

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CITIZENS FOR EQUAL PROTECTION,	)	CASE NO. 4:03CV3155
etc., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
ATTORNEY GENERAL JON BRUNING,	)	
in his official capacity, GOVERNOR	)	
MICHAEL O. JOHANNNS, in his official	)	
capacity,	)	
	)	
Defendants.	)	

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**DEFENDANTS' TRIAL BRIEF**

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## INTRODUCTION

The essence of Plaintiffs' claim is that they have a constitutional right to continue fighting a political battle until they win. But there is no civil right to win a political battle. There is no civil right to control the terms on which a political battle will be fought, i.e., on a local, employer-by-employer, or legislative level rather than on a state-wide voter initiative level. When people 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 before Section 29 was even 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' defeat in the political battle initiated in response to their own efforts does not constitute a violation of the Equal Protection Clause, and it is not "punishment" within the meaning of bill of attainder doctrine.

Plaintiffs' theory of injury and punishment would invalidate every imaginable constitutional amendment that is opposed by a somewhat identifiable class. Their theory is that they have been injured and punished not so much because of *what* Section 29 says, but *where* Section 29 says it – in the Constitution. It is the difficult hurdle of amending the Constitution that allegedly puts them on an uneven playing field. If Section 29 violates Plaintiffs' right to participate in the political process, the backers of the recently failed

Amendment 3 should sue to overturn Article III, Section 24 because it prohibits them from lobbying for legislation permitting casinos and slot machines.

Because Plaintiffs do not have a civil right to fight a political battle until they win, they cannot prevail on their claims. They make no claim that Section 29 would violate their rights if it were a statute instead of a constitutional provision. The sole basis for their claim is that the democratic process in Nebraska resulted in a constitutional amendment. Constitutionality is judged by the effect of a legal provision upon fundamental rights, not by where the provision is written. The idea that Section 29 is unconstitutional because it is in the Constitution defies logic.

#### **PROCEDURAL HISTORY**

The State accepts Plaintiffs' description of the procedural history.

#### **STATEMENT OF FACTS**

The State objects to the statement of facts in the Plaintiffs' brief on the ground that the personal details about and feelings of the Plaintiffs' members are irrelevant to Plaintiffs' right to participate in the political process. Those issues are also irrelevant to whether defining marriage in the Constitution, as opposed to by statute, violates the Equal Protection Clause and constitutes a bill of attainder. Defendants further object to any evidence that goes beyond the claims stated in the Complaint.

Nebraska voters adopted Initiative 416 on November 7, 2000. (Joint Stipulation ¶ 18 (Filing # 45) (“Joint Stip.”)). The initiative was incorporated into the Nebraska Bill of Rights as Article I, Section 29 (“Section 29”).<sup>1</sup> Section 29 reads:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Section 29 defines what marriage is, and what it is not. It prevents recognition in Nebraska of a marriage of a same-sex couple or of marriage imitations, such as civil unions. It allows same-sex couples to receive benefits, but prohibits same-sex couples from receiving benefits that are premised upon formal recognition of their same-sex relationships.

Plaintiffs started the political fight that resulted in the adoption of Section 29. They began participating in the political process by advocating for homosexual rights before anyone began talking about amending the Nebraska Constitution to protect marriage. Plaintiff Citizens for Equal Protection (“CFEP”) was formed more than ten years ago to advocate for homosexual rights. (Joint Stip. ¶ 1.) Plaintiff Nebraska Advocates for Justice Equality (“NAJE”) was formed for a similar purpose four years ago (Joint Stip. ¶ 2), and Plaintiff ACLU Nebraska was formed thirty-eight years ago. (Ex. 40, ¶ 5.) ACLU Nebraska began lobbying for marital rights for same-sex couples in 1996, before the first piece of marriage-protection legislation was introduced in 1997. (Ex. 40, ¶ 9; see *also* ¶ 8; Ex. 38, ¶ 15.) Plaintiffs CFEP and ACLU Nebraska participated in the political process by advocating in support of civil

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<sup>1</sup> In referring to “Section 29,” this brief generally means the second sentence only unless otherwise indicated by the context, since the second sentence is the only part of Section 29 at issue.

recognition of same-sex relationships prior to the passage of Section 29, and by opposing marriage legislation in 1997, 1999, and 2000. (Ex. 38, ¶ 15; Ex. 40, ¶ 8.) All three Plaintiffs participated in the political process to oppose Initiative 416. (Ex. 38, ¶¶ 17-20; Ex. 39, ¶ 9; Ex. 40, ¶¶ 15-17.)

The Nebraska legislature attempted on several occasions to pass a statutory prohibition on same-sex marriage. State Senator Jim Jensen introduced LB 280 in 1997, which would have defined marriage as between a man and a woman. Ex. 211, ¶ 3. Although co-sponsored by 31 of 49 senators, the bill was filibustered and never reached a final vote. *Id.*, at ¶ 4. Senator Jim Jones introduced LB 513 in 1999, which also would have defined marriage as between a man and a woman. Ex. 210, ¶ 3. Despite being sponsored by more than half of the state senators at the time, LB 513 similarly never reached a final vote. *Id.*, at ¶ 4. Both senators testified via affidavit that the failed attempts to define marriage by statute led to the initiative process which resulted in the passage of Section 29. Ex. 210 at ¶ 5, Ex. 211 at ¶ 5.

Plaintiffs initiated, fought, and lost the political battle over whether Nebraska would recognize same-sex relationships as marriages, civil unions, domestic partnerships, or some other arrangement. Their complaint is that they wish to continue fighting for official recognition of their relationships, but Section 29 stands in their way. (Ex. 38, ¶¶ 21-23; Ex. 39, ¶¶ 14, 17-20; Ex. 40, ¶¶ 18-22.) However, it is clear that all three Plaintiffs have participated in the political process by lobbying for homosexual rights after the passage of Section 29. (Ex. 38, ¶ 16; Ex. 39, ¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14.) They simply object to having a constitutional

amendment to overcome in order to fully achieve their goals. (Ex. 38, ¶¶ 21-23; Ex. 39, ¶¶ 14, 17-20; Ex. 40, ¶¶ 18-22.) They are asking this Court to overturn their political loss.

## **ARGUMENT**

### **I.**

#### **PLAINTIFFS DO NOT HAVE A CONSTITUTIONAL RIGHT TO WIN.**

The gravamen of Plaintiffs' novel theory is that "[u]nder the Equal Protection Clause, individuals have a right to remain on an equal footing in their efforts to approach elected officials and public employers and attempt to persuade them to protect themselves and their families." (Pl. Open. Tr. Br. at 21.) In other words, Plaintiffs have a constitutional right to lobby at the local and state level until they win all of the benefits they desire—the democratic process may not stop them. That could be true only if there were an underlying fundamental right at issue, but Plaintiffs claim they are not asserting such a right in this case. *Id.* at 19. If there is no underlying fundamental right at issue, Plaintiffs do not have a right to fight a political battle until they win.

Losers of political battles often turn to the courts in an attempt to overturn political defeats, but the courts are not receptive unless there is a fundamental right at issue. In the absence of a fundamental right, a political loss is final, at least until the next round. *Cf. United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1981) ("appellee lost a political battle in which he had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum;" line drawn for level of retirement benefits given to some, but not others, was not a denial of equal protection); *Silver v. Pataki*, 96 N.Y.2d 532, 539 (Ct.

App. 2001) (no legislator standing to challenge “lost political battles”); *Bendix Safety Restraints Group, Allied Signal, Inc. v. City of Troy*, 544 N.W.2d 481, 483 (1996), O’Connell, J., concurring (“Political battles, however, are fought, won, and lost in the political arena, and the judiciary has no right under the constitution to reposition the competitors, change the rules, or alter the outcome after the fact”).

In contrast, where the result of a political battle violates the loser’s fundamental rights, the courts will overturn it – not to permit the loser to continue the political battle, but rather to eliminate the unconstitutional deprivation. For example, in *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court overturned an Akron, Ohio charter amendment that was enacted to restructure government decisionmaking on discriminatory grounds. Akron’s voters amended the city charter to require that any ordinance regulating real property on the basis of race, color, religion, national origin or ancestry could not go into effect without approval of a majority of the voters at a regular or general election. *Id.* at 387. The Court observed that “[b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are ‘constitutionally suspect,’ and subject to the ‘most rigid scrutiny.’” *Id.* at 391-92 (citations omitted). It held that by discriminating against racial minorities, the charter amendment denied them equal protection of the laws. *Id.* at 393.

The Supreme Court relied heavily upon *Hunter* in invalidating a voter initiative statute in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). The statute at issue removed local school district discretion to assign students to schools for purposes of

desegregation, but permitted broad discretion for assigning students to schools for nearly any other reason. The Court stated the principle at issue as follows:

As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process.

*Washington*, 458 U.S. at 469-70 (citations omitted; emphasis original). It is clear that the entire line of cases relying upon this analysis is addressing *racial* discrimination, the core point of the Fourteenth Amendment. *Hunter*, 393 U.S. at 391.

The Colorado Supreme Court relied in part upon the *Hunter/Washington* line of cases in subjecting Colorado's Amendment 2 to strict scrutiny and invalidating it. *Romer v. Evans*, 517 U.S. 620, 625 (1996). The U.S. Supreme Court "affirm[ed] the [Colorado Supreme Court's] judgment, but on a rationale different from that adopted by the State Supreme Court." *Id.* at 626. Accordingly, the *Romer* decision did not turn on exclusion from, or an unlevel playing field in, the political process, as in *Hunter* and *Washington*; rather, it turned on the fact that Amendment 2 "depriv[e]d gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Id.* at 630. Amendment 2 excluded homosexuals "from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631.

Unlike those disadvantaged by Amendment 2, the Plaintiffs in the case at bar enjoy all the benefits and protections of Nebraska law that any other person has. Plaintiffs continue to lobby for rights for same-sex couples. (Ex. 38, ¶ 16; Ex. 39, ¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14.) Their homosexual members have the same right to lobby for change as their heterosexual members. Plaintiffs have succeeded in gaining rights notwithstanding Section 29. Plaintiffs' members merely cannot marry someone of the same sex, or have the state treat their relationships as though they were marriages, without amending the Constitution. The fact that they face a constitutional hurdle rather than a statutory one is not a violation of the Equal Protection Clause.

As the Court observed in *Washington*, laws “allocating political power according to ‘neutral principles’—such as the . . . typically burdensome requirements for amending state constitutions—are *not subject to equal protection attack*, though they may ‘make it more difficult for minorities to achieve favorable legislation.’” *Washington*, 458 U.S. at 470 (emphasis added). The fact that the enactment of Section 29 means that same-sex couples may not achieve their ultimate goal of marriage without amending the Constitution does not mean that same-sex couples are subject to a different political process than everyone else. Section 29 defines what marriage is and is not; it does not create a separate political process for same-sex couples. There is no equal protection violation absent creation of a separate political process, or the awarding of benefits to opposite-sex couples that same-sex couples in the same circumstances do not receive. Plaintiffs have not alleged a claim based upon the latter.

## II.

### **PLAINTIFFS' CLAIMS ARE LIMITED BY THE COMPLAINT.**

Plaintiffs' Complaint is limited to a claim that Section 29 denies them equal access to the political process. (Complaint, ¶ 4 (plaintiffs "seek nothing more - and nothing less - than a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection. This lawsuit is about equal access . . . in the political arena")). Moreover, as this Court recognized in *Citizens for Equal Protection, Inc. v. Bruning*, 290 F. Supp. 2d 1004, 1005 (2003), the Complaint attacks only the second sentence of Section 29: Plaintiffs "contend the second sentence of Section 29 should be declared unconstitutional . . . ." The limitation of the Complaint to an attack on the second sentence is evident throughout. (See, e.g., Complaint, ¶¶ 2, 3, 15, 17, 18, 23, 24, 29.)

Despite the limited nature of the Complaint, Plaintiffs' trial brief attacks the entire section: "Section 29 in its entirety violates the Equal Protection Clause . . ." (Pl. Open. Tr. Br. at 2); see also *id.* at 20, 26. The trial brief makes it clear that Plaintiffs are not just seeking certain "basic protections," they are seeking the right to redefine marriage to include same-sex couples. *Id.* at 5, 24, 28. In addition, the trial brief appears to argue that Section 29 violates the Equal Protection Clause because it classifies based on sexual orientation. *Id.* at 16-18.

Plaintiffs may not amend their Complaint by arguments in their trial brief. "To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and simply by raising a point in a brief." *Morgan Distrib. Co. v.*

*Unidynamic Corp.*, 868 F.2d 992, 995 (8<sup>th</sup> Cir. 1989) (citations omitted). Because Plaintiffs neither attacked the first sentence of Section 29 nor asserted an equal protection claim regarding classification based on sexual orientation in their Complaint, the trial must be limited to the issue of whether the second sentence deprives Plaintiffs of a constitutional right to participate in the political process. Otherwise, the State would be prejudiced because it has not submitted evidence on other issues.

### III.

#### **SECTION 29 SATISFIES THE EQUAL PROTECTION CLAUSE.**

The Supreme Court has never ruled that a law, valid as a statute, could somehow become unconstitutional if enacted as a constitutional amendment. Plaintiffs cite no case that suggests such a principle. Yet the essence of their equal protection claim is that they are unable to “seek protection for their committed relationships through the ordinary political process or from government employers,” (Complaint, ¶ 28), because Section 29 is a constitutional amendment rather than a statute. *Id.* at ¶¶ 16, 18, 23.<sup>2</sup> That is not an equal

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<sup>2</sup>Plaintiffs are obviously pursuing this indirect attack on Section 29, rather than claiming that it deprives them of a constitutional right to “marriage,” because they know that the fundamental right to marriage does not include same-sex couples. See *Lockyer v. City and County of San Francisco*, 33 Cal. 4<sup>th</sup> 1055, 1126 (2004) (*Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), “is a decision . . . binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution’s guarantees of equal protection and due process of law”) (Kennard, J., concurring in part and dissenting in part) (emphasis in original); *McConnell v. Noonan*, 547 F.2d 54, 56 (8th Cir. 1976) (“the Supreme Court’s dismissal of the [*Baker*] appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts”).

protection claim. The measure at issue in *Romer* would have been no more valid as a statute than it was as a constitutional amendment. See *infra*, Section III.B.1.

**A. Section 29 Does Not Preclude Plaintiffs from Obtaining Legal Rights.**

Plaintiffs claim that Section 29 “denies substantive protections across the board, and it does so with regard to safeguards for families that are commonly and highly valued both by committed heterosexual and gay couples. . . . [T]he measure bars only those in same-sex relationships from advocating with public employers for the most elementary of workplace protections, such as bereavement leave . . . .” (Pl. Open. Tr. Br. at 22-23); see also *id.* at 28 (referring to a “broad and undifferentiated disability”). This is simply false. Plaintiffs can obtain and have obtained legal safeguards for their relationships even with Section 29 in existence. In fact, Plaintiffs’ filings in this case clearly demonstrate this fact. Plaintiffs’ Complaint and their trial brief state that Section 29 makes it futile for them to ask for rights such as hospital visitation. Complaint, ¶ 5, Pl. Open. Tr. Br. at 1. However, Neb. Rev. Stat. § 71-20,120, passed in 2002, allows any adult in Nebraska to designate, orally or in writing, up to 5 people that will be entitled to the same hospital visitation rights as immediate family members. Plaintiffs lobbied for this legislation, demonstrating that they have been successful in the political process in obtaining the rights which they seek in spite of Section 29. Ex. 39, ¶ 13. Plaintiffs have full access to the political process and may obtain the rights via legislation which married couples enjoy, so long as those rights are not premised on recognition of a same-sex relationship.

Section 29 creates no obstacle to obtaining a full panoply of legal safeguards through a reciprocal beneficiary statutory scheme similar to the one in place in Hawaii. See Haw. Rev.

Stat. § 572C. Indeed, Section 29 does not preclude Plaintiffs from using the political process to argue for protections for their same-sex relationships. Accommodations can be made via the legislative process to provide rights accorded to married couples to those in same-sex relationships, as long as those rights are not granted pursuant the couples based on their status as same-sex couples. LB 95 (Exhibits 35-37), passed in 2003, provides an excellent example of just such a bill. Previously, if a person died intestate, there was no procedure in Nebraska whereby the unmarried partner of the decedent could direct the disposition of the decedent's remains. LB 95 amended the Nebraska statutes to allow "any person" to "direct the disposition of the decedent's body pursuant to a notarized affidavit." Thus, in Nebraska, an unmarried couple in a committed relationship (be it heterosexual or homosexual) now has a vehicle to ensure that the surviving partner can direct the disposition of the decedent's body. In fact, those in committed non-married relationships can utilize basic principles of contract law to assign various legal rights to their committed partners. LB 95, introduced and passed after the overwhelming approval of Section 29, simply illustrates this fact.

The reality is that what Plaintiffs truly seek is official recognition of their relationships, not the legal benefits and protections they allegedly cannot seek. (*Cf.* Pl. Open. Tr. Br. at 20-21 (Section 29 disqualifies Plaintiffs "from being able to advocate with or obtain from government officials any protections whatsoever for families, *insofar as those protections turn on the legal recognition of a same-sex couple's committed relationship*") (emphasis added)); *id.* at 22 ("It bars *all* doors to all parts of government, including those that could lead to 'legislative, executive, or judicial action at any level of state or local government' designed to protect the committed relationships of same-sex couples *through civil recognition*")

(emphasis original and emphasis added; citation omitted); *id.* at 28 (referring to obtaining “protections through domestic partnerships, [and] . . . through marriage”).

The record reveals that Plaintiffs do not have an actionable injury because they are fully able to participate in the political process. A concrete injury or “injury in fact,” sufficient to satisfy Article III standing, requires interference with “a legally protected right.” *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 772 (2000). Plaintiffs presently have the ability to lobby for legal protections other than official governmental recognition of their relationships, and they engage in such lobbying efforts. (Ex. 38, ¶ 16; Ex. 39, ¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14.) They claim no substantive right to official recognition of their relationships in this litigation. (Pl. Open. Tr. Br. at 19.) Accordingly, because the only thing that Section 29 withholds from Plaintiffs is an official status for which they do not claim a substantive right, their loss of the political battle over Section 29 does not create a cognizable injury. Because Section 29 does not prohibit the actions in which Plaintiffs allegedly desire to participate, it cannot violate the Equal Protection Clause.

Plaintiffs’ “standing” cases are of no help to them in view of the undisputed fact that Plaintiffs can and do lobby for the benefits they desire (Ex. 38, ¶ 16; Ex. 39, ¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14), and that they did participate in the political process that resulted in the adoption of Section 29. (Ex. 38, ¶¶ 17-20; Ex. 39, ¶ 9; Ex. 40, ¶¶ 15-17.) In *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993), *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003), and *Grutter v. Bollinger*, 539 U.S. 306, 317-18 (2003), the Supreme Court ruled that an inability to compete on an equal footing for a benefit

constitutes an injury in fact.<sup>3</sup> However, those cases had nothing to do with a constitutional amendment that is presumed valid.<sup>4</sup> Nor did those cases have anything to do with a plaintiff that participated in the process, but after losing insisted on the right to continue the process. In each of those cases, there was a limited number of benefits available that the government was going to grant to someone. In this case, Plaintiffs are able to compete for the benefits the state makes available to married couples, so long as they do not premise the benefits upon official recognition of the relationships. But the state does not make a status less than marriage, such as civil unions or domestic partnerships, available to anyone, so Plaintiffs have not been denied an ability to compete for them.

Plaintiffs here are not prevented from competing for any existing contract or benefit, and thus cannot claim the mantle of the Court's competitive barrier cases. If Plaintiffs' alleged injury arises from their inability to lobby for domestic partnership or civil union status without amending the Constitution, their claim is analogous to that of the plaintiffs who wanted to lease or purchase property in *Warth v. Seldin*, 422 U.S. 490 (1975). 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

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<sup>3</sup>Even in these cases, the right to compete for a contract or benefit ends once the contract or benefit has been awarded. There is no perpetual right to compete until one obtains a contract or benefit. *Cf. Gratz*, 539 U.S. at 262 (injury comes from inability to compete, not denial of contract).

<sup>4</sup>It is noteworthy that the Supreme Court did not even cite *Northeastern Fla. Chapter* in its *Romer* decision, and as mentioned *supra*, Section I, the Court chose not to rely upon the ground of uneven access to the political process, as reflected in the *Hunter* and *Washington* line of cases.

effect of excluding them from a particular community. Because 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, and that the inability would be removed if the Court granted relief. *Id.* at 504. The Court held that there was no standing, for the plaintiffs could not demonstrate a substantial probability that they could afford property in the absence of the zoning policy. *Id.* at 507.

As in *Warth*, Plaintiffs cannot demonstrate a substantial probability that a favorable judgment would enable them to obtain their desired objective (official, governmental recognition of their relationships). Accordingly, they cannot show that the requested relief would redress their alleged injury. *Id.* at 508.

**B. *Romer* and *Lawrence* Are Inapposite.**

Plaintiffs cannot succeed in their claims because their reliance upon *Romer* and *Lawrence v. Texas*, 539 U.S. 558 (2003) is misplaced. Neither *Romer* nor *Lawrence* have any bearing on this case whatsoever.

**1. *Romer***

The Supreme Court’s statement that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense,” *Romer*, 517 U.S. at 633, cannot apply here. Moreover, to describe Section 29 as a law that “identif[ies] a class of

persons ‘by a single trait and then den[ies] them protection across the board’” (Pl. Open. Tr. Br. at 20 (quoting *Romer*)), is irresponsible.

Section 29 cannot legitimately 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 prohibit Plaintiffs or their members from participating in the political process to obtain benefits for dependents or their partners, so long as they do not base the benefits on the same-sex relationship itself. (See Ex. 38, ¶ 16; Ex. 39, ¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14; see also Ex. 28, p.2 (Senator Thompson’s bill inconsistent with Section 29 only because it premised the benefit on the same-sex relationship)). NAJE has successfully lobbied against removing “sexual orientation” from the list of hate crimes in Nebraska Revised Statutes § 28-110 through § 28-114, and has lobbied in favor of other sexual orientation bills. (Ex. 39, ¶¶ 11-12.) In contrast, Amendment 2 *repealed* numerous ordinances specifically banning sexual orientation discrimination in “many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.” *Romer*, 517 U.S. at 624. The Supreme Court noted that Amendment 2 “deprive[d] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.” *Id.* at 630. It withheld “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Romer*, 517

U.S. at 631. 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 all other citizens enjoy. 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.” 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, 251 (1996). 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.’” Richard 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 was an amendment rather than a statute, but because it permitted such unlimited discrimination against homosexuals. *Id.* There is no suggestion in *Romer* that

the Court would have upheld the law if it had been a statute instead of an amendment. As a statute, the law, as interpreted, would have removed the same general protections of the law as did the constitutional amendment.

Whereas *Romer* was almost infinitely broad in prohibiting protections, Section 29 is very narrow in scope, dealing with only marriage and marriage substitutes. *Romer* clearly does not apply to the present case.

## **2. *Lawrence***

*Lawrence* does not apply to Plaintiffs' quest for the status of official recognition of their relationships. (Cf. Pl. Open. Tr. Br. at 19-20, 25 (citing *Lawrence* in support of a right to have—not lobby for—official status)). First, *Lawrence* has no arguable bearing on a right to participate in the political process, the only claim at issue in this litigation. Second, despite the Supreme Court's reference to constitutional protection for "personal decisions relating to marriage, procreation, contraception, [and] family relationships," *Lawrence*, 539 U.S. at 574, the Court did not hold or suggest that same-sex couples have a right to official status for their relationships.<sup>5</sup> To the contrary, the Court explicitly held that the case did "not involve whether the government must give formal recognition *to any relationship* that homosexual persons seek to enter." *Id.* at 578 (emphasis added). *Lawrence* prohibited criminal sanctions for homosexual acts, it did not mandate formal recognition of the homosexual relationship. In view of the Court's specific denial that the opinion requires the government to formally

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<sup>5</sup>The Arizona Court of Appeals recently rejected an argument that this language gives same-sex couples a right to marriage. See *Standhardt v. Superior Ct.*, 77 P.3d 451, 456 (2003), review denied (May 25, 2004).

recognize any homosexual relationship, *Lawrence* cannot stand for the proposition that same-sex couples are entitled to any legal status.

**C. The People Have a Valid Interest in Preserving Marriage.**

Because Plaintiffs' ability to participate in the political process has not been infringed, this Court need not consider whether the people had a valid interest in enacting Section 29. However, if the Court chooses to consider that issue, Defendant need only articulate a rationally conceivable justification of the law to withstand scrutiny. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any rationally conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The "fit" between the law and its purpose need not be perfect: "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (citation and internal quotation marks omitted). Nor does the State need any empirical evidence that Section 29 has actually furthered a public interest. See *FCC v. Beach Communications, Inc.*, 508 U.S. at 315.

The definition of marriage pre-dates the state, indeed, this nation. As recognized by *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), "marriage as the union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of

Genesis.” The English term “marriage” has meant the union of a husband and wife, a man and a woman, since at least the Fourteenth Century. See MERRIAM WEBSTER’S COLLEGIATE DICTIONARY—TENTH EDITION 713 (1993) (definition of “marriage”). Ancient English dictionaries are all consistent with this meaning.<sup>6</sup> The historical definition of marriage has continued unchanged to modern times. See MERRIAM WEBSTER’S COLLEGIATE DICTIONARY—TENTH EDITION 713 (1993) (“**1 a:** the state of being married **b:** the mutual relation of husband and wife: WEDLOCK”). The U.S. Supreme Court recognized that marriage is the union of “one man and one woman” in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). There has never been a time in the history of the United States that marriage, in a legal sense, meant anything other than the union of a man and a woman.<sup>7</sup> Section 29 simply places this historic meaning of marriage into the Nebraska Constitution.

The claim that all families deserve the benefits given to married couples views marital benefits as a kind of social welfare given to needy or deserving couples. It assumes that the

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<sup>6</sup> See, e.g., THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1740) (Marriage: “that honourable contract that persons of different sexes make with one another”); JAMES BUCHANAN, LINGVAE BRITANNICAE VERA PRONUNCIATIO (1757) (Marriage: “A civil contract, by which a man and a woman are joined together”); NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 185 (1806) (Marriage: “the act of joining man and woman”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 518 (1830) (Marriage: “The act of uniting a man and woman for life”); JAMES KNOWLES, A CRITICAL PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 425 (1851) (Marriage: “The act of uniting a man and woman for life”).

<sup>7</sup>No state has redefined marriage to include same-sex couples. Only the Massachusetts Supreme Judicial Court has done so. *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 965 (2003) (“our decision today marks a significant change to the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries”).

institution of marriage exists to promote individual interests. But laws extending benefits to married couples have no justification in social welfare concepts or the interests of individuals. Instead, the only justification for extending benefits to married couples that are not given to everyone is that the state has an interest in steering procreation into marriage. Most opposite-sex couples of child-bearing age will procreate regardless of whether it is intentional and regardless of state regulation. It is in the state's interest to encourage couples to procreate in a marital relationship where the children will be raised by both biological parents.<sup>8</sup>

Many courts have recognized that the relationship between procreation and marriage is the reason for governmental recognition of the institution. The Supreme Court tied the fundamental right of marriage to procreation in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and then cited *Skinner* in holding that “marriage is one of the ‘basic civil rights of man,’ fundamental to our very *existence and survival*” in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasis added).<sup>9</sup> The Court later referred to the link between marriage and procreation in overturning a Wisconsin law prohibiting dead-beat dads from marrying. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). The Court summarily affirmed the Minnesota Supreme Court's decision rejecting a right to marriage for same-sex couples, in which the Minnesota court referred to marriage as “uniquely involving the procreation and rearing of children within

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<sup>8</sup>In arguing against procreation as a state interest, proponents of marriage for same-sex couples often portray the rationale as one of the state trying to encourage procreation by limiting marriage to opposite-sex couples. That, of course, is nonsensical – opposite-sex couples need no incentive to procreate.

<sup>9</sup>Marriage would have no relationship to our “very existence and survival” if it had nothing to do with procreation.

a family . . . .” *Baker*, 191 N.W.2d at 186. The D.C. Court of Appeals noted in *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C. App. 1995), that the U.S. Supreme Court “has called this right [to marriage] ‘fundamental’ because of its link to procreation.”<sup>10</sup>

The relationship between procreation and marriage was most recently recognized by a New York trial court that rejected a demand by same-sex couples for marriage licenses: “this court concludes that preserving the institution of marriage for opposite sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman, which in turn, uniquely fosters procreation.” *Shields v. Madigan*, 783 N.Y.S.2d 270 [page no. not yet available; headnote 8] (Supr. Ct. Oct 18, 2004) (citing *Lawrence*, 539 U.S. at 585, O’Connor, J., concurring, as “describing ‘preserving the traditional institution of marriage’ as a legitimate state interest”). The Arizona Court of Appeals likewise recently referred to the state’s interest in encouraging procreation to take place within marriage:

Indisputably, the only sexual relationship capable of producing children is one between a man and a woman. The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.

*Standhardt v. Superior Ct.*, 77 P.3d 451, 462-63 (2003), review denied (May 25, 2004). The Washington Court of Appeals in *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. 1974), similarly

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<sup>10</sup>The Massachusetts Supreme Judicial Court’s rejection of the link between procreation and marriage was based on its portrayal of the rationale as being that procreation is “a necessary component of civil marriage.” *Goodridge*, 798 N.E.2d at 962. No state has ever made procreation a necessary component of marriage.

held that “the state’s refusal to grant a license allowing the appellants to marry one another is not based upon appellants’ status as males, but rather it is based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.”

A Pennsylvania appellate court gave the following insightful description of the state’s interest in marriage:

Many variations of style can be accommodated within the concept of marriage and the family but style should and cannot be confused with substance. *The essence of marriage is the coming together of a man and woman for the purpose of procreation and the rearing of children*, thus creating what we know to be the traditional family. A goal of society, government and law is to protect and foster this basic unit of society. It therefore is entitled to a presumption in its favor over any other form of lifestyle, whether it be polygamy, communal living, homosexual relationships, celibate utopian communities or a myriad of other forms tried throughout the ages, none of which succeeded in supplanting the traditional family. The test of equality between the traditional family and the homosexual relationship cannot be met by the homosexual relationship. Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society. It is clearly evident that the concept of family is essential to society, homosexual relationships are not. A primary function of government and law is to preserve and perpetuate society, in this instance, the family. It, therefore, is required to protect and support the family, which means it must be given every reasonable presumption in its favor.

*Constant A. v. Paul C.A.*, 496 A.2d 1, 6 n.6 (Pa. Super. 1985) (emphasis added). Because the reason for giving state recognition to marriage is to encourage couples to do their procreation within marriage, it is reasonable to limit marriage to the only sexual relationship capable of procreation. *Standhardt*, 77 P.3d at 462-63. The fact that not all opposite-sex couples procreate and that some same-sex couples have children does not invalidate the

limitation. *Id.* at 462, 463; *see also Singer*, 522 P.2d at 1197 (recognizing that not all married couples have children).

In view of the history of marriage, the long-standing recognition that the state's interest in marriage relates to procreation, and recent efforts to redefine marriage judicially and legislatively, it cannot be irrational for the voters to have chosen to explicitly limit marriage to a man and a woman, and to protect that limitation by amending the Constitution. Nor can it be irrational, as part of the effort to defend marriage, for the voters to have rejected marriage imitations such as domestic partnerships and civil unions. The Vermont civil union status, effective July 1, 2000, created "marriage" in everything but name only for same-sex couples. The ACLU described the new status as follows: "A civil union is a comprehensive legal status parallel to civil marriage for all purposes under Vermont state law. . . . According to the Vermont civil union law, spouses in a civil union will enjoy the same state law protections and responsibilities as are available to spouses in a marriage." ACLU Lesbian & Gay Rights Freedom Network, *A Historic Victory: Civil Unions for Same-Sex Couples—What's Next!* at 1 (2000).<sup>11</sup> Thus, at the time Nebraska voters adopted Section 29, they could have legitimately viewed Vermont civil unions as no different from marriage, except for the name. There is a legitimate interest in extending benefits and protections to opposite-sex couples only in order to encourage procreation to take place within the socially recognized unit that is best situated for raising children, regardless of what that unit is called.

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<sup>11</sup>Available at [http://archive.aclu.org/issues/gay/civil\\_union\\_publ.html](http://archive.aclu.org/issues/gay/civil_union_publ.html), last visited November 11, 2004.

Section 29 has nothing to do with disapproval of a minority. (Cf. Pl. Open. Tr. Br. at 27.) It merely preserves society's long-standing belief in what marriage is and why it exists. Rather than change any law, Section 29 retains the status quo. In contrast to the racial prejudice motivating the miscegenation laws overturned in *Loving*,<sup>12</sup> the historical meaning of marriage as the union of a man and a woman developed as a universal principle without any concept that it could be anything else.<sup>13</sup> It is a concept that has existed across times, cultures and religions. As Justice Holmes wrote, "some form of permanent association of the sexes" is one of the rudimentary elements of civilization. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918). When the common law recognized marriage as the union of a man and a woman, it was inconceivable that a same-sex couple might want to marry. In fact, the term "homosexual" did not even exist until 1892, long after marriage was understood as the union of one man and one woman. See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY—TENTH EDITION 556 (definition of "homosexual" as adjective in 1892, and as a noun in 1902). The marriage laws that have existed in Nebraska from the beginning of the state's existence have no discriminatory intent. Statements of intent made in connection with efforts to prevent the marriage laws from being changed, in whole or in part, cannot be

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<sup>12</sup>The statutes at issue in *Loving*, 388 U.S. at 7, 11 and *Perez v. Sharp*, 32 Cal. 2d 711, 719-20, 724 (1948), were designed to denigrate African Americans, and were defended on the basis of white supremacy. The historical meaning of marriage, made part of the Constitution in Section 29, clearly was not designed to denigrate same-sex couples.

<sup>13</sup>Even polygamous marriages involved a man and a woman. A man with multiple wives had multiple marriages, not one marriage with all the wives.

attributed to the original intent of the laws. Moreover, making the marriage laws a part of the Constitution cannot suddenly make the laws a violation of Plaintiffs' right to equal protection.

The U.S. Supreme Court recently ruled that the State of Washington did not violate the Free Exercise Clause by excluding devotional theology degrees from its scholarship program.

*Locke v. Davy*, 124 S. Ct. 1307 (2004). The Court held:

In short, we find neither in the history or text of Article I, 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

*Id.*, at 1315. The historic state interest at issue was preventing state dollars from being used to support the clergy. *Id.*, at 1314. The United States has a long history and tradition of preventing government from supporting religion. Marriage has an even longer history and tradition. The State of Nebraska has a substantial interest in protecting the historical and traditional definition of marriage, and Section 29 thus does not violate the Equal Protection Clause.

**D. Section 29 Was Not Born of Animus.**

Plaintiffs assert that the only basis for passage of Section 29 is disapproval of a disfavored minority. (Pl. Open. Tr. Br. at 26.) As discussed above, the Supreme Court in *Romer* did not infer animosity from the identity of the group disadvantaged by Amendment 2, but rather from the unlimited breadth of the disability created by Amendment 2. Plaintiffs must advance their implausible reading of *Romer* as applied to the present case because instead of demonstrating animus, the record in this case demonstrates the lack of animus by the

sponsors of Section 29. Plaintiffs are asking this Court to disregard the record, and instead infer animus in spite of evidence to the contrary. The record is replete with evidence regarding the real reasons that Section 29 was passed, none of which include animus. For example:

Exhibit 3: Page 1 - "After July 1 of this year, same-sex couples from Nebraska are free to go to Vermont, obtain a 'civil union' and then return to Nebraska. Nebraska will be faced with an uncertain legal question whether same-sex unions performed elsewhere must be recognized." Page 2 - "The purpose of this petition is to preserve Nebraska values for traditional marriage."

Exhibit 4: "Let's keep things the way they are. Marriage between one man and one woman."

Exhibit 6: "Nebraskans (not an outside jurisdiction) should determine our public policy regarding marriage . . . Now it's important to have a stated public policy regarding marriage since another state may legalize same-sex marriage thus making us vulnerable to a court challenge."

Exhibit 15: (From television and radio advertisements sponsored by the Nebraska Coalition for the Protection of Marriage)

Television spot entitled "Law Book": Same-sex marriages may not be legally performed in Nebraska, but if another state legalizes same-sex marriage, then we would be forced to recognize them here as well. Government would force us to change our marriage laws unless we vote yes on Initiative 416, . . . Keep things the way they are."

Television spot entitled "Gavels": "[I]f another state recognizes (same-sex marriages), we have to recognize them. Three Supreme Court judges in another state would have more say-so than all of us. That's why we need Initiative 416. Close the loophole so only Nebraskans decide Nebraska marriage laws."

Television spot entitled "Dictionary": "Initiative 416 is not about lifestyles. It's not about behavior. It's not about civil rights. Initiative 416 is about one thing only: Shall the definition of marriage stay the same or be changed? Gays and lesbians have a right to the lifestyle of their choice, but they do not have the right to redefine marriage for the rest of us. Keep things as they are."

Radio spot Number NCPM-100 - Children: "If we don't pass [Initiative 416], Nebraska could be forced to recognize same-sex marriages. . . That would be such a confusing thing for our kids . . . Marriage. A man and a woman. The way it's always been. The way it should always be."

Radio Spot Number NCPM-102 - Couples: "If we don't vote yes on Initiative 416, we would have to recognize same-sex marriages that may some day be performed in some other state. The courts or the legislatures of other states would have the power to impose their marriage laws on us."

Radio Spot NCPM-103 - Remarkable: "Gays and lesbians may have a right to the lifestyle of their choice, but they do not have the right to redefine marriage for the rest of us. Let's keep marriage the way it has always been, a man and a woman, the way it should be. Vote yes on Initiative 416."

Exhibit 16: "Nebraskans know the difference between respecting people's freedom to make relationship choices, and endorsing same-sex marriages. A YES vote on Initiative 416 respects that freedom, without having to redefine what marriage means for an entire society.

"A fair-minded person's exercise of freedom of conscience in support of traditional marriage is not hatred, bigotry or discrimination towards any person, but simply affirms the role of marriage between one man and one woman in our society."

Exhibit 17: "Marriage should be preserved as it is: A union between a man and a woman.

"Tolerance and respect for people with other beliefs are not just words, but real life values. A fair-minded person's exercise of freedom of conscience in support of traditional marriage is not hatred, bigotry or discrimination towards any person, but simply affirms the role of marriage between one man and one woman in our society.

"[W]e can uphold our tradition of respect for individual freedom without the need to fundamentally redefine marriage."

Exhibit 19: "Initiative Measure 416 provides the opportunity for Nebraskans to affirm in public policy what has been presumed or taken for granted for generations in all of Western society, here in the United states and in the great State of Nebraska: that marriage is a union of a man and a woman, and holds a unique position in our culture and in our laws.

“We urge that the uniqueness of marriage be upheld, retained and perpetuated.”

Exhibit 21: “IM 416 is not about bigotry and discrimination; it is about marriage. It simply recognizes the foundational role of marriage between one man and one woman in our society and the corresponding benefits and responsibilities exclusively afforded that relationship as a matter of state public policy.”

Exhibit 201: “At the Direction of the Nebraska Diocesan Bishops, the Nebraska Catholic Conference actively supported Initiative Measure 416. Neither the Nebraska Catholic Conference nor the Nebraska Diocesan Bishops participated in support of Initiative Measure 416 out of animus, hostility, or unjust intent against those desiring any form of same sex union.”

Exhibit 202: “I believed passage of Initiative 416 was important because marriage provides an unparalleled good for society, and because attempts to redefine marriage would fundamentally undermine the institution of marriage. My support for Initiative 416 was based upon my belief that it was critical to preserve the traditional understanding of marriage.

“I did not view Initiative 416 as an attempt to discriminate against anyone, nor was my support for Initiative 416 based on animus towards any group or person.”

Exhibit 203: “I believed that passage of [the] Initiative was necessary to preserve the institution of marriage in Nebraska. My support for Initiative 416 was not motivated by animus towards any person or group.

“I supported Initiative 416 to preserve and protect the traditional understanding of marriage in Nebraska.”

Exhibit 204: “At the time of the 2000 election, as now, I believed the institution of marriage was important to the welfare of our society and to the well-being of children. I believed the institution of marriage in Nebraska was threatened by the events in Vermont, and would be protected by Measure 416.

“I viewed Measure 416 as a necessary defensive response to a judicial decision in another state that threatened to undermine the institution of marriage. I reached this conclusion because I viewed the creation and recognition of same-sex >civil unions= as really being same-sex marriage by another name, and because official recognition of same-sex unions would necessarily weaken or undermine the traditional role of marriage in society as well as the definition of the most important unit of our culture, the family. I did not

view the measure as an attack on anyone, nor did I vote in favor of Measure 416 out of animosity toward any person or group.

“My intent in voting for Measure 416 was to preserve and defend marriage as it has always been recognized in Nebraska.

The Nebraska Secretary of State is required by Neb. Rev. Stat. § 32-1405.01 to publish an informational pamphlet on all initiative and referendum measures placed on the ballot. With regard to the arguments supporting the passage of Initiative 416, the pamphlet stated, “The amendment doesn’t take away existing rights of individuals. It limits marriage and its benefits to married heterosexual couples.” Ex. 207(A).

Affidavits submitted by Plaintiffs allege that the passage of Section 29 has created an environment where some homosexuals feel unsafe. Ex. 43, ¶ 17. While that may represent their state of mind, the record is devoid of any evidence supporting these feelings. To the contrary, the record demonstrates that hate crimes against homosexuals has actually decreased since the passage of Section 29. Ex. 208.

The record lacks any evidence of animus toward homosexuals, and none should be inferred when it would clearly contradict the actual intent of the sponsors of Section 29. The record clearly reveals that the overriding purpose of the groups urging the passage of Section 29 was to keep other state courts or legislatures from determining Nebraska’s public policy with respect to marriage, and to preserve the traditional definition of marriage as between one man and one woman.

#### IV.

##### **SECTION 29 CANNOT CONSTITUTE A BILL OF ATTAINDER.**

Plaintiffs' bill of attainder theory simply reaches too far. If enacting a measure as a constitutional amendment, rather than as a statute, is an attainder, then Nebraska law (and the laws of other states) is full of attainders. But such a conclusion is inconsistent with the Supreme Court's bill of attainder jurisprudence because the Court has rarely found a measure to constitute a bill of attainder, and never simply because it was a constitutional amendment rather than a statute. Moreover, Plaintiffs' theory would require this Court to ignore the requirements for finding a bill of attainder: specific identification of the attainted party or parties, a legislative adjudication of guilt, and the imposition of punishment. Section 29 does not meet any of these requirements.

##### **A. The Bill of Attainder's Applicability to Modern Litigation Is Extremely Rare.**

The U.S. Supreme Court has only held that a legislative act constituted a bill of attainder five times since the end of the Civil War. Only two of those cases were decided in the Twentieth century. See *United States v. Brown*, 381 U.S. 437 (1965) (Act making it a crime for a member of the Communist Party to serve as an officer of a labor union); *United States v. Lovett*, 328 U.S. 303 (1946) (Act prohibiting certain individuals named "subversives" by the United States House of Representatives Committee on Un-American Activities from ever being employed by the government again).

In the Nineteenth Century, the Court struck down laws as bills of attainders in only three cases. *Pierce v. Carskadon*, 83 U.S. 234 (1873) (West Virginia Reconstruction law

conditioning access to the courts upon the taking of an oath); *Cummings v. Missouri*, 71 U.S. 277 (1867) (Missouri amendment requiring priests and ministers to take an oath saying they had never engaged in acts opposing the Missouri government upon pain of being removed from office, fined, and imprisoned); *Ex parte Garland*, 71 U.S. 333 (1867) (Act requiring lawyers to take an oath of loyalty to the United States in order to be admitted to the Supreme Court of the United States). The oath requirements at issue in *Cummings*, *Garland*, and *Pierce* were bills of attainder because Congress had determined guilt and inflicted punishment on specific classes of persons, for past actions, without a judicial trial.

The Twentieth century cases demonstrate the limited reach of the Bill of Attainder Clause. In *United States v. Lovett*, 328 U.S. 303 (1946), the claimant was one of thirty-nine federal employees *named* by a congressional committee for alleged affiliation with Communist organizations. *Id.* at 309 (emphasis added). Congress, in response to the fear of “subversives” occupying positions of influence in government, had created the Committee on Un-American Activities to hold secret hearings in which defendants were permitted to testify, but not have legal counsel. *Id.* at 310. “Subversives” were punished by having their pay cut off and being forced out of government. *Id.*

The Court held that the “permanent proscription from any opportunity to serve the Government is . . . a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, or acceptance of bribes by members of Congress or by other government officials . . . .” *Lovett*, 328 U.S. at 316 (citations omitted). The Court went on to hold that Congress had inflicted “punishment without the safeguards of

judicial trial and ‘determined by no previous law or fixed rule.’ The Constitution declares that that cannot be done either by a State or by the United States.” *Id.* at 317. This was a bill of attainder.

In *United States v. Brown*, 381 U.S. 437 (1965), the respondent was a member of the Communist Party and held an executive position in the International Longshoremen’s and Warehousemen’s Union. The Labor-Management Reporting and Disclosure Act of 1959 (Act) made it a crime for a member of the Communist Party to serve as an officer of a labor union. In striking down the Act, the Court restated the rule from *Lovett* that “[l]egislative acts, no matter what their form, that apply either to *named* individuals or to *easily ascertainable* members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.” *Brown*, 381 U.S. at 448-49 (emphasis added).

The Act was not “a generally applicable rule decreeing that any person who commits certain acts . . . shall not hold office. . . . Instead, it designate[d] in no uncertain terms the persons [who could not] hold union office without incurring criminal liability.” *Id.* at 450. The Court noted that the Act “inflict[ed] its deprivation upon the members of a political group thought to represent a threat to national security.” *Id.* at 453. The Court explained that if Congress wanted to “weed” out undesirables from government or from unions, it must “accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals.” *Id.* at 461.

In all five cases where the Court has found there to be a bill of attainder, there was a legislative determination of guilt for persons who were either named or described with particularity and subject to clear and direct punishment without a judicial trial. All five cases either required a loyalty oath denouncing affiliation with, or punished membership in, an easily ascertainable group. Moreover, the bills of attainder at issue in these cases all implicated numerous other constitutional provisions and violated fundamental rights. In stark contrast, Section 29 makes no such requirement of anyone. Section 29 is not a punitive amendment aimed at a person or particular class. Section 29 does not prohibit anyone from pursuing an occupation, criminalize conduct, deny a benefit, or infringe a right, and is a rule of general applicability for all the citizens of Nebraska.

**B. Plaintiffs Do Not Qualify for Bill of Attainder Relief Under Any Theory.**

Plaintiffs' claim does not satisfy any of the elements required for a Bill of Attainder and ignores well-established federal law. The Bill of Attainder Clause is "to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of *specifically designated* persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965) (emphasis added). Thus, the Supreme Court has held "implausible" Bill of Attainder claims against commonplace legislative provisions, such as Section 29, codifying the historic definition of marriage. See *Mazurek*, 520 U.S. at 973 (a "provision so commonplace as to exist in 40 other States" was not bill of attainder). Section 29 is certainly commonplace, particularly in view of the fact that 49 states define marriage as a man and a woman (or follow the common law definition), 47 states do not grant any official recognition to same-sex

relationships,<sup>14</sup> and 40 states have Defense of Marriage Acts, 17 of which involve constitutional amendments defining what marriage is.

The Bill of Attainder is not just a watered down version of the Equal Protection Clause. As the Supreme Court held in an appeal by former President Nixon, it simply cannot be that every law that disadvantages someone is a bill of attainder:

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).<sup>15</sup>

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<sup>14</sup>California will give same-sex couples in domestic partnerships all the incidences of marriage it has to offer as of January, 2005; Vermont has civil unions, and Massachusetts now extends marital rights to same-sex couples.

<sup>15</sup>The 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 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.

The Supreme Court's test for evaluating whether a legislative enactment is a bill of attainder is whether such laws "apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial." *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 521 (1995). Accordingly, to constitute a bill of attainder, a statute must satisfy three elements – "specificity in identification, punishment, and lack of a judicial trial." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).<sup>16</sup> If there is more than one person at whom a legislative action is aimed to punish, those persons must be "*easily identifiable* members of a class." *Nixon v. Administrator of General Services*, 433 U.S. 425, 469 (1977) (emphasis added). Section 29 neither singles out any specific individuals or any group, nor imposes any punishment based upon a determination of guilt without a trial; therefore, it is not a bill of attainder.

**1. Section 29 Does not Define a Group that Is Politically Disadvantaged.**

A legislative act can only be a Bill of Attainder if it punishes "*specifically designated* persons or groups. *Brown*, 381 U.S. at 447 (emphasis added). The members of the group must be "easily ascertainable." *Id.* at 448-49. Under Supreme Court jurisprudence, these classes have been very specific, including statutes which designate Communist Party

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<sup>16</sup>The element of a lack of a judicial trial relates to the legislative determination of guilt. See *Selective Serv. Sys.*, 468 U.S. at 846-847 (quoting *Nixon*, 433 U.S. at 468); see also *Brown*, 381 U.S. at 445.

members,<sup>17</sup> named Government employees,<sup>18</sup> or members of a particular profession, such as priests<sup>19</sup> or lawyers.<sup>20</sup> The Eighth Circuit has held that “[a]n ordinance is not made an attainder by the fact that the activity it regulates is described with such particularity that, in probability, few organizations will fall within its purview.” *WMX Techs. v. Gasconade County*, 105 F.3d 1195, 1202 (8th Cir. 1997) (upholding as constitutional a county ordinance that only affected one business). Moreover, the Supreme Court has specifically recognized that class members’ ability to leave the class prevents an alleged bill of attainder from meeting the specificity element. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 850-51 (1984) (Military Selective Service Act denying financial assistance for higher education to men who failed to register for the draft did not meet specificity requirement because those deemed ineligible were given 30 days in which to register and become eligible).

Plaintiffs seem ambivalent about what class is being attained. Plaintiffs have two theories in this regard: 1) that the law targets homosexuals; 2) that the law targets all those who wish to lobby for and extend marital benefits to same-sex couples.<sup>21</sup> The first theory, that

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<sup>17</sup> *United States v. Brown*, 381 U.S. 437 (1965).

<sup>18</sup> *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>19</sup> *Cummings v. Missouri*, 71 U.S. 277 (1867).

<sup>20</sup> *Ex parte Garland*, 71 U.S. 333 (1867).

<sup>21</sup> Plaintiffs’ ambivalence or confusion over this issue is reflected in their inability to argue their political access theory without relying upon the benefits of which they have allegedly been deprived. But since this case is limited to a claim of a denial of political access, Plaintiffs may not rely upon a denial of benefits to support their claim.

the law targets homosexuals, is rebutted by both the plain language and the effect of the amendment. The second theory, that the law targets all those who wish to lobby for and extend marital benefits to same-sex couples, is far too broad a class to be considered “specifically identified.” Thus, Plaintiffs have failed to specifically identify a group that is being attained.

**a. Plaintiffs’ first theory.**

Much of Plaintiffs’ argument rests on the allegation that “Section 29 singles out lesbians, gay and bisexual people, and excludes them from the normal processes by which other Nebraskans can secure protections for their families.” (See Pl. Open. Tr. Br. at 31-32; Complaint, ¶¶ 33-37.) 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.) Thus, the harm that Plaintiffs’ are alleging is based on their political ability to lobby for change in the state’s laws involving marriage and marriage benefits. Plaintiffs are not alleging harm that is based on their sexuality. And indeed, the text of Section 29 is neutral with regard to sexuality:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Section 29 simply says that a woman can only marry a man, and a man can only marry a woman, without regard to sexual orientation, and the government may not recognize quasi-marital relationships such as civil unions. It has no impact whatsoever on homosexuals who do not desire governmental recognition of a same-sex relationship, or who do not desire

employee benefits for a same-sex partner.<sup>22</sup> It is a neutral law of general applicability that applies equally to all Nebraskans, regardless of sexual orientation. Same-sex couples, regardless of their sexual orientation, are unable to obtain official recognition or marital benefits. This includes not only homosexual couples, but also single roommates, sibling arrangements, and anyone else who because of their living arrangements would seek to take advantage of the benefits the state extends to married couples.<sup>23</sup>

Thus, Plaintiffs are part of a large, diverse portion of the Nebraska population that favors official recognition of same-sex relationships. The common denominator of that diverse groups is their political views, not their sexuality.

**b. Plaintiffs' second theory.**

Plaintiffs admit that not all members of the plaintiff organizations are homosexuals. (See Affidavit of Shelley Kiel at Plaintiffs' Exhibit 39. ("NAJE has members across the state, *including* members who are gay, lesbian, or bisexual") (emphasis added)). Indeed, the president of Plaintiff NAJE, Shelley Kiel, is in an opposite-sex relationship. *Id.* at ¶ 15. And that more than 30% of Nebraska citizens opposed Section 29<sup>24</sup> demonstrates that legal

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<sup>22</sup>The record is silent as to the number of homosexuals who desire governmental recognition of their relationships.

<sup>23</sup>Although Section 29 admittedly has a greater impact on homosexuals, disparate impact alone is insufficient to trigger the Bill of Attainder Clause. *See, e.g., WMX Techs.*, 105 F.3d at 1202 (upholding as constitutional a county ordinance that only affected one business).

<sup>24</sup> See [www.abcnews.go.com/Sections/politics/2000vote/general/issues.html#nebraska](http://www.abcnews.go.com/Sections/politics/2000vote/general/issues.html#nebraska).

recognition for same-sex relationships enjoys support among many who are not homosexual.<sup>25</sup>

Thus, the hurdle of having to amend the Constitution to obtain official recognition for same-sex couples applies not only to homosexuals, but to the broader group comprised of all people who favor legal protection for same-sex couples. This includes persons like Shelley Kiel who felt they had a moral duty to oppose Section 29, persons whom Plaintiffs have subsequently persuaded that they have a moral obligation to help obtain official recognition for same-sex relationships, and even persons who supported Section 29 at the time, but may later be persuaded that it was a bad idea. It is untenable to suggest that a “group” of such vast and ambiguous membership could qualify as “specifically designated persons or groups” as required by the Supreme Court in *Brown*, 381 U.S. at 447. Nor can such an amorphous group qualify as “easily ascertainable.” *Id.* at 448-49. The segment of Nebraska’s population who support the recognition of same-sex relationships is further unidentifiable because that “group” is always in a state of flux, as people’s opinions change. The group members’ ability to join or leave the class prevents an alleged bill of attainder from meeting the specificity element. See *Selective Serv. Sys.*, 468 U.S. at 850-51. See also Hills, *Amendment 2 Really a Bill of Attainder? Some Questions about Professor Amar’s Analysis of Romer*, 95 MICH. L. REV. at 240 (“The essence of such “naming”—such illegal legislative specification—is that the

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<sup>25</sup>According to surveys recognized by even homosexual activist organizations, homosexuals represent only 2% of the general population. Brief for *Amicus Curiae* Human Rights Campaign, 2002 U.S. Briefs 102, 17 n. 42, *Lawrence v. Texas*, 539 U.S. 558 (2003) (“The most widely accepted study of sexual practices in the United States is the National Health and Social Life Survey (NHSL). The NHSL found that 2.8% of the male, and 1.4% of the female, population identify themselves as gay, lesbian, or bisexual.”).

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*) (emphasis added).

The Court pronounced in *Brown* that Congress must proceed “by rules of general applicability.” 381 U.S. at 461. Section 29 does not run afoul of that pronouncement. Plaintiffs’ premise that Section 29 disadvantages an identifiable group of persons is flawed for two reasons: first, the law, on its face, is neutral and generally applicable; and second, Plaintiffs’ alleged harm—disadvantage in the political arena—extends to everyone opposed to Section 29.

## **2. Section 29 does not impose punishment.**

Even if the Plaintiffs were able to avoid the fact that the legislature has not determined guilt, see *infra* Section IV.B.3, Section 29 imposes no punishment. *Selective Serv. Sys.*, 468 U.S. at 846-847. “Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences.” *Nixon*, 433 U.S. at 472. Instead, “one who complains of being attainted must establish that the legislature’s action constituted punishment and not merely the legitimate regulation of conduct.” *Id.* at 476. The test for whether a provision is punitive is well-established:

To rise to the level of “punishment” under the Bill of Attainder Clause, harm must fall within the traditional meaning of legislative punishment, fail to further a nonpunitive purpose, or be based on a congressional intent to punish.

*Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984); see also *Planned Parenthood*, 167 F.3d at 465. The Eighth Circuit has explained

that according to this test, punishment is evaluated according to a “historical test, a functional test, and a motivational test.” *WMX Techs.*, 105 F.3d at 1202.

While Plaintiffs repeatedly allege that Section 29 imposes punishment, they fail to articulate how it punishes. Plaintiffs’ punishment theory seems to be that Section 29 is a bill of attainder, at least in part, because it is a constitutional amendment instead of a statute.<sup>26</sup> That Plaintiffs would prefer to lobby legislators, rather than go through the process to amend the state constitution, does not transform Section 29 into a bill of attainder. The fact of the matter is that Plaintiffs were unsuccessful in lobbying for local government change before Section 29 was enacted. If having to go through the constitutional amendment process constitutes “punishment,” then many constitutional amendments constitute punishment to those who oppose them. (See, *infra*, section IV.C.)

Despite Plaintiffs’ frequent bemoaning of their inability to qualify for marital benefits, the only alleged harm at issue in this case relates to participation in the political process. Plaintiffs have not demonstrated how Section 29 “targets” or “harms” homosexuals in any way that is different from all Nebraska citizens who support recognition of same-sex relationships. Because Plaintiffs do not assert a right to legal recognition of same-sex relationships, they cannot sustain a claim of “punishment” for depriving them of that “right.” Section 29 prohibits something that Plaintiffs never had and do not claim a right to in this litigation. This is significant because the Supreme Court has explained that there can be no punishment absent

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<sup>26</sup> 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).

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). The rights and political power of Plaintiffs and others advancing similar political agendas remain the same after the adoption of Section 29 as before. Moreover, Section 29 erects no impediment to Plaintiffs’ use of the very same political avenues used by proponents of the constitutional amendment.

Defeat in the political process has never been found to be “punishment” for bill of attainder purposes, nor is it a cognizable injury for Article III purposes. See *Raines v. Byrd*, 521 U.S. 811, 821 (1997). While Nebraskans who favor marital benefits for same-sex couples might have had a stronger lobbying position if Section 29 were never adopted, it does not follow that Section 29 targets or punishes them. Plaintiffs were lobbying for legal recognition of same-sex relationships long before the passage of Section 29, and continue to do so.

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 given the existence of Section 29.<sup>27</sup> 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. The punishment at issue in *Cummings* was the inability to work in a chosen profession, not the inability to effectively lobby for a change in law.

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<sup>27</sup>Although Plaintiffs complain of an inability to lobby for employee benefits, that is true only to the extent they seek benefits based upon official recognition of same-sex relationships.

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." *Nixon*, 433 U.S. at 470. Section 29 is not punishment historically. It 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.

**a. 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. *Nixon*, 433 U.S. 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 deprives 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 or somehow disenfranchises them (Pl. Open. Tr. Br. at 34-35), 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; Ex. 38, ¶ 16; Ex. 39,

¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14.) 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.<sup>28</sup> (Ex. 38, ¶¶ 21-23; Ex. 39, ¶¶ 14, 17-20; Ex. 40, ¶¶ 18-22.) A legislative—or voter initiative—obstacle to success in political lobbying cannot 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.” (Pl. Open. Tr. Br. at 37 (emphasis added)).<sup>29</sup> 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

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<sup>28</sup>As pointed out *supra*, Plaintiffs are free to obtain the benefits they allegedly seek without conflicting with Section 29, providing they do not base the benefits on same-sex relationships.

<sup>29</sup>Plaintiffs’ argument that they are being denied as much as “40% of an employee’s compensation” is patently false. (See Pl. Open Tr. Br. at 37-38.) The sources that Plaintiffs cite refer to all of an employee’s benefit’s package, not just that portion which inures to a spouse. Presumably, the only benefit that Plaintiffs would be deprived of is health insurance for a partner or a partner’s children.

the government leave open the possibility of qualifying for a benefit for which there is no constitutional right.<sup>30</sup> 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.) In any event, nothing in the statute forbids Plaintiffs from lobbying for a reciprocal benefits statute, or some other form of benefits that is not dependant on the nature of the couple's relationship.

Finally, Section 29 in no way "single[s] out gay people for denunciation and public censure." (Pl. Open. Tr. Br. at 38.) 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 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." The intent of a sponsor 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); see also *Omaha Nat'l Bk v. Spire*, 223 Neb. 209, 224, 225, 389 N.W.2d 269, 279 (1986) (intent of voters must be determined from language of initiative); *infra* Section IV.B.2.c. Moreover, even if Section 29

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<sup>30</sup>Therefore, Plaintiffs' reliance upon *Planned Parenthood of Mid-Missouri & Eastern Kansas v. Dempsey*, 167 F.3d 458, 465 (8<sup>th</sup> 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.

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.

**b. 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 Plaintiffs initiated over recognition of same-sex relationships. It has the legitimate purpose of steering the procreation that will occur between opposite-sex couples into marriage. See *supra* Section II.C. And Section 29 preserves the historical meaning of marriage. See *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring) (describing “preserving the traditional institution of marriage” as a legitimate state interest).

Plaintiffs CFEP 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; Ex. 38, ¶ 15; Ex. 40, ¶ 8.) The record makes it clear that Plaintiffs continue to desire to bring about cultural and political change regarding recognition of same-sex relationships, including marriage. (Ex. 38, ¶ 16; Ex. 39, ¶¶ 10, 13; Ex. 40, ¶¶ 10, 13-14; Pl. Open. Tr. Br. at 5, 24, 28.) 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 steps<sup>31</sup> does not mean that the choice to respond to Plaintiffs' efforts through a voter-initiated constitutional amendment makes the amendment punitive. Section 29 clearly serves legitimate, nonpunitive purposes.<sup>32</sup>

**c. 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 Pl. Open. Tr. Br. at 42-43), 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]

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<sup>31</sup> See 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).

<sup>32</sup> Plaintiffs' 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").

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 (2<sup>nd</sup> Cir. 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. (Pl. Open. Tr. Br. at 45 (quoting Complaint, ¶ 21)). The quoted statements of Mills’ personal beliefs do not 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 Nat’l Bk*, 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," (Pl. Open. Tr. Br. at 43 (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 Pl. Open. Tr. Br. at 44.) 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*. See, *supra*, Section III.B.1. 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? Some Questions about Professor Amar's Analysis of Romer*, 95 MICH. L. REV. at 251-52.

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 (8<sup>th</sup> Cir. 1996), this Court should conclude that the bill of attainder claim “is without merit.”

### **3. Section 29 Does not Determine Guilt without a Judicial Trial.**

The Bill of Attainder doctrine has no applicability unless legislative action determines guilt.<sup>33</sup> As the Supreme Court has explained, 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 the prohibited position were guilty of a

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<sup>33</sup>Plaintiffs’ theory of attainder—that the judicial trial element is always met if there is no trial—would completely eliminate the third prong of the bill of attainder elements. No legislative act, or constitutional amendment by the people, ever involves a judicial trial. This element would be meaningless if it did not require a determination of guilt without a trial.

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. Plaintiff’s Version of the Bill of Attainder Would Render Almost Any Legislative Classification Unconstitutional.**

Plaintiffs’ defense of their bill of attainder claim reveals a basic misunderstanding of what a bill of attainder is. 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.” *Brown*, 381 U.S. at 442. In *Brown*, the Court extensively discussed the relationship between the 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); see also *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 469 (1977) (noting *Brown*'s holding that "the Bill of Attainder Clause 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;<sup>34</sup>
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;

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<sup>34</sup>Unlike Section 29, §§ 28-701 and 4-106 actually involve punishment because violating either of these provisions is a misdemeanor.

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.

9. 8 U.S.C. § 1182(a)(3)(E): prohibiting aliens formerly involved in Nazi activities from being admitted for citizenship.<sup>35</sup>

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.

Similar to the laws cited above, 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.

### **CONCLUSION**

For the foregoing reasons, this Court should rule that Section 29 comports with the United State Constitution.

DATED this 1<sup>st</sup> day of December, 2004.

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<sup>35</sup>This statute was challenged unsuccessfully as a bill of attainder in *Hammer v. INS*, 195 F.3d 836 (9th Cir. 1999).

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2004, 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: Robert F. Bartle, David S. Buckel, Fred B. Chase, James D. Esseks, Tamara Lange, Matthew W. McNair, and Amy A. Miller.

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