CASE NO. 05-2604

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITIZENS FOR EQUAL PROTECTION, INC., et al.

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

Honorable Joseph F. Bataillon, United States District Judge

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND/OR REHEARING EN BANC

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Statement of Reasons Why
Rehearing Should Be Granted

The panel's decision conflicts with the decision of the United States Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). The panel fails to follow *both* of *Romer*'s central holdings.

Romer struck down a section of the Colorado Constitution that prohibited government from protecting gay people, and gay people alone, from discrimination. *Romer* first holds that a constitutional provision making it impossible for one group of Americans to seek aid from the government against discrimination is a denial of equal protection "...in the most literal sense." 517 U.S. at 624, 631-633.

Despite that holding, the panel here upheld a section of the Nebraska Constitution that prohibits government from recognizing the relationships of gay people, and gay people alone, no matter what form that recognition takes. Neb. Const. art I, § 29. That section is legally indistinguishable from the section of the Colorado Constitution struck down in *Romer*.

The panel declined to follow the first holding in *Romer* because it was disturbed by what it saw as the implications of *Romer*'s holding that a constitutional provision imposing a "...broad and undifferentiated disability..." on a single group of Americans was an "...invalid form of legislation." 517 U.S. at 632; *see* Panel Opinion at 6-7. But a Court of

Appeals may not disregard a ruling of the Supreme Court, even if it thinks the ruling unwise. *Hutto v. Davis*, 454 U.S. 370 (1982).

Romer's second holding was that the Colorado Constitution's prohibition on discrimination laws was irrational under the "conventional and venerable" equal protection "rational basis test." So is the Nebraska Constitution's prohibition on government recognition of same-sex couples. Other provisions of Nebraska law may be thought to encourage responsible procreative behavior by heterosexuals (the panel's rationale). A constitutional mandate prohibiting government from in any way recognizing the existence of same-sex relationships, while permitting recognition of nonmarital heterosexual relationships, cannot be. Nor could it be thought to achieve any other legitimate governmental purpose.

Request for Rehearing and/or Rehearing En Banc

This case presents questions of exceptional importance, warranting en banc review. Fed. R. App. P. 35(a). Over 19 States, in one form or another, have already adopted constitutional amendments limiting or banning recognition of same-sex relationships. Many other States are considering similar amendments.

In banning any recognition of same-sex relationships, the Nebraska constitutional amendment went further than any of the others.[1] The practical question this case poses is whether there is any limit to how far a State may go in disabling government from ever recognizing the relationships of same-sex couples. This is the first appellate court, state or federal, to address that question.

Thus, the decision in this case could well have repercussions far beyond these parties and this constitutional amendment.

Finally, no principle is more fundamental to the rule of law and democratic government than that which says the process by which it operates must be open to all and fair to all. Any law that forbids an entire State's government from protecting the relationships at the center of most people's lives, but does so for one class of citizens only, poses issues of exceptional importance.

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[1] *Compare* Neb. Const. art I, § 29 ("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") *with, e.g.*, Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."), Ky. Const. § 233A ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.").

ARGUMENT

1. Section 29 and the Supreme Court's two rulings in *Romer v. Evans.*

Section 29 of the Nebraska Constitution says:

> 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.

Neb. Const. art. I, § 29 (hereinafter "Section 29").

In 2003, a member of the legislature asked the Nebraska Attorney General if a law merely allowing same-sex and opposite-sex domestic partners to make organ donations and funeral arrangements for deceased partners would be constitutional. In a written opinion, the Attorney General said that such a law would violate Section 29. The legislature could pass a law recognizing heterosexual domestic partnerships for the purposes of organ donation and burial, he said, but not same-sex domestic partnerships. (Record on Appeal, Volume I ("AV1") at 43, 124; Record on Appeal, Volume II ("AV2") at 553-54.)

The opinion of the Attorney General and the position of the State in this case is that Section 29 means what it says: while the State may recognize nonmarital and marital heterosexual relationships, it may never

recognize the relationship of a same-sex couple, no matter how deeply committed the members of a same-sex couple may be.

At one time, the Colorado Constitution said:

> Neither the State of Colorado, through any of its branches, or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices, or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Former Colorado Const. art. II, § 30b,

The United States Supreme Court struck that provision ("Amendment 2") down in *Romer v. Evans*, 517 U.S. 620 (1996). The Court held that Amendment 2 violated the Equal Protection Clause of the 14th Amendment on two distinct grounds: 1) since it imposed a "…broad and undifferentiated disability on a single group…," it was "an invalid form of legislation"; and 2) since its "sheer breadth" was "…so discontinuous with the reasons offered for it…," it was inexplicable by anything other than animus, and thus lacked a rational basis. *Romer*, 517 U.S. at 632.

2. Section 29 of the Nebraska Constitution is a literal violation of the 14th Amendment's guarantee of equal protection.

Crucial to the Court's first point in *Romer* was the fact that Colorado put into its Constitution, for one group of people, an absolute ban on

protection from discrimination and its harms. As the Court explained, central to both the rule of law and equal protection is the principle that government must remain open on impartial terms to all who seek its assistance. Constitutionally disqualifying a class of persons from seeking protection from the law is, the Court said, "unprecedented in our jurisprudence." *Romer,* 517 U.S. at 633. Doing that, the Court held, is "...a denial of equal protection of the laws in the most literal sense." *Id.*

The government of Nebraska likewise is no longer open on equal terms to gay people. Heterosexuals may ask the government to create comprehensive civil unions, *see, e.g.*, Conn. Pub. Act No. 05-10 (2005), limited domestic partnerships, *see, e.g.*, Iowa City Ordinance 94-3647, 11-8-94, or even isolated protections based on their relationships, *see* AV-43, 123-25 (Nebraska Att'y Gen. Op.). If they persuade the legislature or the right executive, the government may afford them protections. *Id.* Not so for gay people. Section 29 disables gay people and gay people alone from seeking any legal protections based on their relationships.

The panel opinion appears to view the first part of the *Romer* holding as unworkable, and thus as something the Supreme Court could not possibly have meant. According to the panel, the Court must really have meant only to strike the Colorado provision under its second holding, as a violation of

the "core standard of rational basis review." Panel Opinion ("Panel Op.") at 7. As the panel put it,

> No doubt for these reasons, although the majority opinion in *Romer* contained broad language condemning the Colorado enactment for making it "more difficult for one group of citizens than for all others to seek aid for the government," 517 U.S. at 633, the Court's conclusion was that the enactment "lacks a rational relationship to legitimate state interests." *Id.* at 632.

Panel Op. at 7.

But the Supreme Court in *Romer* was clear that it meant what it said when it ruled that Amendment 2 was invalid because it made it constitutionally more difficult for gay people to seek the aid of government. In the summary of its holding at the start of Part III of the opinion, the Court said flatly that it had two reasons for holding Amendment 2 invalid: "[f]irst," that as a "broad, undifferentiated disability" imposed on a single group, it is "an invalid form of legislation;" and "[s]econd," that Amendment 2 "lacks a rational relationship to legitimate state interests" because "its sheer breadth is so discontinuous with the reasons offered for it." *Romer*, 517 U.S. at 632. When the Court turned to that second rationale, the "conventional and venerable" rational basis test, the Court again said that ordinary rational basis was its *second* reason for striking the law:

> We conclude that *in addition to the far reaching deficiencies of Amendment 2 that we have noted*, the principles it offends, *in*

> *another sense*, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose [citations omitted] and Amendment 2 does not.

Id. at 635 (emphasis added).

This Court is obligated to follow rulings of the Supreme Court, even if this Court considers them misguided. *Hutto v. Davis*, 454 U.S. 370, 374 (1982).

Moreover, the panel's apparent fear that "chaos" would result if the Supreme Court were taken at its word stems from a misunderstanding of the first *Romer* holding. The panel says that preemption clauses, requirements that people vote on certain issues, and bans on gambling and polygamy would all go by the board under *Romer*. Panel Op. at 7. But this litany misses the two crucial characteristics of the provisions *Romer* condemns: first, they are selective—they apply to some people and not others; and second, they completely deprive the government of the power to help a group in an entire area of law. 517 U.S. at 633.

A constitution may say that neither games of chance nor polygamy can ever be allowed; it cannot say, however, they may be allowed to all but Catholics, Mormons, or disabled people. A constitution may say that public housing needs to be approved by the legislature or even by voters at a referendum; it cannot say, however, that public housing for immigrants can

never be allowed at all. *See id.* at 633; *see also James v. Valtierra*, 402 U.S. 137, 141-43 (1971) (upholding a California constitutional requirement that low income housing projects be approved by a referendum among local residents).[2]

The Equal Protection Clause allows States to put some activities beyond the reach of government, which is what a constitutional ban on gambling or polygamy does. While those who favor an activity may dislike a constitutional ban more than others, the ban still limits the power of government to act—to allow polygamy or gambling—for everyone. Selective bans do not. *See, e.g.*, *Gordon v. Lance*, 403 U.S. 1, 5-7 (1971).[3]

The Equal Protection Clause allows States to tinker with how they distribute power, which is what preemption or requiring a vote of the people on an issue does. *See James*, 402 U.S. at 141-43. But a constitutional ban

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[2] The California constitutional provision in *James* provided for a vote on public housing projects; it did not ban them absent future amendment of the constitution. *See James v. Valtierra*, 402 U.S. 137, 141-43 (1971). Of course, if there were a conflict between *James* and *Romer*, *Romer*, as the later decision, would control.

[3] In his dissent in *Romer*, on which the panel inexplicably relies, Justice Scalia used constitutional bans on voting by polygamists to argue that since the Supreme Court had upheld state constitutional bans on voting by polygamists a hundred years ago, it was departing from precedent by striking the political disability imposed on gay people by Colorado. *Romer*, 517 U.S. at 649-50 (Scalia, J., dissenting). The Court replied that the voting ban surely was no longer good law because of the Court's cases on the right to vote, and was thus beside the point. *Id.* at 634 (Kennedy, J., for the Court).

on legal protections for one group does not shift the governmental level at which decisions are made; it takes the issue out of the political system created by that constitution entirely. *See, e.g.*, *Romer*, 517 U.S. at 627. Most Americans can seek the protection of the law in a variety of ways at the local or the state level. Sometimes state constitutions limit the options. State law preemptions take the power to do some things away from localities; the occasional mandatory referendum provision requires approval of the voters on a particular issue. But a group of citizens who constitutionally cannot be protected at all has to change the constitution itself to begin pursuing any one of those routes to political change. They are not included in the political process created by the constitution at all. To say that they are not excluded because the constitution could be amended to include them is like saying the federal constitution does not ban a state religion because it could be amended to allow one. *Id.* at 633.

Part of the difficulty with the panel opinion is that it fails to appreciate the magnitude of what Nebraska has done to the gay people who live there. For example, the panel opinion says that Section 29 "limits the class of people who may validly enter into marriage and the legal equivalents to marriage emerging in other states—civil unions and domestic partnerships." Panel Op. at 10. In the next paragraph, the opinion describes Section 29 as

merely having a "reinforcing effect" on laws that limit marriage. Panel Op. at 11.

These descriptions do not reflect what Section 29 says: it does not limit marriage, it bans *any* recognition of same-sex relationships and allows *any* recognition of *nonmarital* as well as marital heterosexual relationships. And Section 29 is part of the Nebraska Constitution. It is no more an ordinary law "limiting marriage" or a provision "reinforcing" a marriage law than Amendment 2 of the Colorado Constitution was a law "limiting antidiscrimination laws" or a provision "reinforcing" such a limit. The central principle of equal protection is that government be open on impartial terms to all who seek its aid. *Romer*, 517 U.S. at 633. When a state constitution completely forecloses aid in an area to one group, it is no small tinker with republican process; it betrays the cardinal principle of equal citizenship. *Id.*

The only difference between the section of the Colorado Constitution struck down in *Romer* and the section of the Nebraska Constitution upheld by the panel here is that Colorado's denied gay people the protection of discrimination laws, and Nebraska's denies gay people the protection of the domestic relations laws. That difference in subject matter can hardly justify the difference in the result. Discrimination laws, important as they are,

forbid acts only when driven by a narrow group of specified motivations, acts most Americans never encounter. Domestic relations laws, on the other hand, touch on aspects of the daily lives of most couples, on matters both exceptional and mundane.

Domestic relations law sorts the daily lives of people subject to it, ordering rights in the property they own, the salaries they are paid, the debts they incur. *See, e.g.*, Neb. Rev. Stat. Art. 6, Chap. 42. That body of law controls the momentous, like succession if a will is destroyed or never made, Neb. Rev. Stat. Art. 1, Chap. 30, the commonplace, like permits to hunt, Neb. Rev. Stat. § 37-455, and the intensely personal, like burying the person with whom you shared your life, instead of having outsiders do it regardless of your wishes, Neb. Rev. Stat. § 71-1339.

Disabling gay people from asking the State to extend any of these protections to same-sex couples is precisely the kind of broad undifferentiated disability that the Supreme Court condemned in the first part of its holding in *Romer*. 517 U.S. at 632-33.

3. Section 29 is irrational.

Although the panel goes over some of the law on rational basis, it never articulates the central requirement of even the most deferential form of equal protection review: that a rational legislator could believe that the

classification drawn by the law would advance a legitimate government purpose. *Romer,* 517 U.S. at 631, 632-33.

The panel says that laws defining and extending benefits to marriage are "rationally related" to the government interest in "steering procreation into marriage." Panel Op. at 9. The panel explains:

> By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best suited for raising children."

Id.

But the panel's rationale does not respond to the questions posed by *this* case. Whether a rational legislator could think people are induced to marry by domestic relations laws is a due process question about marriage laws. Section 29 does not provide a "basket of rights and benefits" to married couples and the issue here is not whether marriage laws are valid under the Due Process Clause. The issue here is whether the constitutional exclusion created by Section 29—and that is all Section 29 does—violates equal protection. The issue here is whether forbidding any recognition of same-sex relationships, while allowing recognition of both marital and nonmarital heterosexual relationships, could, as the panel puts it, rationally be thought to "steer" procreation into marriage.

The panel was unable to suggest any reason why telling the legislature never to permit a gay man to donate his deceased partner's heart to medical science would encourage heterosexuals to marry. The panel was unable to suggest any reason why making sure the government never allows a lesbian to decide how to bury her partner would induce heterosexuals to keep their procreation inside marriage.

No rational legislator could think excluding the relationships of gay people from any legal recognition would push heterosexuals toward procreation inside marriage. The proposition is simply not tenable. The notion that prohibiting any recognition of same-sex relationships while allowing recognition of nonmarital heterosexual relationships would encourage heterosexual marital procreation is, to put it mildly, beyond reason.

Conclusion

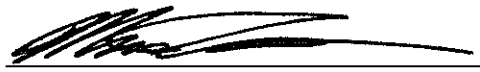
This case is not about the constitutionality of excluding same-sex couples from marriage. It is not about whether the government is compelled to recognize the relationships of same-sex couples. This case is about the constitutionality of taking away the power of government ever to recognize the relationships of same-sex couples, while giving it unlimited power to recognize the nonmarital and marital relationships of heterosexuals. No

constitution with a meaningful requirement of equal protection could allow a state provision like that to stand.

The panel should set aside its decision and opinion, rehear the case, and affirm the judgment below. In the alternative, the full Court should set aside the decision and opinion of the panel, and set the case for a new hearing in front of the full Court.

July 27, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on July 27, 2006, I caused to be served two copies of the Plaintiffs-Appellees' Petition for Rehearing and/or Rehearing En Banc on counsel for the Defendants-Appellants herein by placing said copies in the care of FedEx, overnight postage prepaid, addressed to the following counsel of record for Defendants-Appellants:

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I also served them with an electronic copy of the brief, in Portable Document Format, by electronic mail, as agreed between the parties.

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