

CASE NO. 05-2604

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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CITIZENS FOR EQUAL PROTECTION, et al.,

Appellees,

v.

ATTORNEY GENERAL JON BRUNING, in his official capacity,  
GOVERNOR DAVE HEINEMAN, in his official capacity

Appellants.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

Honorable Joseph F. Bataillon, Judge

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***BRIEF OF APPELLANTS***

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## **SUMMARY AND REQUEST FOR ORAL ARGUMENT**

This case is an action brought by plaintiff advocacy organizations (“Plaintiffs”) under 42 U.S.C. § 1983 challenging the constitutionality of Neb. Const. art. I, § 29, adopted by Nebraska voters in 2000. Section 29 states: “Only marriage between a man and 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.” The defendants (collectively, the “State”) are the Nebraska Attorney General and Governor.

After the State’s motion to dismiss on standing and ripeness grounds was denied, the matter proceeded to trial on a stipulated record and separate affidavits received in evidence. The district court found that § 29 violates the “free speech” and “right to petition government for redress of grievances” provisions of the 1st Amendment and the equal protection clause of the 14th Amendment and is also an unconstitutional bill of attainder. Judgment was entered declaring § 29 to be unconstitutional and enjoining its enforcement. Later an order awarding attorney fees and costs to Plaintiffs was also entered. The State has appealed.

This appeal presents complex and weighty issues in the context of a declaration that a state constitutional provision violates the U.S. Constitution. The State believes that oral argument is clearly warranted and would be of assistance to the court. The State suggests that each side be given at least thirty (30) minutes for such argument.

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## **JURISDICTIONAL STATEMENT**

1. Plaintiffs brought this action under 42 U.S.C. § 1983 alleging that Neb. Const. art. I, § 29 violates the equal protection clause of the Fourteenth Amendment and is a bill of attainder made unconstitutional by U.S. Const. art. I, § 9. They sought declaratory and injunctive relief and asked for an award of attorney fees and costs under 42 U.S.C. § 1988. (App. Vol. I at 2, 13-16) The district court had jurisdiction of Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343 and jurisdiction to award attorney fees and costs under section 1988.

2. The district court, after trial on a stipulated record and additional affidavits offered and received in evidence, found in favor of Plaintiffs on their claims. (App. Vol. II at 589-90) It entered a final judgment declaring Neb. Const. art. I, § 29 unconstitutional and enjoining enforcement of that provision. (App. Vol. II at 591) The district court subsequently filed an order awarding attorney fees and costs to Plaintiffs. (App. Vol. II at 663-64) The Court of Appeals has jurisdiction of this appeal from the final decision of the district court pursuant to 28 U.S.C. § 1291.

3. The district court's memorandum and order and judgment declaring § 29 unconstitutional and enjoining enforcement thereof were filed on May 12, 2005. The State's notice of appeal was filed within thirty days thereafter on June 9, 2005. The

district court subsequently entered its order awarding attorney fees and costs to Plaintiffs on August 1, 2005. The next day, August 2, 2005, the State filed an amended notice of appeal under Fed. R. App. P. 4(a)(4)(B)(ii) to ensure that the attorney fees and costs award would also be before the appellate court. (*See* “Docket Report” of district court, filing nos. 71, 72, 73, 81 and 82.)

4. The present appeal is from the final decision of the district court declaring Neb. Const. art. I, § 29 unconstitutional, enjoining its enforcement and awarding attorney fees and costs to Plaintiffs. The district court has disposed of all the parties’ claims.

#### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the district court committed reversible error in finding that Plaintiffs had standing to pursue their action and that the matter was “ripe” for judicial determination such that the district court had jurisdiction to hear and decide this litigation.

*Raines, Director, Office of Management and Budget v. Byrd*, 521 U.S. 811 (1997)

*Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998)

*Renne v. Geary*, 501 U.S. 312 (1991)

2. Whether the district court committed reversible error by determining that section 29 violates Plaintiffs' First Amendment right to freedom of speech (association).

*Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW*, 485 U.S. 360 (1988)

*United States v. \$84,615 in U.S. Currency*, 379 F.3d 496 (8<sup>th</sup> Cir. 2004)

*Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458 (8<sup>th</sup> Cir. 1999)

3. Whether the district court committed reversible error by determining that section 29 violates Plaintiffs' First Amendment right to petition government for the redress of grievances.

*Laird v. Tatum*, 408 U.S. 1 (1972)

*United States v. \$84,615 in U.S. Currency*, 379 F.3d 496 (8<sup>th</sup> Cir. 2004)

*Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458 (8<sup>th</sup> Cir. 1999)

4. Whether the district court committed reversible error by determining that section 29 violates Plaintiffs' Fourteenth Amendment right to equal protection of the law.

*Richenberg v. Perry*, 97 F.3d 256 (8<sup>th</sup> Cir. 1996)

*Romer v. Evans*, 517 U.S. 620 (1996)

*Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307 (1993)

5. Whether the district court committed reversible error by determining that section 29 constitutes a bill of attainder in violation of U.S. Const. art. I, § 9.

*United States v. Brown*, 381 U.S. 437 (1965)

*Nixon v. Administrator of General Serv.*, 433 U.S. 425 (1977)

*Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S.841 (1984)

6. Whether the district court committed reversible error by invalidating both sentences of section 29.

*Dalton v. Little Rock Family Planning Serv.*, 516 U.S. 474 (1996)

7. If the district court's decision on the merits of Plaintiffs' claims is reversed, whether the district court's award of attorney fees and costs to Plaintiffs should also be reversed.

42 U.S.C. § 1988

## STATEMENT OF THE CASE

### Nature of the Case

Plaintiffs, which are three advocacy groups claiming to represent individuals who would seek local and state legislative changes to Nebraska law to allow marital rights and/or marital-like rights to same-sex couples (App. Vol. I at 3-4), filed this action under 42 U.S.C. § 1983 claiming that Nebraska's "defense of marriage amendment" to its constitution, Neb. Const. art. I, § 29, which was adopted by a large majority of Nebraska voters in 2000, violates the United States Constitution. Specifically, Plaintiffs alleged that section 29 violates their members' right to equal protection of the law under the Fourteenth Amendment and is also a bill of attainder in violation of Art. I, § 9. (App. Vol. I at 13-15) Plaintiffs named as defendants Nebraska's Attorney General and Governor in their official capacities. (App. Vol. I at 4) Plaintiffs sought a declaration of section 29's unconstitutionality and an injunction prohibiting its enforcement. They asked for award of attorney fees and costs under 42 U.S.C. § 1988. (App. Vol. I at 15-16)

### The Course of Proceedings Below

The State responded to Plaintiffs' complaint by filing a motion to dismiss. In its motion the State challenged the district court's jurisdiction, contending that Plaintiffs lacked the requisite standing to bring their claims and that, in any event, the

claims were not ripe for adjudication. The State also urged that Plaintiffs' bill of attainder claim did not state a claim upon which relief could be granted. (App. Vol. I at 17-18) The district court denied the State's motion to dismiss (App. Vol. I at 32), and the State then filed an answer to Plaintiffs' complaint. (App. Vol. I at 33-36)

The matter proceeded to trial on a stipulated record. (App. Vol. I at 328) The parties agreed to submit a stipulation of facts with attached exhibits, to which either party could object, and also to the submission of additional affidavits, to which objection could be made, by each side. (App. Vol. I at 38-199 (Jt. Stip. and exhibits thereto) and 200-327 (affidavits)) Objections to various exhibits and proffered affidavits were made (App. Vol. II at 329-353), but the district court overruled all objections. (App. Vol. II at 385-88) Thus, when the district court made its decision it had before it the record consisting of the stipulation of the parties, all exhibits to that stipulation and all affidavits offered by the parties.

#### The Disposition Below

The district court ruled in favor of Plaintiffs on their claims that section 29 violates the equal protection clause and is an unconstitutional bill of attainder. (App. Vol. II at 583, 589) Additionally, although not raised as claims in the complaint and not argued by the parties, the district court found that section 29 violates the First Amendment free speech (associational) rights of Plaintiffs and their right, under that

amendment, to petition government for the redress of grievances. (App. Vol. II at 556-57) The district court entered its memorandum and order and judgment declaring section 29 unconstitutional and enjoining its enforcement. (App. Vol. II at 590-91) The district court determined that Plaintiffs were “prevailing parties” under 42 U.S.C. § 1988 (App. Vol. II at 589-90) and, subsequently, entered an order awarding them attorney fees and costs. (App. Vol. II at 663-64)

### **STATEMENT OF FACTS**

At issue in the present appeal is the validity, under the United States Constitution, of Neb. Const. art. I, § 29, which reads as follows:

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.

(App. Vol. I at 39)

Section 29 was added to the Nebraska Constitution in 2000 through the initiative petition process. Prior to its adoption, the proposed initiative amendment containing section 29 was known as Initiative Measure 416. (App. Vol. I at 40)

The Nebraska initiative process is set out in Neb. Const. art. III, §§ 2 and 4 and in relevant portions of the Nebraska Election Act, Neb. Rev. Stat. §§ 32-101 through

32-1551 (2004). Under that process, sponsors of an initiative measure circulate petitions for signature by registered voters and, if a sufficient number of registered voters sign those petitions, a measure is placed on the ballot. Once a proposal is placed on the ballot, the amendment is subject to majority vote to determine whether it is adopted or rejected. (*Id.*)

In 2000 various groups interested in placing a “defense of marriage” amendment in Nebraska’s constitution sponsored and supported Initiative Measure 416. Even though only approximately 105,000 valid signatures of registered voters were required to place the measure on the ballot, volunteer circulators gathered and submitted more than 150,000 signatures for Measure 416. The measure was placed on the ballot for the 2000 General Election. (App. Vol. I at 40-42)

At the General Election on November 7, 2000, Nebraska voters adopted Measure 416 as part of the Nebraska Constitution. The final vote totals were 477,571 (70.1%) in favor and 203,667 (29.9%) against. The measure, subsequently codified in the Nebraska Constitution as Article I, § 29, became law on November 7, 2000, when it received the required number of votes and became effective on December 7, 2000, with the Governor’s signature on the Proclamation of Adoption. (App. Vol. I at 42-43)

Subsequent to the adoption of section 29, the Nebraska Attorney General has issued a formal opinion opining that a certain proposed piece of legislation in the Nebraska Legislature would likely be in contravention of that section; and no further action was taken on that particular proposal in the Legislature. During that same time-frame, however, other legislation has been proposed and enacted which would be beneficial to unmarried couples in committed relationships, regardless of sexual orientation. (App. Vol. I at 43-44, 113-125, 156-199)

Plaintiffs filed their action challenging section 29 on April 30, 2003. (App. Vol. I at 1)

Other pertinent facts will be cited and discussed as necessary and appropriate in the Argument section of this brief.

### **SUMMARY OF THE ARGUMENT**

The district court erred in holding that Plaintiffs sustained an injury-in-fact necessary for Article III standing. The only injury that Plaintiffs articulate is that they lack access to the political process since efforts to pass legislation contrary to section 29 would be ineffective. Plaintiffs have not yet succeeded in passing such legislation, much less in having such legislation tested in the courts, and their claims are thus not ripe.

The district court similarly erred in holding that section 29 violates the freedom of speech and freedom of association protected by the First and Fourteenth Amendments. The court held that section 29 creates a barrier to participation in the political process because opponents of section 29 would be required to surmount the hurdle of passing a constitutional amendment to achieve their goals. (App. Vol. II at 570) In essence, the court held that section 29 is unconstitutional because it is in the State Constitution.

Section 29 does not violate any person's freedom of expression or association. Opponents of section 29 are free to gather, express themselves, lobby, and generally participate in the political process however they see fit. Plaintiffs are free to petition state senators to place a constitutional amendment on the ballot. Plaintiffs are similarly free to begin an initiative process to place a constitutional amendment on the ballot, just as supporters of section 29 did. Plaintiffs' efforts to pass legislation that contradicts section 29 would be ineffective, but the mere fact that section 29 appears in the Constitution does not make it unconstitutional. Constitutionality is judged by the effect of a legal provision upon individual rights, not by where the provision is written. The idea that section 29 is unconstitutional because it is in the constitution defies logic.

If the trial court's ruling stands, citizens who disagree with any state constitutional provision will have standing to challenge it in federal court, simply by alleging that the mere existence of that constitutional provision discourages them from advocating for potentially inconsistent legislation in the future. There is no authority for the proposition that the right to participate in the political process is violated if a minority cannot achieve its goals without amending the Constitution.

The court erred in holding that section 29 violates the equal protection clause. Section 29 impinges no fundamental rights, does not target a suspect class, and is based on the rational basis of defining traditional marriage and encouraging procreation to occur within marriage.

The district court also erred in holding that section 29 is a bill of attainder. Section 29 clearly does not punish any person, nor is any person identified by section 29.

The district court erred in invalidating both sentences of section 29. Only the second sentence of section 29 was at issue in this case. No problem or issue with the first sentence was briefed by either of the parties. The first sentence of section 29 does not rely on the second sentence, and could easily stand alone. The court therefore erred in striking down the entirety of section 29.

Plaintiffs have no standing, and their complaint failed to state a claim for which relief may be granted.

## **ARGUMENT**

### **Applicable Standards of Review**

#### Jurisdictional Issues

After being served with Plaintiffs' complaint, the State filed a motion to dismiss contending that the district court lacked jurisdiction. The State pointed out that Plaintiffs did not have standing to pursue this action and that the matter was not ripe for adjudication such as to constitute a case or controversy. (App. Vol. I at 17-18) The district court denied the State's motion (App. Vol. I at 32); but the State continued to raise this jurisdictional issue in its answer (App. Vol. I at 35-36).

A decision to deny or grant a motion to dismiss for lack of subject matter jurisdiction is reviewed de novo by the appellate court. *Bill M. by and through William M. v. Nebraska Department of Health and Human Services Finance and Support*, 408 F.3d 1096, 1099 (8<sup>th</sup> Cir. 2005). The existence of standing is also a determination of law that, on appeal, is reviewed de novo. *ACLU Nebraska Foundation v. City of Plattsmouth, NE*, 358 F.3d 1020, 1027 (8<sup>th</sup> Cir. 2004); *Park v. Forest Service of the United States*, 205 F.3d 1034, 1036 (8<sup>th</sup> Cir. 2000).

## Constitutional Issues

In their action Plaintiffs mounted a facial challenge to the constitutionality of Neb. Const. art. I, § 29, maintaining that section 29 is invalid in all respects, not just as applied in particular circumstances. The district court agreed with Plaintiffs' claims of facial unconstitutionality and struck down section 29 in its entirety. (App. Vol. II at 590)

A facial challenge to the constitutionality of a statute or, presumably, a state constitutional provision presents a pure question of law, *see, XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1026 (8<sup>th</sup> Cir. 2004) (challenge to state statute under state constitution presents pure question of law); and questions of law are reviewed de novo by the appellate court. *Carhart v. Gonzales*, 413 F.3d 791, 794 (8<sup>th</sup> Cir. 2005). Moreover, even if there are mixed questions of law and fact involved in the present appeal, the Eighth Circuit has strongly indicated that such mixed questions are also to be reviewed de novo. *United States for the use and benefit of Morris Construction, Inc. v. Aetna Casualty Insurance Co.*, 908 F.2d 375, 377 (8<sup>th</sup> Cir. 1990).

### I.

**PLAINTIFFS LACKED STANDING TO BRING THIS  
ACTION AND THE MATTER WAS NOT RIPE FOR**

**ADJUDICATION. THUS, THE DISTRICT COURT DID NOT  
HAVE JURISDICTION.**

As noted above, the district court denied the State's initial motion to dismiss which was based, in part, upon standing and ripeness issues. However, as will be seen below, the trial court erred in that determination, and Plaintiffs do not have standing to bring this action. Nor is this case ripe for adjudication. On that basis, the decision of the trial court should be reversed, and this case should be dismissed for lack of jurisdiction.

**A. PLAINTIFFS LACK STANDING.**

There are a number of reasons why Plaintiffs lack standing in this case. They are discussed below.

**1. Plaintiffs Have Suffered No Injury-in-fact to Establish Standing.**

The trial court erred in holding that Plaintiffs suffered an injury-in-fact necessary for Article III standing. (App. Vol. I at 25) There is no injury-in-fact in this case because no actual legislation supported by the plaintiffs has been invalidated under the provisions of section 29. No such legislation has been voted on, much less signed into law and reviewed by a court, so any claimed injury by Plaintiffs is merely hypothetical. Therefore, in an attempt to create standing, the Plaintiffs claim that they lack access to the political process because their efforts to lobby for passage of

legislation contrary to section 29 would be futile, and that section 29 prevents them from advocating for legislation contradictory to section 29. (App. Vol. I at 1-2) This is true of any constitutional provision. Inability to pass legislation contrary to constitutional provisions is not a constitutional injury. If the district court's ruling on section 29 stands, then Neb. Const. art. III, § 24 of the Nebraska Constitution is also invalid because it prevents gambling interests from effectively lobbying at the legislative or local level for new gambling laws; and the U.S. Supreme Court's recent decision in *Locke v. Davey*, 540 U.S. 712 (2004), was wrongly decided because the Washington constitutional provision in that case prevented the plaintiff from effectively lobbying the legislature to grant tuition scholarships for theology degrees. No state constitutional provision that adversely affects a somewhat identifiable group could withstand the district court's analysis.

Article III of the United States Constitution ensures that the judicial branch resolves only those disputes committed to its jurisdiction. The "irreducible constitutional minimum of standing" under Article III is that Plaintiffs must demonstrate that they have suffered an injury-in-fact that is capable of judicial redress:

First and foremost, there must be alleged (and ultimately proved) an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be

redressability—a likelihood that the requested relief will redress the alleged injury. *This triad of injury in fact, causation, and redressability constitutes the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.*

*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998) (citations and internal quotation marks omitted) (emphasis added). A plaintiff’s failure to prove any one of these requirements requires a court to dismiss the case for lack of standing. *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The Supreme Court has emphasized that standing serves a critical function in the constitutional scheme of separation of powers. It is not a perfunctory threshold:

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

*Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 (1982). Article III’s standing requirements safeguard the integrity of the constitutional boundary on judicial power by preventing federal courts from issuing overly-broad advisory opinions with unintended consequences:

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

*Valley Forge*, 454 U.S. at 472.<sup>1</sup>

Despite the trial court’s ruling, Plaintiffs failed to demonstrate that their claims in this case satisfied these important standing requirements. Their claims of injury are purely hypothetical because no laws contrary to section 29 have been passed and tested by any court. Their claimed loss of political access is in reality a self-imposed limitation on their political strategies for seeking certain benefits.

Taken to its logical conclusion, Plaintiffs’ standing arguments, as adopted by the trial court, would mean that no constitutional amendment would ever be valid because anyone that opposed a constitutional amendment would automatically have been “denied access to the political process,” simply by being required to pass an additional constitutional amendment to make any changes or reverse the amendment.

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<sup>1</sup> See also, Christopher N. May & Allan Ides, *Constitutional Law: National Power and Federalism* at 107 (2d ed. 2001): “The rule against generalized grievances precludes Article III courts from entertaining ‘citizen’ or ‘taxpayer’ lawsuits in which the only injury claimed by the plaintiff is the shared harm experienced by all citizens and taxpayers when the government fails to comply with the Constitution or laws of the United States. . . . In the Court's view, it is simply inadequate to premise standing on nothing more than a generalized claim that the government must comply with the law.”

**2. Section 29 Inflicts No Concrete Injury on Plaintiffs so as to Establish Standing.**

Plaintiffs alleged only a generalized injury. They did not complain that section 29 denies them any marriage, civil union, or domestic partnership that would otherwise be available to them. Absent section 29, Plaintiffs' members would still not be able to marry or form a recognized domestic partnership because Nebraska statutory law does not recognize such relationships. The only injury Plaintiffs alleged was that the mere existence of section 29 discouraged them from seeking to enact future, speculative laws that would provide them with certain benefits premised upon a marriage, civil union, or domestic partnership. This intangible "injury" is shared by all Nebraskans that are ideologically opposed to section 29 or who wish to redefine marriage in Nebraska, and thus is too abstract, too speculative, and too generalized to provide Article III

standing.<sup>2</sup> Because Plaintiffs suffered no specific, concrete injury, the decision below constitutes an advisory opinion regarding the constitutionality of section 29.

**i. The Supreme Court has never held that the diminution of general political power amounts to sufficient “injury” to warrant Article III standing.**

Whether standing requirements have been met “often turns on the nature and source of the claim asserted.” *Raines, Director, Office Management and Budget v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal citation omitted). At a minimum, however, the injury element of Article III standing requires “an invasion of a legally protected interest.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

*Raines* is analogous to the case at bar because the plaintiffs in *Raines* alleged a loss of general political power when the 104<sup>th</sup> Congress passed the Line Item Veto Act,

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<sup>2</sup> Plaintiffs, as three non-profit organizations, have no independent “sexual orientation.” They could assert a constitutional claim based on sexual orientation only in a representative capacity on behalf of some of their members. See *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263-64 (1977) (Court noted that a corporation has no racial identity and thus cannot sue in its own capacity, but refrained from any discussion as to whether the corporation could sue on behalf of its members, in that individual members of a racial minority were a named party to the lawsuit). Plaintiffs do not assert that all of their members are homosexual, nor have they ever alleged that all of those who oppose § 29, either now or at the time of its adoption, share a common “sexual orientation.” The injury alleged by Plaintiffs did not hinge upon the sexual orientation of any individual, and was not even specific to Plaintiffs. As such, their complaint should have been dismissed for lack of standing as asserting only a generalized grievance common to all Nebraska citizens who support legal recognition for same-sex couples.

and the President signed the Act into law. *Raines*, 521 U.S. at 821. The plaintiffs in *Raines* were unable to comply with the Court’s requirement of “strict compliance with th[e] jurisdictional standing requirement.” *Id.* at 819. They alleged that their *future* votes would be “less ‘effective’ than before, and that the ‘meaning’ and ‘integrity’ of their vote ha[d] changed.” *Id.* at 825. But the Supreme Court disagreed because the plaintiffs had suffered no direct, personal harm. *Id.* at 821. The Court found that the particular members of Congress that brought suit suffered a harm no different than any other Member of Congress would have. The claim amounted to an “institutional injury,” that would damage all Members of Congress on an equal basis. *Id.* The Court’s holding highlighted the deficiency in Plaintiffs’ basis for standing in the case bar:

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

*Id.* (emphasis added).

Standing requires that the plaintiff asserting a claim have an *actual* right to the object of the litigation. In *Raines*, being denied a seat in Congress would have conveyed standing, but the plaintiffs could only claim a general loss of political power. Here, Plaintiffs allege their political access has been hindered in general—not that anyone

in their named associations or organizations has actually been forbidden the right to vote or enact legislation. Absent a claim of a right to legal recognition of same-sex relationships, Plaintiffs cannot allege a personal deprivation of a generalized right. *Id.*; *Lujan*, 504 U.S. at 560. As in *Raines*, Plaintiffs' allegation that section 29 minimizes their ability to exercise political power is insufficient to confer standing. Section 29 made no substantive change in Nebraska law, and provides no impediment to any effort by Plaintiffs to amend the Nebraska Constitution. Section 29 did not repeal any existing rights or prevent Plaintiffs from obtaining additional individual rights. Section 29 preserves the traditional definition and meaning of marriage; it is not about benefits. Section 29 simply prevents same-sex couples from having their relationships treated as marriage equivalents, and prevents benefits from being granted based solely on recognition of same-sex relationship status. Nebraska law did not recognize same-sex relationships prior to section 29, and Plaintiffs did not allege that they could succeed in gaining legal recognition for same-sex relationships absent section 29. Nebraska voters used the political process to define marriage. Plaintiffs participated in that process just as vigorously as any other person or group. Plaintiffs are free to continue to engage in the political process to try to change the definition of marriage, but they should not be allowed to bypass the political process via the federal courts.

Plaintiffs are advocates for lesbian, gay, bisexual and trans-gender “civil rights.” (App. Vol. I at 1, 3-4) Nothing in section 29 prevents them advocating such rights for individuals. Nothing in section 29 prevents Plaintiffs from asking the Nebraska Legislature to put a revision or rescission of section 29 on the ballot. Nothing in section 29 prevents Plaintiffs from pursuing a revision or rescission of section 29 through the initiative process. Nothing in section 29 prevents Plaintiffs from asking state or local government bodies for benefits for dependents or the designee of their choice.

A concrete injury or “injury in fact” requires interference with “a legally protected right.” *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 772 (2000). The only right actually placed at issue by Plaintiffs is the right to participate in the political process, a right with which section 29 does not interfere.

Plaintiffs have equal access to the political process of changing the definition of marriage in Nebraska – no group may make a radical change in the definition of marriage without a constitutional amendment. Plaintiffs simply do not like the political process that is available to them. If the definition of marriage is not unconstitutional, neither is the process for changing it. The fact that the Nebraska electorate chose to incorporate these provisions into the State Constitution instead of enacting them in a statute does not inflict a concrete injury on Plaintiffs.

**ii. Plaintiffs' alleged injuries are hypothetical because section 29 did not change Nebraska law.**

Since Nebraska has never given legal status to same-sex relationships under any circumstances, section 29 did not change Plaintiffs' legal status, and any claimed injuries are purely hypothetical. The hypothetical nature of these "injuries" is highlighted by Plaintiffs' description of "the fate of a recent bill in the Nebraska legislature" - LB 671. (App. Vol. I at 6, 113-125) Plaintiffs complained that the "Attorney General issued an opinion on March 10, 2003 stating that the proposed law would be unconstitutional under Section 29." (App. Vol. I at 6) However, the fate of the bill was not determined by the Attorney General's opinion. The Attorney General's opinion did not prohibit the legislature from introducing, debating, or voting on the legislation, it would not bind any court, and thus the opinion did not have any effect on making Plaintiffs' alleged injury any more concrete. Plaintiffs asserted only that the Attorney General believes the legislation to be unconstitutional, but this alone does not demonstrate injury-in-fact, particularly given other legislation recently adopted (discussed below) that addresses similar concerns raised by Plaintiffs. To allege a concrete injury, Plaintiffs at minimum would have had to suggest that the bill would have passed if it been introduced, as it could have been. As it now stands, LB 671 is

simply one of many bills on which the Nebraska Legislature failed to vote in that session.

The fact that section 29 did not make any affirmative changes to Nebraska law as it affects the rights or status of Plaintiffs places it in direct contrast to Colorado's Amendment 2 at issue in *Romer*, supra.<sup>3</sup> Amendment 2 created a concrete injury cognizable by the courts because, "[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation." *Romer*, 517 U.S. at 626. Amendment 2 thus had a dramatic impact on the law *as it existed in Colorado at the time of Amendment 2's passage*. Conversely, section 29 had no effect on the status or rights of any person in Nebraska. Plaintiffs have all of the rights and privileges that they enjoyed prior to the passage of section 29. No statutes, regulations, or ordinances were repealed by section 29. The only thing section 29 changed was that Plaintiffs are now required to seek a constitutional amendment, just as the supporters of section 29 did, if they want to change the types of relationships that may be recognized by the State.

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<sup>3</sup> Standing was not an issue in *Romer*. That case was originally filed in state court, not an Article III court; and the Colorado amendment removed existing rights, thus establishing the injury necessary for standing.

The district court improperly relied upon *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), to hold that section 29 denies Plaintiffs the right to participate equally in the political process. (App. Vol. II at 579) In *Northeastern*, the City of Jacksonville, Florida had enacted an ordinance requiring that 10% of the funds spent on city contracts each year be set aside for minority business enterprises. The plaintiff, an association of non-minority businesses, claimed that its members were harmed because it was more difficult for them to obtain city contracts than for minority businesses. The Supreme Court held that the allegation of an unlevel playing field in competing for contracts was a sufficient injury to create standing. 508 U.S. at 666.

However, the Court in *Northeastern* said nothing about the plaintiff's right to compete for the contracts *after they were awarded*. Unlike the plaintiffs in *Northeastern*, who competed on an unlevel playing field, the Plaintiffs in this case participated on a level playing field in the political process leading up to the adoption of section 29. There were no barriers and no exclusion.

Plaintiffs had the level playing field the Supreme Court required in *Northeastern*. Because Plaintiffs are not claiming a constitutional right to recognition of their relationships, they cannot claim a constitutional deprivation from losing the political battle to gain recognition.

**iii. Plaintiffs were not injured by section 29 because they can obtain the benefits they allegedly desire by other means.**

Central to Plaintiffs' complaint is the allegation that section 29 denies them the equal opportunity to advocate for numerous rights and benefits that opposite-sex couples could theoretically obtain through legislative means other than a constitutional amendment. Plaintiffs articulated seven specific rights they claimed section 29 prohibits them from seeking or obtaining.<sup>4</sup> However, Plaintiffs clearly want these benefits as "legal protection" for "same-sex relationships" through creation of a legal status rather than as individual rights or benefits (App. Vol. I at 2), because they are already entitled to some of these benefits as individuals pursuant to statute (see below). Section 29 prohibits only the legal recognition of legal statuses for same-sex relationships, not the granting of any particular benefits. Plaintiffs may be prohibited from receiving the benefits they seek premised on the recognition of same-sex relationships, but they can already obtain most of these benefits by other means, or could pursue them legislatively on a basis other than same-sex couple status.

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<sup>4</sup> These rights include: hospital visitation (App. Vol. I at 2, 5, 12), medical decision-making (*Id.*), bereavement leave (*Id.* at 2, 5, 13), end-of-life decision-making authority (*Id.* at 2, 5-6, 12-13), responsibility to provide for living expenses (*Id.* at 5-6, 12-13), family and medical leave (*Id.* at 6, 13), and health insurance (*Id.* at 6).

Same-sex couples already have some of the rights Plaintiffs claim they would seek absent section 29. For instance, same-sex couples have the right to visit each other in the hospital and to make medical decisions for each other if they choose. In 2002, two years *after* adoption of section 29, the Nebraska Legislature passed legislation enabling any adult nineteen years of age or older or any emancipated minor to designate orally or in writing up to five individuals not legally related by blood or marriage who are to be accorded the same hospital visitation rights as immediate family members. Neb. Rev. Stat. § 71-20,120 (2002). Additionally, the Legislature had earlier authorized any “competent adult to designate another person to make health care and medical treatment decisions if the adult becomes incapable of making such decisions.” Neb. Rev. Stat. §§ 30-3401, et seq. (1992).

Other rights Plaintiffs purportedly seek, such as end-of-life decision-making authority and responsibility to provide for living expenses, are available to individuals regardless of their involvement in same-sex relationships through a variety of other means including contracts, powers of attorney, or wills. Again, Plaintiffs’ complaint ultimately is that these benefits are not granted *based on same-sex couple status*.

As for the rights Plaintiffs seek to which they may not be currently entitled, such as family and medical leave, bereavement leave, and health insurance, these benefits are not available to unmarried opposite-sex couples either, *as couples*. Yet section 29 does

not prohibit the State of Nebraska from allowing citizens to designate adults living in the same household to receive these benefits, so long as the benefits are not premised on recognition of same-sex couple status. The hospital visitation statute discussed above, Neb. Rev. Stat. § 71-20,120 (2002), adopted in Nebraska two years after section 29, proves the point.

Neither section 29 nor any other provision of Nebraska law prevents Plaintiffs from introducing or lobbying for legislation providing all the other rights they allegedly desire. If they seek the rights as individuals rather than through the creation of a legal status designed to give legal recognition to same-sex relationships, the legislation will not conflict with section 29. Section 29 in no way makes an individual's participation in a same-sex relationship a legal barrier to seeking and obtaining legal benefits available to any other adult.<sup>5</sup> Again, Plaintiffs complaint ultimately is not that these benefits are not available, only that they cannot receive them in the manner they desire (i.e. through the creation of a legal status premised on a same-sex relationship).

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<sup>5</sup> For example, the constitutional infirmity under § 29 in the proposed LB 671 is that it attempted to premise rights upon "recognition of a domestic partnership; a partnership which could comprise same sex couples." (App. Vol. I at 6) The legislation would have been consistent with § 29 if it had been drafted to permit competent adults to designate a person of their choice to make decisions about funeral arrangements and organ donation. Indeed, similar legislation was enacted on that basis. See App. Vol. II at 554, n.7; Vol. I at 44, 156-92.

**3. Plaintiffs and Their Supporters Fully Participated in the Political Process, and Do Not Have Standing to Challenge Their Political Loss.**

Plaintiffs do not claim a right to the ultimate objective of recognition of their relationships.

The plaintiffs expressly disclaim an interest in recognition of same-sex marriages, civil unions or domestic partnerships as a remedy in this case. They seek only “a level playing field, an equal opportunity to convince the people’s elected representatives that same-sex relationships deserve legal protection” and “equal access, not guaranteed success, in the political arena.” (App. Vol. II at 549, n.1(quoting complaint)).

Plaintiffs had equal access to the political arena, and they participated vigorously in the debate leading up to the vote on section 29. (App. Vol. I at 229, 237, 254-55) Plaintiffs merely want the court to overturn the political defeat they suffered at the ballot box when section 29 was approved by Nebraska voters.

The district court ruled that “[t]his lawsuit is about equal access, not guaranteed success, in the political process.” (App. Vol. II at 580) However, as noted above, Plaintiffs participated vigorously in the political process on a level playing field, and they continue to participate in political battles for benefits at the legislative or local level, albeit not for recognition of their relationships, which is foreclosed by section 29. (App. Vol. I at 229, 237, 254)

Absent a fundamental right, a political loss is final, at least until the next round, and the loser does not have standing to challenge the loss. *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”); “Political battles . . . 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.” *Bendix Safety Restraints Group, Allied Signal, Inc. v. City of Troy*, 544 N.W.2d 481, 483 (Mich. App. 1996) (O’Connell, J., concurring).

In contrast, where the result of a political battle violates the fundamental rights of an affected group, the courts will overturn it – not to permit the losing side to continue the political battle, but to eliminate the unconstitutional deprivation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court overturned Colorado’s Amendment 2 not because it made it more difficult for homosexuals to achieve favorable legislation, but because it deprived them of the fundamental right to the ordinary protection of general laws extended to all other persons, and prevented both the state and local governments from enacting and enforcing anti-discrimination laws based on sexual orientation, both in the public and private sphere. *Id.* at 630-31, 633; *see* discussion of *Romer*, *infra*.

The cases involving laws that improperly made it more difficult for minorities to achieve favorable legislation relate to the decision-making process, not to substantive law. For example, the Supreme Court invalidated 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 (cits. omitted; emphasis original). This line of cases relates solely to equal access to the decisionmaking process.

The Colorado Supreme Court relied in part upon the *Washington* line of cases in subjecting Colorado’s Amendment 2 to strict scrutiny and invalidating it. *Romer*,

517 U.S. at 625. 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. The Court properly declined to premise its decision on exclusion from the decision-making process because the plaintiffs faced the same hurdle as anyone else in challenging an unfavorable amendment – “the typically burdensome requirements for amending state constitutions.” *Washington*, 458 U.S. at 470. That is the burden that the district court here found unacceptable. (App. Vol. II at 580)

Section 29 defines what marriage is and what it is not based on existing law; it does not create a separate decision-making process for same-sex couples. There is no equal protection violation absent creation of a separate decision-making process.

**4. Deprivation of the Ability to Seek Rights in a Way that Affirms Same-sex Relationships Does Not Constitute an “Injury” which Would Provide Standing for Plaintiffs.**

Notwithstanding Plaintiffs’ claimed deprivations, as described above, section 29 does not prevent Plaintiffs from obtaining those rights on some basis other than the recognition of a same-sex relationship status. Given that they could obtain such benefits through other means, the only “injury” they have suffered is being foreclosed from having the state create a legal status for same-sex couples that would serve as an alternative to marriage, and the satisfaction associated with achieving their preferred

policy goal. Such “psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (“psychological consequence presumably produced by observation of conduct with which one disagrees” does not confer standing).

**B. PLAINTIFFS’ CLAIMS ARE NOT RIPE.**

“The ripeness doctrine flows both from the Article III ‘cases’ and ‘controversies’ limitation and also from prudential considerations for refusing to exercise jurisdiction.” *Missouri Soybean Ass’n v. United States EPA*, 289 F.3d 509, 512 (8<sup>th</sup> Cir. 2002) (citation omitted). It “is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (citations and internal quotation marks omitted). “To be ripe for decision a case must be fit for judicial resolution and the parties must experience hardship if the court withheld consideration of the case’s merits.” *Missouri Soybean Ass’n*, 289 F.3d at 512; *see also National Park Hospitality Ass’n v. Department of the Interior*, 538 U.S. 803, 810 (2003).

Plaintiffs would experience no hardship if the court were to order dismissal of Plaintiffs' case because they have deliberately chosen not to seek the benefits they ultimately desire. While the evidence shows that there have been times when an Attorney General opinion questioning the constitutionality of legislation resulted in the legislation being withdrawn, there have also been instances where legislation passed despite an Attorney General opinion. (App. Vol. II at 555) Plaintiffs have made a deliberate choice not to seek the legislation they allegedly desire. Yet the district court rejected the State's motion to dismiss for lack of ripeness without citing any authority. *Citizens for Equal Protection v. Bruning*, 290 F. Supp. 2d 1004, 1008 (2003); *see also* App. Vol. II at 556 & n.7. Until Plaintiffs or their members actually succeed in passing legislation, and it is struck down on the basis of section 29, their claims are not ripe.

The Supreme Court's decision in *Renne v. Geary*, 501 U.S. 312 (1991), where it vacated a judgment because the claims were not ripe, is instructive. In *Renne*, Republicans and Democrats had challenged an amendment to the California Constitution that prohibited political parties from endorsing candidates for nonpartisan offices. In arguing that the case was ripe, the Democrats claimed that they had refrained from endorsing candidates for fear of prosecution under the constitutional provision. But because there was no claim that the constitutional section had prevented the Democratic Party from endorsing a particular candidate for a particular office, the

Court rejected the general allegations as unripe. *Id.* at 321. On the flip side, in the same litigation, the Court also rejected the arguments of the Republican Party, which had endorsed candidates despite the constitutional prohibition. The Court held that the Republican Party's claim was not ripe in that no action was taken to enforce the provisions in question, and the Republican Party suffered no adverse impact due to their apparent violation of the constitutional provision. *Id.* In both cases, the Court withheld review in the absence of an imminent injury.

If the Supreme Court could find no ripe injury where the plaintiffs had violated a constitutional provision without adverse consequences, Plaintiffs' claims in the present case can hardly be ripe. Here, no injury has occurred because the challenged section imposes no direct or imminent burden on Plaintiffs' right to participate in the political processes. Should Plaintiffs or their members successfully pass legislation inconsistent with section 29 and later have the measure struck down, the Court might be faced with a ripe controversy<sup>6</sup>, providing Plaintiffs claim a right to the benefit granted by the legislation. Meanwhile, in the absence of imminent injury to Plaintiffs' right of access to the ordinary political process, the district court should have dismissed the complaint for lack of ripeness.

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<sup>6</sup> For example, had any government official denied Plaintiffs a "right," that would represent ripeness. Here neither of the named defendants (the Attorney General and Governor) have denied any of Plaintiffs a "right." The fact that no Nebraska official is even alleged to have done so demonstrates this lack of ripeness.

## II.

**THE DISTRICT COURT’S CONCLUSION THAT SECTION 29 VIOLATES PLAINTIFFS’ FIRST AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION AND TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES IS INCORRECT UNDER THE LAW.**

**A. THE CLAIMS BEFORE THE COURT ARE LIMITED TO A RIGHT TO PARTICIPATE IN THE POLITICAL PROCESS.**

The sole claim in this case is that Plaintiffs believe they have a right to seek recognition of same-sex relationships without amending the constitution. (App. Vol. II at 549, n.1; Vol. I at 13-14) However, the weakness of that claim resulted in Plaintiffs repeatedly raising unrelated allegations of harm in their briefing. The district court ruled on several issues not raised or briefed by the parties, including the First Amendment and severability. The district court did not order that the complaint be amended or give the State notice that it intended to consider other issues. The State did not consent to trying issues beyond the complaint. Thus, the court abused its discretion by ruling on issues outside of the complaint. *See United States v. \$84,615 in U.S. Currency*, 379 F.3d 496, 500 (8<sup>th</sup> Cir. 2004) (“issues actually tried *without* objection are effectively

incorporated into the pleadings”); *Pariser v. Christian Health Care Sys., Inc.*, 816 F.2d 1248, 1253 (8<sup>th</sup> Cir. 1987) (appropriate to refuse to amend pleadings where defendant not on notice that another claim would be tried). “The core of due process is the right to notice and a meaningful opportunity to be heard.” *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). By deciding the case on the basis of issues not pled by Plaintiffs and not briefed by the parties, the court violated the State’s right to procedural due process.

Most of the district court’s decision addressed issues other than the claimed deprivation of a right to participate in the political process. *See* App. Vol. II at 556-70 (addressing First Amendment issues neither pleaded nor briefed); 568 n.12 (“Section 29’s broad proscriptions could also interfere with or prevent arrangements between potential adoptive or foster parents and children, related persons living together, and people sharing custody of children as well as gay individuals and people inclined to align with them to promote changes in legislation”); 571 n.14 (assuming, without briefing by the parties, that the parties believe the two sentences of § 29 cannot be severed); 572-73 (addressing the nature of “marriage,” which is not at issue in the suit); 574 (addressing specific benefits Plaintiffs desire); 567, 577, 581 (criticizing the phrase “‘similar to’ marriage”—which does not even appear in section 29); 577 (“Section 29 attempts to impose a broad disability on a single group”); 579 (concluding that section

29 excludes Plaintiffs ““from an almost limitless number of transactions and endeavors that constitute ordinary civil life in a free society,”” and that section 29 makes it more difficult for Plaintiffs to obtain benefits than it is for others); 580 (section 29 applies “to existing contracts, regulations, and benefits that may be conditioned upon a civil union or domestic partnership”); 582-83 (discussing “the breadth of the amendment” and numerous alleged problems unrelated to access to the political process); 584 (concluding that section 29 ““makes it a capital crime to be who I am””) (citations omitted).

Because these issues go beyond the pleadings and beyond the arguments of the parties, the court’s ruling on these issues violate the core of due process. *See LaChance*, 522 U.S. at 266. If the trial court intended to address these issues, it should have requested briefing by the parties, ordered the complaint amended to address the additional issues, and permitted the State to submit additional evidence or briefing. *See* Fed. R. Civ. P. 15(b).

Claims relating to an inability to obtain benefits are not the same as claims relating to an inability to have legal status provided to a relationship. The record clearly shows that Plaintiffs can and do lobby for and obtain benefits. (App. Vol. I at 44, 193-99, Vol. II at 549-50) The relief demanded in this suit is solely the right to lobby for creation of a legal status for same-sex couples without having to amend the

Constitution. The district court's intermingling of the alleged denial of benefits with the alleged denial of a right to participate in the political process was prejudicial to the State's defense that Plaintiffs have not been denied the only right at issue. It was Plaintiffs' strategic choice *not* to claim a constitutional right to benefits in their complaint. The district court erred in relying upon the claimed deprivation of those benefits and other supposed deficiencies to hold that section 29 is unconstitutional. *See LaChance*, 522 U.S. at 266.

**B. THE COURT HAD A DUTY TO CONSTRUE THE LAW IN A MANNER THAT IS CONSTITUTIONAL, IF POSSIBLE.**

The district court's analysis of issues outside the pleadings and not briefed by the parties also violated a basic tenet of construction: "that courts shall construe statutes to avoid constitutional difficulties." *United States v. DeLeon*, 330 F.3d 1033, 1035-36 (8<sup>th</sup> Cir. 2003). "When language is ambiguous," as the court concluded by finding section 29 "vague and overly broad" (App. Vol. II at 567, n.11), "and 'an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems,' unless such a construction is plainly contrary to legislative intent." *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461 (8<sup>th</sup> Cir. 1999) (citation omitted). Because Plaintiffs' claims of a denial to access to the political

process were not premised upon the extreme construction given by the district court, it should have interpreted the constitutional provision more narrowly. *Id.*

The district court recognized that Plaintiffs “expressly disclaim an interest in recognition of same-sex marriages, civil unions or domestic partnerships as a remedy in this case. They seek only ‘a level playing field, an equal opportunity to convince the people’s elected representatives that same-sex relationships deserve legal protection’ and ‘equal access, not guaranteed success, in the political arena.’” (App. Vol. II at 549, n.1, 570-71, 573-74) Yet, in addition to finding that section 29 precludes access to the political process because of being in the constitution (App. Vol. II at 570), the district court also invalidated section 29 as the result of finding specific harms resulting from the non-recognition of domestic partnerships. It found, without citation to the record or any claim by Plaintiffs, that “enforcement of Section 29, as the State interprets the provision, could void numerous existing contracts, labor agreements and corporate policies that extend to same-sex partners any benefits once offered only to spouses.” (*Id.*) It found that a recent debate over whether Omaha could provide domestic partner benefits “provides a good example of the chilling effect Section 29 has had on those wishing to advocate for partnership rights.”<sup>7</sup> (App. Vol. II at 574, n.17) It held that

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<sup>7</sup> The fact that a debate occurred is itself evidence that there is no chilling effect on advocacy.

“Section 29 attempts to impose a broad disability on a single group.” (App. Vol. II at 577) It found, without record citation, that “Section 29 reaches to issues beyond marriage—to existing contracts, regulations, and benefits that may be conditioned upon a civil union or domestic partnership (i.e., medical leave act, adoption, insurance benefits, and so forth).” (App. Vol. II at 580) Finally, after referring to benefits given in other states to “domestic partners or civil unions,” and without citation to any Plaintiff argument or record evidence, the district court found as follows:

By its terms, Section 29 prohibits contracts, benefits and arrangements that already receive recognition in various forms in Nebraska. Under Nebraska law, “domestic partnership” is a term of art, given a technical meaning in the Uniform Partnership Act, Mergers and Acquisitions, Neb. Rev. Stat. § 67-451(2). “Domestic” in relation to “partnership” is defined as a business entity formed in this state. . . . Accordingly, a domestic limited partnership composed of same-sex partners as defined in the Partnership Act could run afoul of Section 29 as it is written. “Union” is defined as “an unincorporated association of persons for a common purpose.” . . . Section 29 could affect the ability of private parties to make contracts, such as real estate transactions, prenuptial agreements and business agreements in Nebraska. . . .

The court envisions many situations involving “civil unions” that could run afoul of Section 29. For example, Section 29 could render a lease agreement involving two same-sex persons who share an apartment (traditionally known as “roommates”) invalid, depending on the interpretation of “similar same-sex relationship.” Without governmental inquiry into the intimate sexual practices of its citizens, there is simply no way for the State of Nebraska to know whether, or not, a relationship or living arrangement is in the nature of, or similar to, a marital relationship.” . . . Accordingly, the court finds that Section 29 violates the Equal

Protection Clause of the Constitution of the United States. *See Romer v. Evans*, 517 U.S. at 620.

(App. Vol. II at 582-83) It is noteworthy that the district court had no trouble understanding what domestic partnerships or civil unions are in other parts of its opinion. *See* App. Vol. II at 585. And whether a “same-sex relationship” of whatever nature is similar to a domestic partnership or civil union is not relevant unless the persons in the relationship are seeking official governmental recognition. *See* section 29.

There is no evidence in the record that section 29 is intended to interfere with private contracts, leases, personal relationships, business partnerships, real estate transactions, prenuptial agreements, or corporate policies. Neither the Nebraska courts nor the Attorney General have ever construed section 29 to apply so broadly. In fact, contrary to the court’s perceived motivation for section 29, the record evidence shows that the actual motivation for section 29 was to protect the institution of marriage from redefinition, and to prevent ambiguity about recognition of relationships such as Vermont civil unions. (App. Vol. I at 53-54) Section 29 does not eliminate any existing rights, and there is no legal or factual basis to support of the district court’s conclusion that section 29 imposes an impermissibly broad disability on a single group. Absent these unfounded findings as to the breadth of section 29, the court could not have

drawn the conclusion that section 29 is indistinguishable from Colorado’s Amendment 2, which was invalidated in *Romer*, 517 U.S. at 631 (Amendment 2 withheld from gays and lesbians “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society”). *See* App. Vol. II at 557, n.8, 561, 577. The district court should have construed section 29 narrowly, in accordance with Plaintiffs’ claims, to find only that it precludes Plaintiffs from obtaining legislative creation of a legal status for same-sex couple relationships without amending the Constitution. *See DeLeon*, 330 F.3d at 1035-36; *Planned Parenthood*, 167 F.3d at 461. That construction would render the provision constitutional in view of Plaintiffs’ strategic choice not to claim a constitutional right to same-sex marriage or an equivalent status.

**C. SECTION 29 DOES NOT INTERFERE WITH PLAINTIFFS’ FIRST AMENDMENT RIGHTS.**

The district court erred in ruling that section 29 violates the right to intimate association and the right to petition government for redress of grievances, both because Plaintiffs did not bring or argue such claims, and because section 29 does not infringe such rights. By explaining how the court erred in its analysis of the First Amendment issues, the State does not intend to waive its objection to the court having addressed them.

## 1. Right to Intimate Association

The court found that section 29 deprives Plaintiffs of their First Amendment right to associational freedom and right to petition government for redress of grievances. (App. Vol. II at 556-70) The court held that the phrase “‘similar to’ marriage,” which does not even appear in section 29, “is both exceedingly vague and overly broad.” (*Id.* at 20, n.11) *See also id.* at 577, 581 (criticizing “‘similar to’ marriage”).<sup>8</sup> The court held that the relationships “threatened” by this “vague and overly broad” phrase includes

roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property. Without determining where on this spectrum a potential domestic partnership, civil union or other ‘same-sex’ relationship would fall, let it suffice to say that associations or living arrangements affected by Section 29 are closer to the end of the continuum that deserve Constitutional protection.

(*Id.* at 568) The district court failed to specify how section 29 denies the right of intimate association to any of these relationships.

The district court erred in ruling on what infringes the right to intimate association. The Supreme Court has ruled that a law does not infringe the right to

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<sup>8</sup> The court stated that its finding that “Section 29 burdens rights of intimate association” was “not central to disposition of this case . . . .” (App. Vol. II at 567) Yet, the court later stated that its “decision with respect to the First and Fourteenth Amendment issues is dispositive . . . .” (*Id.* at 583, n.22) Either way, the decision was erroneous.

intimate association if it does not order individuals not to associate or in some other way “directly and substantially” interfere with their ability to associate. *Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 366 (1988). In *Lyng*, a union and union members challenged a food stamp law that prohibited a household from receiving food stamps—basic subsistence—if a household member was on strike. The Court held that the law did not infringe the right to intimate association because it did not prohibit the union members from associating with their families, and it did not prohibit individuals and their unions from associating for the purpose of conducting a strike. *Id.* at 365-66 (“The statute certainly does not ‘order’ any individuals not to dine together, nor does it in any other way ‘directly and substantially’ interfere with family living arrangements”) (citation omitted). The Court found it “exceedingly unlikely” that the denial of a government benefit would prevent any families from living together or any individuals from associating together to pursue lawful union activities. *Id.*; see also *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11<sup>th</sup> Cir. 1995) (rejecting claim that anti-nepotism policy infringed the intimate right of association because it did not “‘directly and substantially’ interfere with the right to marry”).

Section 29 does not criminalize any behavior, and it does not prohibit anyone from living together or organizing to lobby the government for benefits. Indeed, there

was no evidence before the district court to suggest that anyone has ceased associating as a result of section 29. Accordingly, section 29 does not infringe the right to intimate association. *See Lyng*, 485 U.S. at 365-66.

## 2. Right to Petition Government

In regard to the right to petition the government, the district court held:

Section 29 significantly chills the incentive to associate and to organize in pursuit of [Plaintiffs' desired] goals. The ability of proponents to garner support and financial backing for the pursuit will necessarily be diminished by Section 29. The result of the amendment is to discourage or impair the formation of groups and/or associations to lobby for changes in legislation that would benefit same-sex couples.

(App. Vol. II at 568-69)<sup>9</sup> These findings are without *any* evidentiary support in the record and were not argued by Plaintiffs. Conversely, one could easily surmise that section 29 provided Plaintiffs with an issue that would help them raise money for their advocacy. Indeed, the presence of advocacy groups willing to file this case seems ample evidence that advocacy has not been impaired. Regardless, the findings are

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<sup>9</sup> The State argued that the plaintiffs had full access to the political process. It also argued that plaintiffs could obtain any rights that married couples enjoy, so long as the rights are not premised on recognition of a same-sex relationship. The court misconstrued that argument as meaning that “the State concedes that full access to the political process . . . will be forbidden if premised on the recognition of a same-sex relationship.” (App. Vol. II at 569) The State made no such concession, and does not believe its argument could be validly construed in that manner.

irrelevant to whether section 29 infringes Plaintiffs' First Amendment right to petition for redress of grievances.<sup>10</sup>

The district court cited no authority for its holding that section 29 violates the First Amendment right to petition government. Indeed, the authority is to the contrary. The Supreme Court has held that the right is not "chilled" or infringed unless "the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see also O'Keefe v. Van Boening, WSP*, 82 F.3d 322, 325 (9<sup>th</sup> Cir. 1996) (same, citing *Laird*). Section 29 simply does not place any regulation, proscription or compulsion on Plaintiffs. Perhaps that is why Plaintiffs did not bring a claim under this theory.

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<sup>10</sup> The court also erred in holding that "[a] blanket prospective prohibition on any type of legal recognition of a same-sex relationship not only denies the benefits of favorable legislation to these groups, it prohibits them from even asking for such benefits." (App. Vol. II at 569-70) This holding is directly refuted by the record evidence that Plaintiffs have successfully participated in the political process since the adoption of section 29. *See, e.g., App. Vol. II at 554, n.6.*

### III.

#### SECTION 29 SATISFIES THE EQUAL PROTECTION

##### CLAUSE.

The Fourteenth Amendment provides that no State shall “deny *to any person* within its jurisdiction the equal protection of the laws.” (Emphasis added.) Thus, the right to equal protection of the law is an *individual* right. As the Supreme Court held long ago, “[i]t is the individual who is entitled to the equal protection of the laws . . . .” *Missouri v. Canada*, 305 U.S. 337, 351 (1938); *see also, Shelley v. Kramer*, 334 U.S. 1, 22 (1948) (“The rights created by the first sentence of the Fourteenth Amendment are, by its terms, guaranteed to the individual”). The Eighth Circuit has likewise affirmed this principle. *Kansas City, Mo. v. Williams*, 205 F.2d 47, 52 (8<sup>th</sup> Cir. 1953) (“Violations of the Fourteenth Amendment are of course violations of individual or personal rights”); *Brown v. Ramsey*, 185 F.2d 225, 227 (8<sup>th</sup> Cir. 1950) (“It is the individual who is entitled to the equal protection of the laws”) (citation omitted). Thus, in order to establish an equal protection violation, Plaintiffs were required to establish that they are treated unequally as individuals rather than as couples. This they failed to do. All of their allegations relate to the rights of couples, not to the rights of individuals. Plaintiffs have specifically declined to claim a right to recognition of their relationships in this litigation.

**A. SECTION 29 DOES NOT IMPINGE A FUNDAMENTAL RIGHT  
NOR TARGET A SUSPECT CLASS.**

In spite of the district court’s ruling upon First Amendment issues that were not raised by the Plaintiffs, section 29 does not burden any fundamental rights, nor does it target a suspect class. Thus, the rational basis test should be applied in this case. “[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” *Romer v. Evans*, 517 U.S. 620, 631 (1996)(citation omitted).

The right claimed by Plaintiffs is the ability to effectively lobby the state legislature for legislation contrary to section 29. That is clearly not a fundamental right. “[T]he Court implicitly rejects the Supreme Court of Colorado’s holding, *Evans v. Romer*, 854 P.2d 1270, 1282 (1993), that Amendment 2 infringes upon a ‘fundamental right’ of ‘independently identifiable class[es]’ to ‘participate equally in the political process.’” *Id.* at 642, n.1 (Scalia, J., dissenting) .

Further, neither Plaintiffs nor their homosexual members are a suspect class. This court, like all circuit courts that have ruled upon the issue, has declined to apply heightened scrutiny to equal protection cases involving homosexuals because homosexuality is not a suspect classification. See *Richenberg v. Perry*, 97 F.3d 256, 260 (8<sup>th</sup> Cir. 1996); *Lofton v. Secretary of Dept. of Children and Family Services*, 377

F.3d 1275, 1277 (11<sup>th</sup> Cir. 2004)(all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class).

**B. THE COURT APPLIED AN IMPROPER LEGAL STANDARD.**

The district court erred in basing its equal protection holding on harms unrelated to access to participation in the political process. *See* above. Its holding was primarily premised on unrelated harms that it inferred from section 29. It cited no authority to the effect that any group is entitled to continue lobbying for social change without a constitutional impediment, where there is no claim of a constitutional right to the ultimate goal. The legal basis for the district court’s equal protection holding was its improper reliance on the Colorado Supreme Court’s holding in *Romer* to conclude that section 29 violates equal protection because of lack of access to the political process, and its erroneous application of the rational basis test.

**1. *Romer* Is Inapposite.**

Notwithstanding the vast difference between section 29 and Colorado’s Amendment 2, overturned in *Romer*, the district court found that “Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*.” (App. Vol. II at 577, 557 n.8, 561) This conclusion is only possible because of the court’s finding that section 29 “prohibits a class of citizens from accessing the Nebraska Unicameral to advocate for the full array of benefits afforded to the other

citizens of the State of Nebraska,” (App. Vol. II at 578), and its assumption that Amendment 2 was unconstitutional because it excluded plaintiffs therein from the political process. (*Id.* at 565)

In *Romer*, Colorado’s Amendment 2 “repeal[ed] existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation . . . [and] prohibit[ed] any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future” without amending the constitution. *Evans v. Romer*, 882 P.2d 1335, 1339 (1994). The Colorado Supreme Court interpreted the provision as prohibiting individuals “from obtaining legislative, executive, and judicial protection or redress from [sexual orientation] discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment.” *Id.*

The Supreme Court relied upon the Colorado court’s construction of Amendment 2 to conclude that it “deprive[d] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.” *Romer*, 517 U.S. 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.” *Id.* at 631. It denied individual 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, as construed, 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).

The Supreme Court found Amendment 2 unconstitutional not because it was found in the Colorado Constitution, but rather because it permitted such unlimited discrimination against homosexual persons, preventing the state and local governments from enacting anti-discrimination laws based on sexual orientation, both in the public and private sphere. *Id.* The U.S. Supreme Court specifically affirmed *Romer* on a rationale *different* from the Colorado Supreme Court. *See Romer*, 517 U.S. at 625-26 (declining to affirm Colorado Supreme Court’s rationale relating to participation in the political process). Conversely, as Justice Scalia noted, “the Court implicitly rejects the Supreme Court of Colorado’s holding, *Evans v. Romer*, 854 P.2d 1270, 1282 (1993), that Amendment 2 infringes upon a ‘fundamental right’ of ‘independently identifiable class[es]’ to ‘participate equally in the political process.’” *Romer*, 517 U.S. at 642, n.1 (1996)(Scalia, J., dissenting). There is no suggestion in *Romer* that the U.S. Supreme Court would have upheld the law if it had been a statute instead of an amendment. As a statute, Amendment 2 would have removed the same general protections of the law as did the constitutional amendment.

In stark contrast to Amendment 2, section 29 has no impact on individual rights. Plaintiffs and their members have the same individual rights as every other resident of

Nebraska. Plaintiffs' members enjoy all the benefits and protections of Nebraska law that any other person has. Plaintiffs continue to lobby for rights for same-sex couples. (App. Vol. I at 229, 237, 254) Their homosexual members have the same right to lobby for change as their heterosexual members. Moreover, Plaintiffs have succeeded in obtaining rights specifically denied by the amendment at issue in *Romer*. For example, crimes committed against persons because of their "sexual orientation" are subject to enhanced punishment under Neb. Rev. Stat. § § 28-110 and 28-111 (Cum. Supp. 2004). NAJE has successfully lobbied against removing "sexual orientation" from the hate crimes list and has lobbied in favor of other sexual orientation bills. (App. Vol.I at 237) At least three bills involving "sexual orientation" were introduced in the 2005 legislative session, LB 50, LB 627, and LB 759, and numerous amendments relating to sexual orientation were offered to LB 13, LB 312, LB 425, LB 426, LB 427, and LB 548.<sup>11</sup> Section 29 is very clearly different from Amendment 2.

Finally, there is an indisputable and determinative difference between the claims in *Romer* and the claims at issue here. The plaintiffs in *Romer* had a constitutional right to the general protection of the laws that Amendment 2 denied to them as individuals; Plaintiffs have chosen not to claim a constitutional right to the only thing section 29 has

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<sup>11</sup> See information available at [www.unicam.state.ne.us](http://www.unicam.state.ne.us) (last visited August 2, 2005).

denied them – official recognition of their relationships. Absent denial of an individual right, or a constitutional basis for claiming the only “right” section 29 withholds, Plaintiffs have no equal protection claim.

**2. The Court Should Not Have Reached the Merits of the Equal Protection Claim.**

The essence of an equal protection claim is that similarly situated persons are treated differently. *See Murphy v. Missouri Dep’t. of Corrections*, 372 F.3d 979, 984 (8<sup>th</sup> Cir. 2004) (“To succeed on an equal protection claim, [plaintiff] must show that he is treated differently than a similarly situated class”). The district court committed clear error in concluding that Plaintiffs are treated differently than other persons in regard to the ability to participate in the political process. The record shows that they participated in the political process on a level playing field before section 29, and that they continue to do so. Plaintiffs and their political allies face the same obstacle for obtaining favorable legislation as any other group that disagrees with a constitutional provision. *Cf. Washington*, 458 U.S. at 470 (burden of amending constitution not subject to equal protection attack). Thus, Plaintiffs have no valid claim that they are treated differently than any other class. Absent differential treatment, they do not have an equal protection claim, *Murphy*, 372 F.3d at 984, and the court should never have reached the question of whether there is a rational basis for section 29.

### 3. The State Has a Rational Basis for Protecting Traditional Marriage.

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>12</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

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<sup>12</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, LINGUAE 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”).

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>13</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 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 primary 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>14</sup>

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<sup>13</sup> No state legislature 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”).

<sup>14</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.

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>15</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 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>16</sup>

The Arizona Court of Appeals recently referred to the state’s interest in encouraging procreation to take place within marriage:

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<sup>15</sup> Marriage would have no relationship to our “very existence and survival” if it had nothing to do with procreation.

<sup>16</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.

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 Oregon Court of Appeals in *Singer v. Hara*, 522 P.2d 1187, 1195 (1974), similarly 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 statutes, effective July 1, 2000, created “marriage” in everything but name only for same-sex couples. 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.

The 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. People may disagree about the need to protect the definition of traditional marriage, but attempts to steer procreation into marriage can

hardly be called irrational. 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.

#### **4. Rational Basis Does Not Require a Precise Fit.**

“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); *see also Vasquez-Velezmore v. U.S. Immigration and Naturalization Serv.*, 281 F.3d 693, 697 (8<sup>th</sup> Cir. 2002) (same). 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 Beach Communications*, 508 U.S. at 315. “On rational basis review, . . . those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’” *Id.* at 314-15.

The district court cited the standard, but failed to apply it. *See* App. Vol. II at 575-76. The court said that section 29 “is too narrow in that it does not address other potential threats to the institution of marriage, such as divorce.” (App. Vol. II at 578) Failing to address all phases of a perceived problem at one time does not undermine the rational basis of a statute. *See Heller*, 509 U.S. at 321; *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (“reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting others”). Thus, the fact that section 29 does not address other threats to marriage fails to undermine the rational basis for section 29.

The court further held that section 29 “is too broad in that it reaches not only same-sex ‘marriages,’ but many other legitimate associations, arrangements, contracts, benefits and policies.” (App. Vol. II at 578) As noted above, these “harms” were not alleged or argued by Plaintiffs, and the court’s construal of section 29 so broadly violates the principle that courts are to construe provisions narrowly. *See, supra*.

Finally, the district court held that because it could conceive of alternative State interests, as cited in a recent California case, “there is an inadequate fit between [the stated] goal and the breadth of Section 29.” (App. Vol. II at 581) This again ignores the deferential standard of review under rational basis. The issue is not whether the

court can conceive of justifications for a different policy, or whether there is a perfect fit between the asserted goal and the law, but whether the plaintiffs have negated every conceivable justification for the classification. *Heller*, 509 U.S. at 321; *Beach Communications*, 508 U.S. at 313. The State has no burden, *id.*, and it need not justify excluding a class if there is a rational basis for differential treatment. *See Johnson v. Robison*, 415 U.S. 361, 382-83 (1974) (issue was whether there was a valid distinction between active duty veterans and conscientious objectors, not whether Congress had to exclude conscientious objectors in order to accomplish its objective of motivating soldiers to accept active duty). Thus, even if there were differential treatment in regard to access to the political process, the State has a rational basis for the distinction. The trial court committed error in ruling to the contrary.

**C. SECTION 29 DOES NOT PROHIBIT PLAINTIFFS FROM OBTAINING RIGHTS.**

The district court found that section 29 “prohibits a class of citizens from accessing the Nebraska Unicameral to advocate for the full array of benefits afforded to the other citizens of the State of Nebraska.” (App. Vol. II at 578)<sup>17</sup> This finding has no support in the record. Section 29 imposes no limitation on the individual rights of

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<sup>17</sup> The court’s definition of the class as “‘gay, lesbian and homosexual’ couples . . . (or . . . people who would lobby on their behalf),” belies any notion that there is a quantifiable class at issue.

Plaintiffs' members. Plaintiffs can obtain and have obtained legal safeguards for their members even with section 29 in existence. In fact, Plaintiffs' filings in this case clearly demonstrate this fact. Their complaint and trial brief state that section 29 makes it futile for Plaintiffs to ask for rights such as hospital visitation. (App. Vol. I at 5, Vol. II at 395, 574) However, Neb. Rev. Stat. § 71-20,120, passed in 2002, allows any adult in Nebraska to designate, orally or in writing, up to five people that will be entitled to the same hospital visitation rights as immediate family members. Plaintiffs successfully lobbied for this legislation, thereby demonstrating that they can effectively participate in the political process to obtain the rights they seek despite section 29. (App. Vol. I at 237) Plaintiffs complain that they cannot obtain legislation such as LB 671, which would have permitted domestic partners to make an anatomical gift of and/or dispose of a partner's remains. *See* App. Vol. II at 552-53. But the Nebraska Legislature passed similar legislation the same year that permitted any "authorized person," including Plaintiffs' members, to dispose of a person's remains. (App. Vol. II at 554, n.6, Vol. I at 44, 156-92) Plaintiffs have full access to the political process. They have the same rights as all other individuals, and they may obtain rights via legislation that married couples enjoy, so long as those rights are not premised on the creation of a legal status meant to provide recognition of a same-sex relationship. (App. Vol. II at 554, n.6, Vol. I at 44, 156-92, 237)

Section 29 creates no obstacle to obtaining a full panoply of legal safeguards through a reciprocal-beneficiary statutory scheme somewhat similar to the one in place in Hawaii. *See* Haw. Rev. Stat. § 572C. Plaintiffs truly seek official creation of a legal status, not the legal benefits and protections that might accompany those relationships. *See*, App. Vol. II at 414-15 (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)); 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); at 28 (referring to obtaining “protections through domestic partnerships, [and] . . . through marriage”). Absent a deprivation of individual rights, section 29 satisfies the Equal Protection Clause. *See Kansas City*, 205 F.2d at 52; *Brown*, 185 F.2d at 227.

#### **D. SECTION 29 WAS NOT BORN OF ANIMUS**

The district court ruled that the intent and purpose of Section 29 was animus toward homosexuals. (App. Vol. II at 578)

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. The record in this case demonstrates the lack of animus by the sponsors of section 29. While it is impossible to ascertain the motivation of *everyone* who voted for section 29, the evidentiary record is replete with evidence as to the reasons advanced by the groups publically advocating the passage of the amendment, none of which include animus. For example:

App. Vol. I at 58: “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.”

App. Vol. I at 310-27: (From television and radio advertisements sponsored by the Nebraska Coalition for the Protection of Marriage)

Television spot entitled “Law Book” (*Id.* at 311): “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.”

Radio spot Number NCPM-100 - Children (*Id.* at 317): “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 NCPM-103 - Remarkable (*Id.* at 321): “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.”

App. Vol. I at 77: “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.”

App. Vol. I at 80-82: “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.”

App. Vol. I at 100: “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.”

App. Vol. I at 203: “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.”

App. Vol. I at 206: “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.”

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.” (App. Vol. I at 223)

Affidavits submitted by Plaintiffs allege that the passage of section 29 has created an environment where some homosexuals feel unsafe. (App. Vol. I at 270) While that may represent their state of mind, the record is entirely devoid of any evidence supporting these feelings.

The record lacks any evidence of animus toward homosexuals. However, the court ruled that “it is clear that the purpose of Section 29 is to deny access to the legislative process by this group of citizens (or by people who would lobby on their behalf).” (App. Vol. II at 578) The district court’s inference of animus in the absence

of any evidence to that effect is clear error. The record demonstrates 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.

**E. SECTION 29 DOES NOT PROHIBIT ANY PRIVATE CONTRACTS.**

Constitutional provisions simply do not apply to private individuals unless they are acting for the State. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (“the conduct of private parties lies beyond the Constitution’s scope” unless they are acting on behalf of the government); *see also United States v. Miller*, 152 F.3d 813, 815 (8<sup>th</sup> Cir. 1998) (same). Absent clear record evidence of an intent to apply section 29 to private contracts, a definitive opinion from a Nebraska court ruling that section 29 applies to private contracts, or even an Attorney General opinion to that effect, the trial court committed clear error in so construing the amendment. *See Planned Parenthood*, 167 F.3d at 461 (court must construe provision in manner that avoids constitutional problems, absent clear evidence of contrary legislative intent); *see also DeLeon*, 330 F.3d at 1035-36; *United Food*, 857 F.2d at 434.

## IV

### **THE DISTRICT COURT ERRED IN ITS UNPRECEDENTED INTERPRETATION OF THE BILL OF ATTAINDER CLAUSE.**

The 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 since the Nineteenth 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 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).

A review of those laws that have satisfied the narrow definition of a bill of attainder is useful to establish a proper analytical framework within which to examine section 29. In one of its earliest cases, the Supreme Court defined a bill of attainder as “a legislative act which inflicts punishment without a judicial trial.” *Cummings v. Missouri*, 71 U.S. 277, 323 (1867). Following the Civil War, Congress and several states adopted provisions that required persons to take loyalty oaths in order to be able to practice their professional occupations, as in *Cummings* and *Ex Parte Garland*, or to be able to have access to the courts, as in *Pierce v. Carskadon*.

In *Cummings*, a Roman Catholic priest was fined and jailed for preaching without having taken the loyalty oath. The Court struck down amendments to the Missouri Constitution which declared that “[n]o person, after the expiration of the sixty days [from adoption of amended Constitution], is permitted, without taking the oath, to practice as an attorney . . . nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach . . . .” 71 U.S. at 317. The Court explained that the amendment was

aimed at past acts, and not future acts . . . to operate upon parties who . . . had aided or countenanced the Rebellion . . . by depriving such persons of the right . . . to pursue their ordinary and regular avocations. . . . The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed.

To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. . . . The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which . . . have been supposed to be fundamental and unchangeable. *They assume that the parties are guilty*; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way -- by an inquisition, in the form of an expurgatory oath . . . .

*Cummings*, 71 U.S. at 327-28 (emphasis added).

Similarly, in *Ex Parte Garland*, 71 U.S. 333(1867), the Court struck down an act passed by Congress that effectively disbarred former members of the Confederate government by requiring lawyers to take a loyalty oath stating that they had never served in the Confederate government. Garland had served as a member of the Confederate Congress but had received a full pardon from President Andrew Johnson. The Court held (1) the power of the President to pardon “is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders,” *id.* at 380; and (2) that while “[t]he legislature may undoubtedly prescribe qualifications . . . to which [an attorney] must conform,” *id.* at 379, because attorneys are officers of the court, “[t]heir admission or their exclusion is . . . *the exercise of judicial power . . .*” *Id.* (emphasis added). Congress, through a legislative act, had determined guilt and inflicted a punishment on lawyers (exclusion from practice) without a judicial trial. *See also Pierce v. Carskadon*, 83 U.S. 234

(1873) (West Virginia Reconstruction act conditioning access to courts upon the taking of a loyalty oath was held by the Court to be a bill of attainder because it determined guilt without a judicial trial, thereby depriving defendants of an existing right based on past deeds).

The oath requirements at issue in *Cummings*, *Garland*, and *Pierce* were bills of attainder because Congress, instead of the courts, had determined guilt and inflicted punishment on specific classes of persons, for past actions.

The Twentieth Century cases further demonstrate the limited reach of the Bill of Attainder Clause. In *Lovett*, 328 U.S. 303, which was heard by the Court at the end of World War II as the Iron Curtain was about to fall over Eastern Europe, 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 for past actions 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.

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 (emphasis added).

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 for past acts 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 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 it is a rule of general applicability for all the citizens of Nebraska.

**A. THE DISTRICT COURT MISCONSTRUED THE PURPOSE OF THE BILL OF ATTAINDER CLAUSE.**

The district court's decision reveals a 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 445-46 (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 infringement on the judicial prerogative. *See Lovett*, 328 U.S. at 326 (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”).

The criteria for determining whether a law is a bill of attainder are all consistent with the fact that the clause was intended to implement the principle of the separation of powers: a legislative determination of guilt rather than a judicial trial; a readily ascertainable individual or class; and infliction of punishment. *See Selective Serv. Sys.*, 468 U.S. at 846-47. The separation of powers element is unavoidable in the prong relating to a legislative versus judicial determination of guilt. The requirement that the individual or class must be readily identifiable is a necessary element of adjudication of guilt. And the infliction of punishment is what courts ordinarily do after a finding of guilt. Viewed from this separation-of-powers vantage point, section 29 does not meet any of the criteria for a bill of attainder.

**B. THE DISTRICT COURT’S BILL OF ATTAINDER ANALYSIS  
RENDERS THE ELEMENT OF “WITHOUT A JUDICIAL  
TRIAL” SUPERFLUOUS.**

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 846-47 (emphasis added; quoting *Nixon v. Administrator of General Serv.*, 433 U.S. 425, 468 (1977)); 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. Similarly, in *Lovett* the 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. Thus, the bill of attainder element relating to the lack of a judicial trial is directly related to the required element of a finding of guilt – a determination of guilt is the point of a trial.

The district court quoted the standard regarding a legislative finding of guilt. (App. Vol. II at 584) It noted that the parties agreed that there had been no judicial trial, but failed to address the State’s objection that there had been no finding of guilt. (*Id.* at 585) The court’s apparent assumption that the “without a judicial trial” element can be met without an adjudication of guilt would completely eliminate this bill of attainder element. No legislative act or constitutional amendment ever involves a

judicial trial. Accordingly, this element would be meaningless if it did not require a legislative determination of guilt. *See Selective Serv. Sys.*, 468 U.S. at 846-47; *Nixon*, 433 U.S. at 468; *Brown*, 381 U.S. at 445; *Lovett*, 328 U.S. at 314.

There is no record evidence that would support a finding that the Nebraska voters deemed those who seek official recognition of same-sex couples to be guilty of any wrongdoing. The court erred as a matter of law in finding a bill of attainder without finding facts that include a determination of guilt.

**C. THE DISTRICT COURT ERRED IN ITS DESCRIPTION OF THE ATTAINTED CLASS.**

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 members,<sup>18</sup> named Government employees,<sup>19</sup> or members of a particular profession, such as priests<sup>20</sup> or lawyers.<sup>21</sup> This court has held that “[a]n

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<sup>18</sup> *United States v. Brown*, 381 U.S. 437 (1965).

<sup>19</sup> *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>20</sup> *Cummings v. Missouri*, 71 U.S. 277 (1867).

<sup>21</sup> *Ex parte Garland*, 71 U.S. 333 (1867).

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 (8<sup>th</sup> Cir. 1997) (upholding as constitutional a county ordinance that only affected one business).

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. The district court’s holding 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 who has opposed or will oppose section 29.

The district court failed to identify an “easily ascertainable” group that comprises the attained class, even though it acknowledged the standard. (App. Vol. II at 585) The court found that:

Section 29 both names specific groups and describes them in terms of their conduct. By its terms, Section 29 targets the specific group of people who have entered into, will enter into, or seek to enter into “civil unions” and “domestic partnerships” and describes the group’s conduct as “the uniting of two persons of the same sex.”

(*Id.*) However, the record clearly shows that this is not the only group of people who are unable to effectively lobby on a local or state level for recognition of same-sex

relationships – the claimed deprivation at issue. Indeed, the court could not maintain its own description of the class. Two paragraphs after defining the “easily ascertainable group,” the court referred to the group as “lesbian, gay and bisexual people *and their supporters . . .*” (*Id.*) (emphasis added).<sup>22</sup> *See also* App. Vol. II at 588 (“Section 29 is intended to deny access to all levels of the government *to anyone* who advocates for extension of benefits and protections to same-sex couples”) (emphasis added). These inconsistent descriptions, while consistent with Plaintiffs’ confused description of the alleged attainted class, cannot qualify as identifying an easily ascertainable group for bill of attainder purposes.

Plaintiffs admitted that not all members of their organizations are homosexuals. *See*, App. Vol. I at 236 (“NAJE has members across the state, *including* members who are gay, lesbian, or bisexual”) (emphasis added)). Indeed, the president of Plaintiff NAJE, Shelley Kiel, was in an opposite-sex relationship at the time of her affidavit. (*Id.* at 238) Moreover, the fact that nearly 30% of Nebraska voters opposed section 29 (App. Vol. I at 42) demonstrates that legal recognition for same-sex relationships enjoys support among many who are not homosexual.<sup>23</sup>

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<sup>22</sup> Significantly, this “group” is comprised of all homosexuals, not only those who have or wish to have domestic partnerships or civil unions.

<sup>23</sup> According to surveys recognized as authoritative by 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

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 who felt they had a moral duty to oppose section 29, persons whom Plaintiffs have subsequently persuaded that they should 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. Indeed, the court demonstrated that the class is not easily ascertainable by attempting to list the numerous living, social, and associational arrangements, including “roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property.” (App. Vol. II at 567-68) The group members’ ability to join or leave the

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States is the National Health and Social Life Survey (NHSLs). The NHSLs found that 2.8% of the male, and 1.4% of the female, population identify themselves as gay, lesbian, or bisexual”).

class prevents an alleged bill of attainder from meeting the specificity element. *See 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). *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 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 district court erred as a matter of law in ruling that section 29 applies to a readily ascertainable class.

**D. THE DISTRICT COURT ERRED IN CONCLUDING THAT SECTION 29 WAS INTENDED TO PUNISH PLAINTIFFS.**

“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 Sys.*, 468 U.S. at 847; *see also Planned Parenthood*, 167 F.3d at 465.

Significantly, Plaintiffs did not argue, and the district court never found, that there is any evidence of an intent to punish the class of persons who favor or who wish to lobby in favor of recognition of same-sex relationships. Nevertheless, the district court appears to have found punishment under all three prongs of the test. It found that section 29 constitutes traditional punishment because it “disenfranchises” Plaintiffs by “prohibit[ing] their political ability to effectuate changes opposed by the majority.” (App. Vol. II at 587) This finding is unsupported in the record, and has no legal support. As shown by the record, Plaintiffs can and do effect political change. To the extent that they are unable to effect political change opposed by the majority, they are in the same shoes as every other citizen. And the court erred in citing *Brown* as an authority for its apparent conclusion that a group is “disenfranchised” if it is unable to accomplish its political goals without amending the constitution. *Brown* supports the conclusion that denial of a right to vote can be viewed as punishment. *Brown*, 381 U.S. at 441-42, 448. However, *Brown* said nothing about the typically burdensome requirements for amending state constitutions

being punishment. *Cf. Washington*, 458 U.S. at 470 (such laws “provid[e] a just framework within which the diverse political groups in our society may fairly compete”) (citation omitted). If the requirements for amending a constitution could be deemed “disenfranchisement,” any loosely identifiable group that opposes a constitutional amendment would be able to overturn it by claiming that the amendment disenfranchised them.

Any finding of animus or intent to punish is clearly refuted by evidence discussed above regarding animus. Yet the district court, relying upon arguments in the parties’ briefs and on allegations in the complaint, found that there was an intent to punish.<sup>24</sup> (App. Vol. II at 587-88) The court cited the State’s argument that there is no civil right to control the terms of a political battle and no right to win to draw the non-sequitur conclusion “that the intent of Section 29 is to silence the plaintiffs’ views and dilute their political strength.” (*Id.* at 587) The record proves unequivocally that section 29 has not silenced Plaintiffs’ views; and a response of amending a constitution to end a political battle cannot rationally be viewed as an intent to “punish” all opponents by diluting their political strength. When a political battle is fought,

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<sup>24</sup> The court erred in relying upon arguments made in briefs and allegations in the complaint as evidence in support of its legal findings. In addition, the finding of an intent to punish is inconsistent with the court’s earlier statement that “[t]he court is unable to discern the intent of the voters.” (App. Vol. II at 571, n.14) It is also noteworthy that the court had earlier stated that “[a] voter could have voted for Section 29 for a number of reasons.” (*Id.* (citing 23 exhibits))

*someone must lose.* Unless there is a constitutional right to the ultimate objective, losing a fairly-fought political battle leaves one of the parties without judicial recourse. *See Fritz*, 449 U.S. at 179; *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001); *Bendix*, 544 N.W.2d at 483.

The district court further erred in relying upon *Romer*, an equal protection case, to conclude that section 29 is a bill of attainder. (App. Vol. II at 588) The Bill of Attainder Clause 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>25</sup> Plaintiffs’ subjective feeling that losing a vote on a constitutional amendment constitutes “unwarranted punishment” does not make it so. *Id.*

The voters of Nebraska chose to amend their constitution by defining what marriage is, and what it is not. It is readily apparent that there was a nonpunitive purpose for section 29—preserving marriage and its associated benefits as a unique status in society. *See Knight v. Superior Ct*, 26 Cal. Rptr. 3d 687, 694 (Ct.App. 2005) (discussing section 29 as a provision that intended “to limit the benefits associated with marriage to marriage between men and women”). Section 29 is thus non-punitive, and is not a bill of attainder.

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<sup>25</sup> The law review article by Professor Amar upon which the court relied (Mem. at 37) 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 clause in *Brown*, 381 U.S. at 442-46.

**THE DISTRICT COURT ERRED IN STRIKING DOWN  
THE ENTIRE AMENDMENT.**

When a state law is challenged on the basis of federal law, “state law is displaced only ‘to the extent that it actually conflicts with federal law.’” *Dalton v. Little Rock Family Planning Serv.*, 516 U.S. 474, 476 (1996) (citations omitted). As the Supreme Court held in *Dalton*, “[t]he rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.” *Id.* (citation omitted). The constitutional amendment at issue in *Dalton* prohibited the use of “public funds . . . to pay for any abortion, except to save the mother’s life.” *Id.* The Eighth Circuit affirmed the trial court’s invalidation of the entire *Dalton* amendment because it conflicted with federal law. The Supreme Court reversed and “remand[ed] for entry of an order enjoining the enforcement of [the amendment] only to the extent that the amendment imposes obligations inconsistent with federal law.” *Id.* at 478.

The district court in the present case held that the two sentences of section 29 could not be severed. (App. Vol. II at 571, n.14) It ruled that because the parties did not address severance, it “interprets the parties’ positions as an acknowledgment that section 29 embodies one concept that cannot be severed.” (*Id.*) This mis-

characterizes the State's position and, again, reflects error as a result of the court deciding issues Plaintiffs did not raise. Neither party ever briefed or even addressed the issue of severability, and the court should not have presumed the position of the parties without a specific inquiry on that subject. Plaintiffs requested in their complaint, and again in their trial brief, that section 29 be struck down in its entirety. (App. Vol. I at 15, Vol. II at 395-96) However, they never provided any evidence, argument, or legal justification for striking down the first sentence; and that sentence has never been at issue in this litigation.

The court acknowledged that the constitutionality of the first sentence was not presented. (*Id.*) However, even though the Plaintiffs cited no legal authority for striking down the first sentence of section 29 or argued that the two sentences of section 29 were not severable, the court struck down the entire amendment.

The district court properly recognized that state law determines whether a provision may be severable. However, it misconstrued Nebraska law on the issue. In the only Nebraska Supreme Court case addressing severability of a voter initiative, the court held that it must first look at "whether, absent the invalid portion, a workable and independently enforceable plan remains." *Duggan v. Beermann*, 544 N.W.2d 68, 79 (Neb. 1996). An entire act fails only when the "invalid portions [of a statute] are so interwoven with the rest of the act that the act may not be operative with the void

portions eliminated . . . .” *Id.* (citation omitted). In *Duggan*, because the invalid portions were intertwined with the portions that otherwise were valid, the court struck down the entire act. *Id.* In the present case, the two sentences of section 29 are clearly distinct, and the first sentence can easily stand independent of the second sentence. The district court did not find that the two sentences of section 29 are so interwoven as to render the first sentence inoperative without the second sentence.

The second factor of the severability analysis is “whether the unconstitutional portion was such an inducement that the constitutional portions would not have passed without it.” *Id.* In light of the district court’s view that the purposes asserted for the amendment support only the first sentence, (App. Vol. II at 589), it could not have held that the second sentence was an inducement to passing the first.

The final factor of the analysis is whether there is a severability clause, but that factor is not determinative. *See Duggan* at 80-81. Here, there is no severability clause. However, because the sentences are otherwise severable, the court should have followed the Supreme Court’s admonition that ““a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.”” *Dalton*, 516 U.S. at 476 (citation omitted). Thus, even if the court found the second sentence of section 29 to offend the Constitution, the court erred in striking down section 29 in its entirety.

## VI

### **THE DISTRICT COURT'S AWARD OF ATTORNEY FEES AND COSTS SHOULD BE REVERSED.**

The State does not contest the fact that, under the district court's decision in this case, Plaintiffs were "prevailing parties" to whom the court could award attorney fees and costs under 42 U.S.C. § 1988. Neither does the State contest the amount of attorney fees and costs awarded by the district court. Rather, it is the State's position that, for the reasons enunciated above in this brief, judgment in favor of Plaintiffs on the merits of their claims should not have been entered - either the case should have been dismissed on jurisdictional grounds or the district court should have found in favor of the State on Plaintiffs' claims.

If the State prevails in this appeal and the district court's judgment declaring section 29 unconstitutional and enjoining its enforcement is reversed, Plaintiffs will no longer be "prevailing parties" to whom attorney fees and costs can properly be awarded. Therefore, the State simply asks that, if the district court's decision on the merits of Plaintiffs' claims is reversed, the award of attorney fees and costs (App. Vol. II at 663-64) also be reversed.

## CONCLUSION

Plaintiffs lack standing because they have suffered no injury. They have made a strategic decision not to pursue legislation contrary to section 29, and until they do so, there is no case or controversy capable of redress by any federal court.

Section 29 does not prevent Plaintiffs and their members from associating or from lobbying in any way, and therefore does not violate the First Amendment right to freedom of expression or freedom of association. The fact that Plaintiffs must pass a constitutional amendment to achieve their stated goals does not burden them any more than any other person or group who opposes a constitutional amendment.

Section 29 does not violate the equal protection clause because it does not target a suspect class nor burden a fundamental right, and because protecting procreation within the traditional family unit is a rational basis for defining marriage.

Section 29 is not a bill of attainder because it does not inflict punishment on a clearly identifiable class of people.

For these reasons, the State respectfully requests that the decision of the district court be reversed and that this matter be remanded to the district court with directions to enter judgment for the State and to vacate the award of attorney fees and costs made to Plaintiffs.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

It is hereby certified that on August \_\_\_\_, 2005, two copies of the Brief, together with diskette containing the Brief, have been served on counsel for the Appellees herein by placing said copies in the United States Mail, first class postage prepaid, addressed to the following counsel of record for Appellees to the following individuals:

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the diskette containing the Brief of Appellants created using WordPerfect version 8.0, was scanned for viruses using the Norton AntiVirus Corporate Edition version 7.60.926 and was found to be virus free.

Dated this \_\_\_\_ day of August, 2005.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the court's order modifying the number of words allowed because it contains a grand total of 22,476 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 8.0 in Times New Roman type style, font size 14.

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