* had alleged that he had been denied the opportunity to compete on equal terms for a limited number of positions in the class. The *Gratz* and *Grutter* cases handed down by the Supreme Court this past summer apply the same rule. In *Gratz* and *Grutter*, the Court likewise held that a student who had been denied admission had standing to challenge a policy which impaired his ability to compete for the limited number of available positions.

Plaintiffs here are not seeking to compete for any existing contract or position, and thus cannot claim the mantle of the Court's competitive barrier cases. The distinction between those competitive barrier cases and standard equal protection analysis is particularly demonstrated by the Supreme Court's decisions, just two years apart, in *Warth v. Seldin*, 422 U.S. 490 (1975) and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). In *Warth*, the plaintiffs did not allege that they had been impaired in their ability to compete for a competitively-allocated government resource, but rather that a government policy had the discriminatory purpose and effect of excluding low and middle-income persons from a particular community. Where there was no particular office or contract at issue, the Court required plaintiffs to demonstrate a

“substantial probability” that they would have been able to purchase or lease property in Penfield, New York, but for the existence of the allegedly unconstitutional zoning policy.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court provided further clarification in a similar case in which the plaintiff was found to have standing. After citing the principles set forth in *Warth v. Seldin*, the Court went on to find that the Metropolitan Housing Development Corporation (MHDC) had alleged a sufficient “personal stake in the outcome of the controversy” to challenge the zoning ordinance of the Village of Arlington Heights. In *Village of Arlington Heights*, the MHDC had entered into a contingent sale agreement on property within the Village of Arlington Heights, under which the contract hinged upon the ability of MHDC to obtain zoning clearances from the Village for its multiple-family housing project. While the general interest in moving into the village of Penfield did not suffice to establish standing for the plaintiffs in *Warth*, the Court found that the MHDC’s pending contract on property in the Village of Arlington Heights constituted sufficient stake in the outcome of the litigation to establish standing.

Therefore, the cases cited by the Plaintiffs do not establish that there is generalized standing to challenge any law that allegedly violates the Equal Protection Clause, and the Plaintiffs cannot meet the *Warth* standard for standing under the facts of this case .

C. Plaintiffs Have Not Suffered “Serious Non-Economic Injuries” Sufficient to Establish an Injury-In-Fact.

In their brief, Plaintiffs allege alternatively that Section 29 labels “a group of citizens as ‘innately inferior’ and ‘therefore as less worthy participants in the political community,’”

and that such injury alone is sufficient to confer standing to challenge the constitutionality of Section 29. Opposition Br. at 14. This argument fails for several reasons.

First, Plaintiffs have narrowly drawn their complaint to reach only the question of whether individuals who support legal recognition of same-sex relationships are denied access to the political process. In this respect, the “group of citizens” allegedly demeaned by the operation of Section 29 would necessarily include every Nebraskan who is ideologically opposed to the substance of Section 29 and would support contrary legislative efforts. Plaintiffs have provided no explanation of how Section 29 demeans such a large cross-section of Nebraska residents.

Secondly, even if the question of legal recognition of same-sex relationships were at issue in this case, the simple failure of government to endorse or subsidize a particular relationship does not inherently demean that relationship. For example, sibling relationships, roommate relationships, in-laws, and others are not recognized as marriage or given automatic government benefits under Nebraska law, and yet none of these relationships are considered to be demeaned by the law. The simple fact of non-recognition does not constitute “serious non-economic injury.”

Finally, Plaintiffs mistakenly rely on *Romer v. Evans*, 517 U.S. 620 (1996), to establish their “non-economic” theory of standing, and assert that the injury they have suffered “cannot be distinguished meaningfully from the barrier imposed in *Romer*.” *Romer*, however, does not provide support for Plaintiffs’ standing argument, first and foremost because standing was never discussed in *Romer*. *Romer* arose in Colorado state courts, and was not subject to Article III standing requirements. Any analogy Plaintiffs may wish to draw between this case and *Romer* goes only to the merits, and does not bear

upon the question of standing. Even if Article III standing had been at issue in *Romer*, it is likely that plaintiffs would have had standing under the repeal of existing anti-discrimination laws occasioned by the adoption of Colorado's Amendment 2. In any event, Article III standing was not required in *Romer*.

D. There are Appropriate Political Channels through which Plaintiffs May Seek their Desired Policy Objectives.

Plaintiffs would have this Court believe they have suffered actual harm because they cannot access the political process without going through the same difficulty that proponents of Section 29 engaged in – but that is a fabricated claim. The harm complained of in Plaintiffs’ brief analysis discloses their real underlying claims – that they are being deprived of access to marital benefits. This is true because, as previously explained, there has been no denial of access to any political channel. The appropriate channel for relief is open. No one has been banned from holding any political office, or prevented from communicating with the Nebraska public, or from taking the proper steps to initiate the constitutional amendment process. The Court should not ignore this error in logic. If the harm is alleged lack of access to the political process, then the harm cannot also be deprivation of actual benefits. A repeal of Section 29 *may* lead to actual benefits at a lower level of government – but there has been no deprivation of actual benefits.⁴

Plaintiffs’ argument is not logically sound because they allege harm to political access at the wrong level. The correct, and logical analysis must begin at the proper level of political access – if Plaintiffs want to lobby, they must now lobby at the level of obtaining a constitutional amendment, just as occurred to enact Section 29.

Plaintiffs’ futility argument is also disingenuous, because if they can obtain their benefits at a local level, they are capable of obtaining those same benefits, through the

⁴Nebraska law has never extended legal recognition to non-marital domestic partnerships, whether between persons of the same sex or opposite sex. As Plaintiffs implicitly acknowledge, adoption of Section 29 made no change to the substantive benefits available under Nebraska law.

definition of marriage, at the State constitutional level. However, Plaintiffs would rather accomplish their goal through litigation, than the constitutional amendment process.

Even the law review article cited by Plaintiffs contravenes the Plaintiffs' suggestion that Section 29 is unconstitutional simply because it is enshrined in the Nebraska Constitution rather than the Nebraska statutes:

Passing a new constitutional amendment is of course an onerous task. But *all* constitutional provisions entrench in *this* sense. The Strict Scrutiny For Race Discrimination Rule in the Fourteenth Amendment, as construed by the Supreme Court, itself entrenches just this way. Opponents of this federal rule can now prevail only by passing a new federal constitutional amendment (rather than a state law or congressional statute). And, of course, it is notoriously tough to pass a new federal constitutional amendment. But surely *that* entrenchment does not make the Fourteenth Amendment itself unconstitutional.

95 Mich. L. Rev. 203, 206.⁵

Thus, just because the process is tougher, does not mean it is unconstitutional. Accordingly, there is no injury-in-fact here. Even if a generalized harm were acceptable (which it is not), the harm alleged by Plaintiffs plainly does not even constitute a general harm. There has not even been so much as a chill on First Amendment rights. Plaintiffs have not been shut out of any political process.

⁵Defendants disagree with Professor Amar's Bill of Attainder Analysis.

In addition, nothing prevents two individuals from establishing rights between each other or their employers by contract, and as discussed in Defendants' Brief in Support of Motion to Dismiss, many benefits have been granted via other alternatives than through governmental recognition of same-sex relationships. Thus, the right Plaintiffs do have is a right to obtain recognition of same-sex relationships through a constitutional amendment. That political avenue is wide open.

II.

PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR BILL OF ATTAINDER.

Plaintiffs' defense of their bill of attainder claim reveals a basic misunderstanding of what a bill of attainder is. It appears that under their theory, Section 29 is a bill of attainder, at least in part, because it is a constitutional amendment instead of a legislative enactment. See Complaint, ¶ 4 (referring to no "opportunity to convince the people's elected representatives"); ¶¶ 14, 16, 19 (referring to a "constitutional barrier"); ¶ 18 (referring to "a recent bill in the Nebraska legislature" that the Attorney General said would be unconstitutional); ¶ 23 (referring to a bill Plaintiffs would propose absent Section 29); Opposition Br. at 27 ("it was important to include Section 29 in the Constitution rather than passing it as a statute in order to ensure that their work would not be undone in future elections"). Plaintiffs cite no case where a court found that a constitutional provision was a bill of attainder because it was contained in a Constitution instead of in a statute. In fact, being unable to lobby for local governmental change is no different with Section 29 in the Constitution than it would be if Section 29 were a legislatively enacted statute.

Section 29 cannot be a bill of attainder simply because it is contained in the Nebraska Constitution instead of being enacted as a law. The prohibition on bills of

attainder was “an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.” *United States v. Brown*, 381 U.S. 437, 442 (1965). In *Brown*, the Court extensively discussed the relationship between separation of powers doctrine and the prohibitions against bills of attainder. It concluded:

Thus, the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.

...

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”

Brown, 381 U.S. at 445-446 (citation omitted);⁶ see also *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 469 (1977) (noting *Brown*’s holding that “the Bill of Attainder Clause

⁶Given the origins of the bill of attainder clauses, it is doubtful that a constitutional provision can properly be viewed as a bill of attainder. Provisions such as those at issue in *Cummings v. Missouri*, 71 U.S. 277 (1866), likely violate other constitutional provisions, such as the Due Process Clause, or the prohibition against *ex post facto* laws.

was an important ingredient of the doctrine of ‘separation of powers,’ one of the organizing principles of our system of government”). Accordingly, the primary focus of the bill of attainder clause is upon legislative action. See *United States v. Lovett*, 328 U.S. 303, 326 (1946) (Frankfurter, J., concurring) (“The restrictive function of this clause against bills of attainder was to take from the legislature a judicial function which the legislature once possessed”). Section 29 cannot constitute a bill of attainder unless it would also be a bill of attainder if it were a legislatively enacted statute instead of voter-initiated amendment to the constitution. But, much of Plaintiffs’ claimed inability to participate in the political process (i.e., the claimed inability to effect state-wide change) would be eliminated if Section 29 were a statute.

Plaintiffs’ theory of attainder is far too broad, whether based on the fact that Section 29 is a constitutional amendment, or even if Plaintiffs would claim it was a bill of attainder if it were a statute. If Section 29 is a bill of attainder, then all of the following constitutional and statutory provisions are also bills of attainder:

1. Article III, Section 24 of the Nebraska Constitution is a bill of attainder because it prohibits gambling interests from obtaining a right to operate casinos without a constitutional amendment;
2. Article I, Section 27 of the Nebraska Constitution is a bill of attainder because it prevents non-English speaking groups from seeking to have public schools teach in other languages, absent a constitutional amendment;
3. Article I, Section 4 of the Nebraska Constitution is a bill of attainder because it prevents members of the Church of Jesus Christ of Latter Day

Saints from seeking to make their religion the state religion without a constitutional amendment;

4. Neb. Rev. Stat. § 28-701 (1995) is a bill of attainder because it prevents persons with multiple spouses from seeking benefits for them from their employers, or local or state politicians;

5. Neb. Rev. St. § 4-106 (1997) is a bill of attainder because it prevents aliens from seeking to hold an office in a labor or educational organization;⁷

6. Neb. Rev. St. § 20-168 (1997) is a bill of attainder because it prevents employees from lobbying their employers not to hire HIV positive employees;

7. Neb. Rev. St. § 42-103 (1998) is a bill of attainder because it prevents certain relatives, such as first cousins, from marrying;

8. If Neb. Rev. St. § 42-102 is applied literally, it is a bill of attainder because no person with a sexually transmitted disease (even a curable one) can get married in Nebraska.

All of these provisions disadvantage discrete groups deliberately. These groups may wish to lobby to change the law at local governmental levels, or to change their employers' policies. They may feel rejected because the law prohibits their desired results. But that does not transform the laws into bills of attainder. As the Supreme Court held in an appeal by former President Nixon, it cannot be that every law that disadvantages someone is a bill of attainder:

⁷Unlike Section 29, §§ 28-701 and 4-106 actually involve punishment because violating either of these provisions is a misdemeanor.

Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. *United States v. Lovett, supra*, 328 U.S., at 324, 66 S.Ct., at 1083 (Frankfurter, J., concurring). However expansive the prohibition against bills of attainder, *it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals*. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Nixon v. Administrator of General Serv., 433 U.S. 425, 470-71 (1977) (footnotes and citation omitted; emphasis added).⁸

⁸The law review article by Professor Amar upon which Plaintiffs rely assumes, counter to *Nixon*, that the attainder clause is a species of equal protection clause. See

Plaintiffs' bill of attainder claim does not satisfy any of the elements of a bill of attainder. Section 29 does not define a clearly identifiable group that it disadvantages politically, it does not assign guilt of anything to anyone, and it does not punish any person under any concept of "punishment." For those reasons, the bill of attainder claim is without merit.

A. Section 29 Does not Define a Group that Is Politically Disadvantaged⁹.

Plaintiffs acknowledge that in order to constitute a bill of attainder, a provision must punish "specifically designated persons or groups." Opposition Br. at 28 (quoting *Brown*, 381 U.S. at 447).

The essence of such "naming"—such illegal legislative specification—is that the legislation defines a closed class, a class with a membership that is permanently fixed when the class is defined, *from which members can never exit and into which nonmembers can never enter, as a matter of law.*

Roderick M. Hills, *Is Amendment 2 Really a Bill of Attainder? Some Questions about Professor Amar's Analysis of Romer*, 95 Mich. L. Rev. 236, 240 (1996) (emphasis added);¹⁰

Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 208 (1996) ("the Attainder Clause, in its logic and spirit, is an early forebear [sic] of the Equal Protection Clause"). This assumption is also counter to the Court's description of the separation of powers rationale of the attainder clauses in *Brown*, 381 U.S. at 442-446.

⁹Plaintiffs correctly note that in the brief in support of the Motion to Dismiss, Defendants erroneously asserted that a bill must name particular people or be limited to past conduct to qualify as a bill of attainder. Opposition Br. at 26, 31. Defendants apologize to the Court and to Plaintiffs for that misstatement.

¹⁰Professor Hills was one of the attorneys for the plaintiffs in *Romer v. Evans*, 517 U.S. 620 (1996). *Id.* at n. a. Professor Hills denies that laws like Colorado's Amendment 2 constitute bills of attainder.

see also *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 850-51 (1984) (ability to leave the class avoids specificity element).

Plaintiffs allege that Section 29 “targets lesbian, gay and bisexual people based on ‘who they are,’ and ‘based on their intimate associations.’” Opposition Br. at 30; see also at 32. In making this assertion, Plaintiffs engage in a sleight of hand. The Complaint does not allege that all members of the plaintiff organizations are homosexuals, nor could it. See Complaint, ¶¶ 8-10. Yet the supposed legislative “punishment” in Section 29 is allegedly limited to homosexuals:

Section 29 disqualifies lesbian, gay and bisexual people from using ordinary political channels to protect their same-sex relationships; disenfranchises them by barring their elected representatives from advancing any city, state or local policies or legislation that requires recognition of same-sex relationships; and excludes them from an important part of political life by making it futile for them to participate in the democratic process in Nebraska in their efforts to obtain protection for same-sex relationships.

Complaint, ¶ 34. These alleged “punishments” apply to far more than just homosexuals. They apply to all members of the plaintiff organizations, to everyone who felt they had a moral duty to oppose Section 29, to everyone whom Plaintiffs have subsequently persuaded that they have a moral obligation to help obtain official recognition for same-sex relationships, and even to those who supported Section 29 at the time, but may later be persuaded that it was a bad idea. Cf. *Hills*, 95 MICH. L. REV. at 243 (“In theory, the proponents of Amendment 2 themselves could be burdened by Amendment 2, if and when they experienced homosexual orientation”).

If Section 29 targets homosexuals in a way that is distinct from any “harm” to all Nebraska Citizens who feel morally obligated to support recognition of same-sex relationships, it is only in the inability to have their relationships formally recognized by state or local governments. See Complaint, ¶ 36. Yet, Plaintiffs specifically disclaim any intention of asserting a constitutional right to have same-sex relationships recognized as “marriage[s], civil unions or domestic partnerships” in this lawsuit. Complaint, ¶ 4. They cannot sustain a claim of “punishment” for depriving them of a “right” that they are unwilling to assert in this litigation. And if the “punishment” is that lobbying for recognition of same-sex relationships is more difficult than it was before Section 29, then it is not imposed on a definable, limited class.

In short, Plaintiffs deny that they wish to assert a constitutional right to have same-sex relationships recognized in this litigation. Complaint, ¶ 4. But their bill of attainder claim rests entirely upon Section 29’s effect of “forbid[ding] any form of governmental protection for same-sex relationships” to assert that it “inherently targets lesbian, gay and bisexual people based on ‘who they are.’” Opposition Br. at 30. Plaintiffs cannot have it both ways. They must either assert a constitutional right to have same-sex relationships recognized, or fail in their claim that Section 29 singles out homosexuals for special political disability.¹¹ Plaintiffs are part of a large, diverse portion of the Nebraska population that favors official

¹¹ Plaintiffs mischaracterize the Supreme Court’s decision in *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003), when they assert that the Court said “*Romer* applies to all legislation that is aimed at the ‘solitary class [of] persons who [are] homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships.’”” Opposition Br. at 32. In *Lawrence* the Court merely noted that *Romer* invalidated a Colorado constitutional amendment, not that *Romer* applies to all legislation relating to homosexuals. See *Lawrence*, 123 S. Ct. at 2482.

recognition of same-sex relationships. The common denominator of that diverse group is their political views, not their sexuality.

Persons in general who wish to lobby for or propose legislation recognizing same-sex relationships cannot be deemed to be a disfavored minority.¹² Therefore, the unidentifiable, fluctuating class of people who support legal recognition of same-sex relationships in Nebraska cannot be a group that is “peculiarly vulnerable to nonjudicial determinations of guilt.” See *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); see also *Brown*, 381 U.S. at 448-49 (referring to “easily ascertainable members of a group”).

B. Section 29 Does not Determine Guilt.

In addition to not singling out a specific, unpopular minority for political disability, Section 29 does not determine guilt on its face or in effect. A bill of attainder is “a law that *legislatively determines guilt* and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *Selective Serv. Sys.*, 468 U.S. at 846-847 (emphasis added; quoting *Nixon*, 433 U.S. at 468); see also *Brown*, 381 U.S. at 445 (noting that the legislature is not well situated for “the task of ruling upon the blameworthiness” of “specific persons”). For example, the statute at issue in *Brown* made it “a crime for a member of the Communist Party to serve as an officer or . . . as an employee of a labor union.” *Brown*, 381 U.S. at 438. The statute was a legislative determination that Communist Party members who served as officers or employees of labor unions were guilty of a crime. *Id.* at 450, 452. The legislative determination of guilt was not that persons who “possess the feared characteristics” were guilty of a crime, but that those persons who filled

¹² Plaintiffs do not allege that Senator Nancy Thompson, who proposed the legislation attached to the Complaint as Exhibit A, is a homosexual.

the prohibited position were guilty of a crime. *Id.* at 450. Similarly, in *Lovett* the three government employees from whom the legislature withheld authorization for salary were “deemed guilty of ‘subversive activities’ and therefore ‘unfit’ to hold a federal job” because of their beliefs and past associations. *Lovett*, 328 U.S. at 314.

Plaintiffs posit no malfeasance of which the legislature, or the general populace, has found people who promote recognition of same-sex relationships guilty. The fact that certain supporters of Section 29 believed that formal recognition of same-sex relationships undermines marriage and society in general does not constitute an adjudication of guilt. Again, Plaintiffs’ purported disability relates solely to participation in the political process. Neither Section 29 nor any public statements during the initiative campaign suggest that general supporters of official recognition of same-sex relationships are guilty of wrongdoing that should be punished.

C. Section 29 Does not Impose Punishment.

Plaintiffs assert that Section 29 imposes punishment by prohibiting “their civil and political rights to attempt to persuade their governmental representatives and employers to protect [same-sex] intimate relationships and by singling [homosexuals] out for moral censure.” Opposition Br. at 32. Yet they repeatedly describe the “punishment” as the inability “to qualify for health insurance,” or “to obtain any form of government recognition for the same-sex relationships that are at the core of their identities” (Opposition Br. at 35); as “disqualifying gay public employees from eligibility for a variety of standard employee benefits and denouncing gay people and their relationships” (Opposition Br. at 37); or as “preventing them from *obtaining* any form of protection for their relationships ‘unless the state constitution is first amended to permit such measures.’” Opposition Br. at 38; (citation

omitted, emphasis added). Those things have nothing to do with freedom to *lobby* for such rights, but everything to do with *being denied official recognition* of “rights” to same-sex relationships – a right that the Complaint denies is part of this lawsuit. Complaint, ¶ 4. There can be no punishment absent deprivation of a right. See *Cummings v. Missouri*, 71 U.S. 277, 320 (1866) (it is the deprivation of “rights, civil or political, *previously enjoyed*, [that] may be punishment,” depending upon the circumstances) (emphasis added). Because Plaintiffs are unwilling to seek a “right” to have official recognition of same-sex relationships in this lawsuit, they cannot rely upon the absence of that recognition as an injury or punishment for purposes of their bill of attainder claim.¹³ Furthermore, withholding a “right” that same-sex couples have not “previously enjoyed” is not punishment within bill of attainder doctrine. *Id.*

Given the deliberate limitation of the claims in Plaintiffs Complaint, the only basis they may assert for “punishment” is the purported inability to successfully lobby for recognition of same-sex relationships absent a constitutional amendment. That is in no sense a “punishment.” The mere loss of a political battle opposing a constitutional amendment has never been found to be “punishment” for bill of attainder purposes.

As already discussed, not every burden or disadvantage arising from a law constitutes punishment, even if it only affects one person. See *Nixon*, 433 U.S. at 470-71. Plaintiffs’ theory that a law limiting a group’s ability to accomplish political objectives is an attainder “removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment.” *Id.* at 470. Section 29 is not punishment historically. It

¹³Plaintiffs have not amended their Complaint to add a claim seeking official recognition of same-sex relationships.

is not punishment functionally (i.e., it has nonpunitive purposes). And, it does not reflect an intent to punish. *Cf. id.*, 473, 475-76, 478.

1. Section 29 does not impose “punishment” in a historical sense.

Historically, a bill of attainder was a legislative determination that someone or some group had committed a crime, and a legislatively imposed punishment for the crime. *Id.* at 473-75. The kinds of punishment historically associated with a bill of attainder included the death penalty, imprisonment, banishment, confiscation of property, and prohibition from specific employment or vocations because of past or current conduct or political affiliations. *Id.* Even bills of attainder that were prospective in nature carried some kind of criminal sanction for violating the laws. *See Brown*, 381 U.S. at 438.

As in *Nixon*, Plaintiffs “cannot claim to have suffered any of these forbidden deprivations” as a result of Section 29. *See Nixon*, 433 U.S. at 475. Although they claim that Section 29 “depriv[es] them of the civil and political right to advocate with their local and state governments and government employers for the creation of laws and policies that will protect their committed relationships” (Opposition Br. at 33), that is not true. Plaintiffs and their allies have complete freedom to advocate for governmental recognition of same-sex relationships. All three plaintiff organizations do advocate for government recognition of same-sex relationships. Complaint, ¶¶ 8-10. No one has punished them or threatened to punish them for doing so. Their complaint is that Section 29 allegedly stands in the way of success.¹⁴ A legislatively constructed obstacle to success in political lobbying cannot

¹⁴As pointed out in Defendants opening brief, same-sex couples have some of the benefits Plaintiffs claim they cannot obtain. And they are free to obtain other benefits they allegedly seek without conflicting with Section 29, providing they do not base the benefits on same-sex relationships.

constitute punishment for bill of attainder purposes unless there is a constitutional right to success, and the Plaintiffs have “previously enjoyed” the claimed right. See *Cummings*, 71 U.S. at 320. Plaintiffs are not claiming a constitutional right to success, and they have never had governmental recognition of same-sex relationships in Nebraska.

Apparently recognizing the futility of claiming punishment based on a perceived inability to succeed in political lobbying, Plaintiffs claim punishment based on the deprivation “of the opportunity to obtain critical benefits of government employment that *potentially* were available to them before the passage of Section 29.” Opposition Br. at 34 (emphasis added). Again, they are not claiming a constitutional right to the benefits on the basis of same-sex relationships, and they admittedly did not previously have such benefits. Therefore, the lack of an opportunity to obtain benefits on the basis of a same-sex relationship does not constitute punishment. See *Cummings*, 71 U.S. at 320. There can be no requirement that the government leave open the possibility of qualifying for a benefit for which there is no constitutional right.¹⁵ See *id.* Moreover, this claimed deprivation is based upon the absence of official recognition of same-sex relationships, an issue that is not relevant in this litigation. Complaint, ¶ 4.

Finally, Section 29 in no way “single[s] out gay people for denunciation and public censure.” Opposition Br. at 35. The language of Section 29 does not pass judgment on homosexuals. It only states the obvious, that marriage requires a man and a woman, and

¹⁵Therefore, Plaintiffs’ reliance upon *Planned Parenthood of Mid-Missouri & Eastern Kansas v. Dempsey*, 167 F.3d 458, 465 (8th Cir. 1999) (quoting *Selective Serv. Sys.*, 468 U.S. at 853), is unavailing. They are not prohibited from qualifying for any benefits they seek, so long as they do not premise the benefits on same-sex relationships. Like the plaintiffs in *Selective Serv. Sys.*, the Plaintiffs just don’t like the conditions associated with the benefits, and want to change them.

it states that same-sex relationships will not be legally recognized in Nebraska, a preservation of the prior state of the law. Plaintiffs can cite no case in which a law that preserves a constitutionally permissible status quo constitutes “denunciation and public censure.”¹⁶ Moreover, even if Section 29 did involve some kind of “denunciation and public censure,” there is no authority for saying that such “denunciation and public censure” constitutes historical punishment for bill of attainder purposes. No case has held that it does.

¹⁶The intent of the sponsors of the voter initiative cannot transform Section 29 into a public censure of same-sex couples. “The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express.” *United States v. Goelet*, 232 U.S. 293, 298 (1914).

2. Section 29 does not impose “punishment” functionally.

A provision is not punitive under the functional test if it “reasonably can be said to further nonpunitive legislative purposes.” *Nixon*, 433 U.S. at 475-76. Section 29 has the legitimate purposes of resolving the political battle over recognition of same-sex relationships, and of preserving the historical meaning of marriage.

Plaintiffs Citizens for Equal Protection, Inc. and ACLU Nebraska were both seeking cultural and political change through legal recognition of same-sex relationships long before Section 29 was enacted. Complaint, ¶¶ 8, 10. Through the allegations of the Complaint and the Brief in Opposition to the Motion to Dismiss, it is clear that Plaintiffs continue to desire to bring about cultural and political change regarding recognition of same-sex relationships. Section 29 was a legitimate response to political advocacy by the Plaintiff organizations as well as events in other states, which raised the issue of what Nebraska’s position would be in regard to same-sex relationships, whether denominated “marriages,” “civil unions,” or some other designation. Thus, the voter initiative that led to Section 29 was the culmination of a political battle initiated by Plaintiffs themselves. If any group that wishes to bring about social change can claim that it has been punished if its efforts are rebuffed by a constitutional amendment, the democratic process will have little meaning.

The fact that Plaintiffs would have preferred to continue lobbying for change in small steps¹⁷ does not mean that the choice to respond to Plaintiffs’ efforts through a voter-initiated constitutional amendment makes the amendment punitive. Section 29 clearly

¹⁷See Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 441 (2001) (recommending a process of small changes in order to bring about legal recognition of same-sex marriage).

serves the legitimate purpose of preventing the redefinition of marriage through official recognition of “same-sex” marriage or marriage imitations, such as civil unions.¹⁸

Plaintiffs are simply incorrect when they assert that the Court *must* “determine whether there are ‘less burdensome alternatives by which [the] legislature could have achieved its legitimate nonpunitive objectives.’” Opposition Br. at 37, quoting *Nixon*, 433 U.S. at 482. In *Nixon*, the Court noted that “it is often useful to inquire into the existence of less burdensome alternatives,” but did not make that inquiry a mandatory part of the functional test. *Nixon*, 433 U.S. at 482. Nevertheless, the Court undertook that inquiry because former President Nixon proposed an allegedly less burdensome alternative. *Id.* at 482-83. The Court rejected the argument that Congress was required to use a less burdensome alternative, since the record did not “unambiguously . . . demonstrate that the Act represents the infliction of legislative punishment” *Id.* at 483. Here, the Plaintiffs have not even suggested a possible “less burdensome alternative.” Opposition Br. at 37-38. Moreover, there is no unambiguous evidence that Section 29 represents the infliction of legislative punishment. *See Nixon*, 433 U.S. at 483.

¹⁸Plaintiffs’ reliance on *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), is misplaced. That case merely held that the state may not criminalize adult consensual sex. It has no bearing on whether there is a nonpunitive purpose in refusing to give official recognition to same-sex relationships. *Id.* at 2484 (the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

3. Section 29 does not reflect a legislative intent to punish anyone.

Plaintiffs' evidence of a legislative intent to "punish" is so sparse as to be non-existent. The third inquiry into whether a provision is punitive relates not to the language of the provision itself (see Opposition Br. at 38), but "inquir[es] whether *the legislative record* evinces a congressional intent to punish." *Nixon*, 433 U.S. at 478 (emphasis added). The evidence of punitive intent in the legislative history must be strong indeed to invalidate a law as a bill of attainder:

The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish. See *Flemming [v. Nestor]*, 363 U.S. [603,] 617 [(1960)] . . . ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]); see also, e.g., *Lovett*, 328 U.S. at 308-12, 66 S.Ct. 1073 (recounting extensive evidence of punitive intent in the legislative record). *Statements by a smattering of legislators "do not constitute [the required] unmistakable evidence of punitive intent."* *Selective Serv. Sys.*, 468 U.S. at 856 n. 15, 104 S.Ct. 3348 (internal quotations omitted).

Consolidated Edison Co. v. Pataki, 292 F.3d 338, 354 (2002) (emphasis added). Plaintiffs' sole evidence of a legislative intent to punish is their interpretation of statements made by a single proponent of the voter initiative, Guyla Mills. Opposition Br. at 39 (quoting Complaint, ¶ 21). The quoted statements of Mills' personal beliefs do not necessarily reflect an intent to "punish" anyone, and there is no allegation that Mills believed the proposed initiative would bring about that result. As a result, her statements, standing alone, do not

even constitute the “smattering of legislators” that the *Consolidated Edison* court said are insufficient to provide unmistakable evidence of punitive intent. See *Consolidated Edison Co.*, 292 F.3d at 354. More importantly, in *Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986), the Nebraska Supreme Court indicated that the intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative measure itself, and not from documents and other parts of the initiative process. *Id.*, 223 Neb. at 224, 225, 389 N.W.2d at 279. That conclusion was based on the reasoning that there is no real way to determine the intent of all the Nebraska voters who vote for a particular initiative measure. *Id.* As a result, Mills’ statements are not even relevant in this case to the issue of the intent underlying Section 29, and cannot be used to establish that Section 29 was placed in the Nebraska Constitution with an intent to “punish.”

Plaintiffs’ quotation of *Nixon*’s reference to “assum[ing] the mantle of judge or, worse still, lynch mob,” (Opposition Br. at 38, quoting *Nixon*, 433 U.S. at 480), emphasizes the exaggerated nature of their claims of the “punitive” impact of Section 29. Section 29 did not take away any existing rights; it did not impose any burdens on same-sex couples; it did not criminalize any behavior (or status). Section 29 merely reflects the Nebraska voters’ decision not to accept the social and political changes that Plaintiffs desire. That is not evidence of punitive intent.

Because Plaintiffs can cite no evidence in the *legislative record* of an intent to punish, they have attempted to use *Romer v. Evans*, 517 U.S. 620 (1996), to transform the *language* of Section 29 into evidence of an intent to punish. See Opposition Br. at 38. However, the third inquiry relates only to the “legislative record.” *Selective Serv. Sys.*, 468

U.S. at 852; *Nixon*, 433 U.S. at 478. Moreover, if the language of a provision reflects a nonpunitive legislative purpose, as it does in Section 29, the language cannot possibly constitute evidence of a legislative intent to punish.

In addition, Section 29 simply cannot be analogized to Colorado's Amendment 2 that was overturned in *Romer*. *Section 29 did not change the law*—it merely made the historical, pre-existing legal status of same-sex couples a part of the Nebraska Constitution. Section 29 does not impose any general hardships on homosexual persons – they are entitled to the same legal protections as everyone else. Section 29 does not even allegedly prohibit homosexuals from seeking and obtaining benefits for dependents or their partners, so long as they do not base the benefits on the same-sex relationship itself. In contrast, the U.S. Supreme Court described Amendment 2 as withholding “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Id.* at 631.¹⁹ It denied homosexuals “protection across the board.” *Id.* at 633. Under the broad interpretation given to Amendment 2, Colorado law could not have given homosexuals the same basic protections that everyone else enjoys. As one of the plaintiffs' attorneys in *Romer* has observed, the basis for overturning Amendment 2 was “the breadth of the disabilities imposed by Amendment 2.” Hills, *Is Amendment 2 Really a Bill*

¹⁹Plaintiffs improperly string together into one sentence two quotations that are separated by nearly a full page when they quote from *Romer*, 517 U.S. at 633-34, which they incorrectly cite as “*Id.* at 634-35.” See Opposition Br. at 38. The “inevitable inference” to which the Court referred was the result of the breadth of Amendment 2, a law that denied homosexuals “protection across the board.” *Romer*, 517 U.S. at 633. If Section 29 made it “more difficult” for homosexuals to seek aid from the government than it is for others, it would only be because Section 29 is in the Constitution. As pointed out above, a provision cannot be a bill of attainder because it is in a state's Constitution instead of in its general laws. And the bill of attainder clauses are not “a variant of the equal protection doctrine.” *Nixon*, 433 U.S. at 471.

of Attainder?, 95 MICH. L. REV. at 251. Professor Hills' illustration of the type of protection Amendment 2 withheld from homosexuals highlights the stark contrast between it and Section 29:

[S]uppose that state law forbids police officers from generally acting arbitrarily in the execution of their duties. If the police chief of Denver were to issue a written "policy" stating that police officers could not refuse to provide back-up assistance to lesbian and gay police officers on the basis of their sexual orientation, then Amendment 2 would have barred that promulgation of such a policy.

Id. at 252. In view of this broad potential for mistreatment under Amendment 2, one commentator has noted that "[t]he case would have come out exactly the same way had the Amendment denied any 'narrowly defined' group—homosexuals, smokers, convicted felons, prostitutes, insurance salesmen—protection 'against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.'" Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL OF RTS J. 147, 149 (1997) (quoting *Romer*, 517 U.S. at 631). Amendment 2 was not unconstitutional because it referred to homosexuals, but because it permitted such unlimited discrimination against a narrowly defined group. *Id.*

Despite Plaintiffs' strenuous efforts to create a bill of attainder claim, it remains unfounded. Not even Amendment 2, which made Colorado homosexuals "stranger[s] to its laws," *Romer*, 517 U.S. at 635, was a bill of attainder. See Hills, *Is Amendment 2 Really a*

Bill of Attainder?, 95 MICH. L. REV. at 250-51 (refuting argument that the Court actually overturned Amendment 2 as a bill of attainder).

Plaintiffs and their homosexual members have not been excluded from the political process. They initiated the battle for legal recognition of same-sex relationships in Nebraska, and they fully participated in the battle leading to the adoption of Section 29. They simply lost the battle they started, and they object. As in *Richenberg v. Perry*, 97 F.3d 256, 264 (8th Cir. 1996), this Court should conclude that the bill of attainder claim “is without merit.”

CONCLUSION

For the various reasons stated above and in the Defendants’ Brief in Support of Motion to Dismiss, this Court lacks jurisdiction over the subject matter of this case, and the Plaintiffs’ Complaint fails to state a claim upon which relief can be granted. As a result, this case should be dismissed.

DATED this 22nd day of September, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2003, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Matt McNair, Robert F. Bartle, David S. Buckle, Fred B. Chase, Tamara Lange, and Amy Miller, and I hereby certify that I have mailed by United State Mail the document to the following non CM/ECF participant:

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