IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CITIZENS FOR EQUAL PROTECTION INC., et al. Plaintiffs, v. ATTORNEY GENERAL JON BRUNING, et al. Defendants.	)	CASE NO. 4:03CV3155

PLAINTIFFS' REBUTTAL BRIEF

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INTRODUCTION

Section 29 singles out gay and lesbian Nebraskans, and prevents them from securing *any* form of government protection for their families. By enshrining the second-class status of same-sex couples in the Constitution, Section 29 betrays the concepts of fair play and equal treatment that undergird our democratic system. Defendants have presented no legitimate government interest that the imposition of this unequal burden would rationally further. Rather, their failed efforts to defend this law only confirm what is obvious from the face of the statute – Section 29 is a law that exists merely to express disapproval of gay and lesbian Nebraskans.

Contrary to defendants' suggestion, this case is not about the right to win the game. Rather, it is about the right to remain on the playing field. Plaintiffs have established that Section 29 violates the constitutional guarantee of equal protection under the law, and that Section 29 does not rationally further any legitimate government purpose. Plaintiffs also have demonstrated that Section 29 targets lesbian and gay Nebraskans for legislative punishment without the benefit of a trial, in violation of the Bill of Attainder Clause. For both of these reasons, Section 29 cannot withstand constitutional scrutiny.

ARGUMENT

I. SECTION 29 VIOLATES EQUAL PROTECTION

A. Defendants Cannot Recast What this Court Already has Found to be an Injury to Plaintiffs' Equal Protection Rights in Order to Suit Defendants' Need for an Argument

1. Plaintiffs ask the Court to level the playing field, not to guarantee a win on the field

In denying defendants' motion to dismiss, this Court concluded that "Section 29 acts as a barrier to plaintiffs' participation in the political process, and thus as a result plaintiffs have established injury. . . ." *Citizens for Equal Prot., Inc.*, 290 F. Supp. 2d 1004, 1008 (D. Neb. 2003) (Filing # 35). Defendants acknowledge that plaintiffs consistently have presented that as the gravaman of their case, quoting plaintiffs' brief as follows: "[u]nder the Equal Protection Clause, individuals have a right to remain on an equal footing in their efforts to approach elected officials and public employers and attempt to persuade them to protect themselves and their families." Defendants' Trial Brief ("Def. Br.") at 5 (Filing # 66). Nonetheless, repeating arguments they made in their motion to dismiss, defendants seek to re-cast plaintiffs' injury as a violation of a purported right to "win all of the benefits they desire," or a "right to fight a political battle until they win," and then defendants devote a section to arguing against an injury other than the one that plaintiffs actually allege and that this Court already has found to exist. Def. Br. at 2.

Contrary to defendants' current attempt to re-cast the injury, the Court noted in its earlier opinion in this litigation that the injury in "an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Citizens for Equal Prot., Inc.*, 290 F. Supp. 2d at 1007 (quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("*Northeastern Fla. Chapter*") ("Singly and collectively, [the Supreme Court's precedents] stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.")). Plaintiffs already set forth the Supreme Court's string of precedents in this regard, Plaintiffs Opening Trial Brief ("Pl. Open. Tr. Br.") at 21-22 (Filing # 65), and have asserted from the beginning that "[t]his lawsuit is about equal access, not guaranteed success, in the political arena," Complaint at ¶ 4 (Filing # 1). And the Court already has agreed.[1]

[1] Despite the Court's finding of a cognizable constitutional injury, defendants assert that plaintiffs' challenge is "indirect" because plaintiffs have not asked for the right to marry and, according to defendants, would lose if they did so because of *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). Def. Br. at 10 n. 2. Whether plaintiffs are entitled to marry under the U.S. Constitution is a question for another day, but whatever the outcome in that future case, plaintiffs still have the equal right to attempt to convince the Unicameral to pass domestic partnership laws, or

Thus, defendants cannot change the injury that is the basis for plaintiffs' action into a violation of some manufactured straw man of a "right to win" in order to suit defendants' need for something to argue.[2]

2. Plaintiffs challenge Section 29's discriminatory barrier to civil recognition of relationships, so it misses the point of the suit for defendants to discuss laws of general application that do not turn on civil recognition of relationships

In another attempt to re-cast the equal protection injury that is the actual basis for plaintiffs' suit, defendants assert that plaintiffs are not harmed because they can obtain safeguards for relationships through laws of general application that do not turn on civil recognition of a committed same-sex relationship. Def.

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eventually recognize marital status, regardless of what the federal constitution may otherwise require of the Unicameral. As for *Baker*, over thirty years ago the U.S. Supreme Court summarily dismissed the appeal, and the precedential value of such summary dispositions is limited, *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979), and intervening Supreme Court case law calls into doubt the limited authority of a summary dismissal, *Jones v. Bates*, 127 F.3d 839, 852 (9th Cir. 1997). *See Lawrence v. Texas*, 539 U.S. 558 (2003) (lesbians and gay men are fully protected by constitutional right to privacy on an equal basis with heterosexuals); *Romer v. Evans*, 517 U.S. 620 (1996) (finding equal protection violation based on sexual orientation classification).

[2] Similarly ignoring what this Court already has decided, defendants flip their argument that plaintiffs have no right to win into another argument that, because plaintiffs supposedly *cannot* win, they are unable to demonstrate redressability. Def. Br. at 15. To do this, defendants erroneously assert that plaintiffs seek "recognition of their relationships" instead of what plaintiffs actually seek, which is the removal of the discriminatory barrier to advocating for such recognition. In any event, this Court has put the issue to rest, having ruled that plaintiffs established redressability because striking Section 29 would open up access to legislative advocacy that this constitutional amendment currently makes futile. *Citizens for Equal Prot., Inc.*, 290 F. Supp. 2d at 1008.

Br. at 11-15. This simply repeats an argument made on defendants' unsuccessful motion to dismiss, *see Citizens for Equal Prot., Inc.*, 290 F. Supp. 2d at 1007-08 ("Defendants argue . . . plaintiffs can pursue other avenues to redress their grievances and to obtain the benefits they want."), which the Court has already rejected by finding it "obvious" that Section 29 acts as a barrier to plaintiffs seeking the assistance of government for protection of their relationships, thereby establishing an equal protection injury. *Id.* at 1008.[3]

Telling plaintiffs and their members that they can still lobby for government protection of committed same-sex relationships so long as they do not tie the protection to the relationships misses the point of this lawsuit. Being barred from advocating for legislative safeguards for relationships and families, when heterosexuals are not similarly barred, is precisely the injury plaintiffs assert. To suggest that plaintiffs theoretically might achieve some measure of generally applicable protections that do not recognize relationships does not lift the inequality imposed by Section 29 – it highlights it. Even if same-sex couples somehow could manage to work around Section 29's unequal barrier and obtain *all* of the protections that different-sex couples already have or can pursue without constraint, that still would not address plaintiffs' constitutional injury of being

[3] The rejected argument was previously before the Court in Defendants' Brief in Support of Motion to Dismiss at 13 (Filing # 23).

subjected in the first place to the unequal barrier that makes it more difficult for them than for others, and the attendant mark of inferiority.[4]

The State of Colorado in *Romer* also argued that plaintiffs could protect themselves through laws of general application, but the Supreme Court rejected the idea that such a possibility meant the plaintiffs had suffered no harm:

> In any event, even if, as we doubt, [gay persons] could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive [gay persons] of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. [They] are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to

[4] Marking a group of citizens as inferior and less worthy also causes a justiciable and unconstitutional injury in fact distinct from the discriminatory barrier itself, irrespective of whether those citizens could seek related protections through some other means. *Heckler v. Mathews*, 465 U.S. 728, 739 (1984); Ex. 44, ¶ 10 (Barbara DiBernard: "It angers me that I have to spend so much of my energy worrying about and piecing together what little security we can for the life Judy and I have worked so hard to build together as a committed couple, especially when there is so much that needs to be done in the world."). On the injury from the barrier and the mark of inferiority, defendants raise objections to the sworn testimony regarding the importance of committed relationships, family, and individual dignity. Def. Br. at 2. But the Court already has overruled those objections, so the record contains all proffered evidence, including sworn testimony, to which the Court has said it will attach the appropriate weight. Order (Filing # 62). For the equal protection claim, the Court weighs the evidence of the importance of committed relationships and family to plaintiffs' members because it helps demonstrate the breathtaking sweep of harms that arise from a barrier to advocating for protections of relationships and family. And that directly responds to the State's attempt to suggest those hardships are not serious.

> pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.

Romer, 517 U.S. 620, 631 (1996).[5]

In addition, defendants diminish the hardships from the discriminatory barrier to the point of callous absurdity. The family safeguards under laws of general applicability by definition turn on the *absence* of civil recognition of a relationship, and thus do not address protections that necessarily turn on such civil recognition, like family health insurance, family medical leave, or bereavement leave.

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[5] This passage from *Romer* also refutes defendants' resurrected argument that because same-sex couples can work to amend the State Constitution they are not "subject to a different political process than everyone else." Def. Br. at 8; *Citizens for Equal Prot., Inc.*, 290 F. Supp. 2d at 1007 ("[d]efendants argue first that there is no injury, as plaintiffs could try to amend the constitution. . . ."). The *Romer* Court struck down the challenged provision of the Colorado Constitution in part *because* it deprived plaintiffs of any access in the absence of a repeal. It is always true that unconstitutional laws may be repealed, but that does not insulate them from judicial review while they remain in force. This also addresses defendants' constant refrain about what would occur if Section 29 was a statute. *See, e.g.,* Def. Br. at 2 ("They make no claim that Section 29 would violate their rights if it were a statute. . . . "). Like the *Romer* plaintiffs, plaintiffs here do not challenge a statute but a constitutional law, and the plain fact is that a constitutional law exacts greater harm than a statute, and plaintiffs argue that the harm is of such a sweep as to create both a literal and a conventional violation of equal protection. Lastly, defendants are inaccurate to suggest that the *Romer* Court found Amendment 2 to deprive "gays and lesbians even of the protection of general laws and policies." Def. Br. at 16; *Romer*, 517 U.S. at 630 ("The state court did not decide whether the amendment has this effect, however, and neither need we.").

Further, laws of general application, such as the one cited for hospital visitation, are not comparable substitutes both because they do not convey the status and importance of a committed relationship in difficult emotional circumstances and because they often are utterly disregarded, as exemplified by the experience of Doreen Moritz. Ms. Moritz paid her attorney to draw up a series of documents designed to ensure her decision-making authority at the time of her life partner's illness and death. Despite these documents, which established her authority not by recognizing her relationship with her partner but through more general means, she repeatedly had to establish her authority with medical professionals, and after the death she actually had to request that her attorney rush over to explain the law to a recalcitrant funeral home director, who refused to respect the legal documents until her lawyer contacted the funeral home's lawyer. Ex. 50, ¶¶ 11-19. At a time when a mourning individual should be able to focus on coping with grief, Ms. Moritz faced the anguish that her deceased loved one's wishes might not be honored and that Ms. Moritz would be excluded from the memorial service. *Id*. at ¶ 20. Her experience demonstrates how even for the few problems that can be addressed as a theoretical matter through generally applicable solutions, the very relationships and familial bonds gay Nebraskans seek to protect remain terribly vulnerable. There can be no doubt defendants would recognize the injury if married couples were forced to create documents to ensure their

respective wishes after death are carried out and yet were forced at the time of mourning to get a lawyer on an emergency basis to help enforce the documents.

3. The injury in *Romer* turned principally on the greater difficulty imposed for one group than for all others, not on the partial effect of the invalidation of laws

The fact that Amendment 2 invalidated a handful of existing non-discrimination laws/ordinances does not materially distinguish *Romer* from this case because *Romer* turned principally on a far broader constitutional injury. The Court's analysis in *Romer* flowed from the settled doctrine set forth in *Northeastern Fla. Chapter* having to do with the imposition of a discriminatory barrier. Thus *Romer* characterized Amendment 2 as a law providing that "in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." 517 U.S. at 633.[6] The Court catalogued the consequences of the injury wrought by Amendment 2, in a section specifically devoted to rejecting the state's argument that the amendment did nothing more than deny "special rights." *Id*. at 626. But those consequences were far broader than the invalidation of existing laws. The Court explained that Amendment 2

[6] Defendants attempt to avoid *Romer* with a lengthy discussion of *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), which involved the fundamental right to equal political access and a suspect classification by race. Def. Br. at 6-8. Plaintiffs, however, do not ask this Court to employ heightened scrutiny of a suspect classification, and have therefore relied principally on *Northeastern Fla. Chapter* and *Romer*.

prospectively "bars" gay Americans from securing protections that would apply in public accommodations, finding that the bar to seeking such protections "in itself is a serious consequence," and only then did the Court note that there were additional consequences in the form of what Amendment 2 "nullifies." *Id*. at 629. The Court further explained that, in the public sector, Amendment 2 "operates to repeal *and forbid* all laws or policies." *Id*. at 629 (emphasis added). What was forbidden further included the reinstatement of laws and policies. *Id.* at 627. Thus *Romer's* discussion of the consequences of Amendment 2's injury did not limit them to the invalidated laws, and more importantly, *Romer's* discussion and holding are consistent with the settled doctrine presented in *Northeastern Fla. Chapter*.

Amendment 2 caused a justiciable and unconstitutional injury even if no laws were invalidated at all. Likewise, by imposing an unequal barrier, Section 29 causes a similarly justiciable and unconstitutional injury even though it was adopted before passage of any city domestic partner registry and before any Nebraska government employer adopted a policy of providing family benefits to gay employees. In addition, as argued previously, Section 29 in one important dimension is even more far-reaching than Amendment 2 by virtue of its burden on the protected liberty for forming family relationships, underlying which are interests of the most profound value to individuals. Pl. Open. Tr. Br. at 25.

B. Section 29 is a "Literal" Violation of the Equal Protection Clause

Unlike many laws challenged on constitutional grounds, Section 29 is not "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served." *Romer*, 517 U.S. at 632-33. This is because Section 29 targets a group by a single trait and denies protections across the board, without any differentiation, constituting a blanket declaration of law that it shall be more difficult for the targeted group to seek assistance from its government. That is plainly discrimination for its own sake, and for this reason Section 29 is a "literal" denial of equal protection, meaning that the Court need not even reach defendants' purported justifications for the infringement. Pl. Open. Tr. Br. at 20-26.[7]

[7] Since plaintiffs filed their opening brief, other states' constitutions have been amended regarding civil recognition of same-sex couples' relationships, but Nebraska's Section 29 still stands in a class of its own for expressly and unambiguously barring any and absolutely all forms of civil recognition of committed same-sex couples' relationships, and imposing that full-sweep categorical bar *only* on same-sex couples, including the even the most minimal of domestic partnership benefits on the one hand and marriage on the other. The *Romer* Court noted that laws of an "unusual character" warrant especially careful consideration. *Romer*, 517 U.S. at 633.

To the extent defendants have responded on this point, it is with a conclusory statement that "Section 29 is very narrow in scope," Def. Br. at 18, and with a purported distinction for *Romer* as addressing protections relating to "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," Def. Br. at 16. But Section 29 indeed relates to limitless aspects of individuals' lives because it involves one's most intimate family, including one's partner for life and any children one may have.[8] The measure of this is the same for gay couples as it is for heterosexual couples. Family is part and parcel of an individual's interactions with the workplace, children's schools, doctors/dentists, police, hospitals, insurance companies, banks, as well as everyday interactions with neighbors and extended family. Commitment, responsibility, and other values are enormous components of

[8] Estimates of the number of children being raised by same-sex couples in the United States range from six to fourteen million. *Baker v. State*, 744 A.2d 864, 881-82 (Vt. 1999) (noting that the numbers are "increasing"). The American Psychological Association has resolved that "the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish." American Psychological Ass'n Council of Representatives, *Resolution on Sexual Orientation, Parents, and Children* (July 2004), *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf. The American Academy of Pediatrics has a formal policy declaring that "children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual." Ellen C. Perrin, M.D. & Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 343 (2002), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics; 109/2/341.pdf.

familial bonds.[9] The limitless and profound dimensions of lifetime relationships and families are what underlie the protected liberty in the formation of those families, and underscore the harm in all government's doors being closed to individuals seeking safeguards for their families, when others have access to the most minimal of protections as well as the most extensive singular array of safeguards government can provide: marriage. Pl. Open. Br. at 22-26.[10] Amendment 2 was an unlawful barrier to gay people advocating for laws/policies prohibiting discrimination by others; Section 29 is an unlawful barrier to gay people advocating for laws/policies ensuring protections for what is most widely valued in human life: family. Like Amendment 2, Section 29 sweepingly denies protection across the board.

In the face of this argument, defendants assert plaintiffs "may not amend their Complaint" with an argument that Section 29's classification is based on sexual orientation. Def. Br. at 9. But the Complaint explicitly states what is obvious: "Section 29 classifies people based on sexual orientation." Complaint at

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[9] Ex. 47, ¶ 6 (Jim Kieffer: "As part of following through on my values, and to protect the life that Gary and I have worked hard to build together, I want to help persuade government officials that it's a good thing to give legal recognition to committed same-sex couples' relationships, including the kind of recognition that builds in responsibilities and obligations. In that regard, when the law lets me act on my values, I will take action.").

[10] Section 29 does not only put legislative activity off limits. Based on that provision, the Governor's door was closed as well to two parents seeking assistance in better protecting their son. Ex. 49, ¶ 20.

¶ 15.[11] Plaintiffs have not burdened this Court with an argument for heightened scrutiny on the basis of sexual orientation, so it is perplexing why defendants waste the Court's time on the issue.

Defendants also assert plaintiffs are amending the Complaint by arguing that the constitutional infirmity of Section 29 turns in part on the fact that it bars plaintiffs not only from advocating in the legislature for domestic partner benefits, but also for marital status. Def. Br. at 9. But the Complaint clearly seeks to invalidate Section 29 as a whole, not in its parts. Thus plaintiffs' prayer for relief explicitly seeks court orders:

- "Declaring that Article I, Section 29 of the Nebraska Constitution [rather than only one sentence or portion of Section 29] violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,"

- "Declaring that Article I, Section 29 of the Nebraska Constitution [rather than only one sentence or portion of Section 29] is a bill of attainder in violation of Article I, section 10 of the United States Constitution," and

- "Striking down and permanently enjoining enforcement of Article I, Section 29 of the Nebraska Constitution [rather than only one sentence or portion of Section 29]."

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[11] Because Section 29 is aimed directly at same-sex couples who make a commitment to "uniting" as a couple, it discriminates against individuals on the basis of their sexual orientation. *Lawrence*, 539 U.S. at 581 (recognizing that adverse treatment of those with same-sex "partners" is discrimination based on "sexual orientation.") (O'Connor, J., concurring). Also, for equal protection purposes, any invidious governmental classification is subject to judicial review, including classifications of couples and classifications of individuals who are members of particular kinds of couples.

Complaint p. 15. Furthermore, the second sentence of Section 29 incorporates the first sentence by barring absolutely all forms of civil recognition of relationships between same-sex couples with the residual clause of "or other similar same-sex relationship." If Section 29 did not include the first sentence, the second sentence still would leave no doubt that committed same-sex couples are barred from access to marriage as well. In any event, after the Court denied defendants' motion to dismiss, they filed an Answer in which they had to respond to every paragraph of the Complaint, so they further waste the Court's time in dodging the plain notice given them in the Complaint.[12]

Like Amendment 2 in *Romer*, Section 29 is a literal denial of equal protection.

[12] It is true that plaintiffs' Complaint discussed at length the harms that arise from Section 29's imposition of a barrier to advocating for domestic partner benefits. In part that is because plaintiffs' immediate plans if they prevail are to lobby for domestic partner benefits, as reflected in the already drafted "Financial Responsibility and Protection for Domestic Partners Act." Ex. 38, ¶¶ 21-22; Ex. 39, ¶¶ 17-20; Ex. 40, ¶¶ 18-20. But, in part, the Complaint's discussion of domestic partner benefits demonstrated that Section 29's uniquely vast sweep included a wide range of such benefits, and plaintiffs made their initial showing regarding that sweep in their Complaint. Further, the vast sweep of the discriminatory barrier goes as far as is possible in *two* directions, made most clear in the second sentence's residual clause, extending Section 29's reach to the most minimal of protections, on the one hand, and marriage, on the other.

C. Alternatively, Section 29 Fails the Conventional Rational Basis Test Because it does not Rationally Further a Legitimate State Interest

Section 29's blanket civil disqualification of same-sex couples from advocating for their families raises the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and causes injuries that "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 at 634-35; Pl. Open. Tr. Br. at 26-31.[13] Thus the Court need not reach any purported State interests, because there is no legitimate State purpose that could be rationally furthered by the broad and undifferentiated disability imposed by Section 29. But should the Court reach defendants' purported interest, it should require substantiation. The purported interest in procreation fails any type of rational basis review because it does not rationally further any legitimate state interest.

1. The Court should require substantiation of the classification because there is reason to infer antipathy and the general rule of deference therefore does not apply

If the Court reaches the government interest now asserted by defendants regarding procreation, Section 29 fails even the conventional rational basis test.

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[13] To the extent this Court determines that Section 29 does not speak for itself, the extrinsic evidence, when properly examined, further supports the "inevitable inference." That analysis appears below in plaintiffs' discussion of their bill of attainder claim, and, to avoid repetition, is incorporated herein with reference to plaintiffs' equal protection claim.

Although that test is generally deferential, that deference is usually appropriate because "[t]he Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added), *quoted in FCC v. Beach Communications,* 508 U.S. 307, 314 (1993) ("*Beach Communications*").

When a classification has the purpose of expressing animus toward a class of citizens, however, there *is* "reason to infer antipathy," and the rationale for institutional deference to the State's lawmaking process and its remedial capacity no longer exists. The Supreme Court has demonstrated that it regards such cases as raising an inference that even facially nondiscriminatory explanations are pretextual. "'If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.'" *Romer*, 517 U.S. at 633 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)). In such cases, the Court still applies the rational basis test, *Romer*, 517 U.S. at 635, (applying "conventional and venerable" rational basis principles); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (describing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), as applying standard rational basis review), but does so with skepticism as to whether rationales offered in support of

the classification credibly could be thought to underlie it. *See also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (where a law targets a politically unpopular group, the Court applies "a more searching form of rational basis review," and has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.").

In such cases, the Court often has spoken in terms of a search for "substantiation." In *Cleburne*, for example, the Court was asked to uphold a zoning regulation adversely affecting people with mental disabilities that was passed in response to the negative attitudes of nearby property owners and also allegedly addressed concerns about possible harassment of the disabled by local junior high students. 473 U.S. at 448, 449. The Court held that "mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable in a zoning proceeding*, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id*. at 448 (emphasis added). The *Cleburne* Court went on to analyze closely, and in the context of zoning law, the credibility, logic, and factual support for other reasons offered for the City's differential treatment of this population and – without hypothesizing any of its own – determined that the City's line-drawing did not rationally serve any of those interests. *Cleburne*, 473 U.S. at 448-50. *See also*

Plyler v. Doe, 457 U.S. 202, 228, 229 (1982) (rejecting hypothetical justifications for law excluding undocumented children from educational services as unsupported by record evidence).

Thus, the *Cleburne* decision rejected the supposed greater risk of liability these disabled citizens might pose for the City, in contrast to users such as boarding and fraternity houses, as "difficult to believe." 473 U.S. at 449. *See also id*. at 455 (Stevens, J., concurring) (rejecting as unconvincing rationale not generally considered under zoning ordinances). Posited concerns about the size of the home and the number of occupants, flood plains, density and other matters were rejected as lacking credibility, especially given the lack of evidentiary support showing why these were taken into account as to the mentally retarded alone. *Id*. at 449, 450 ("this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.").

In another case of discrimination for its own sake, *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), the Court rejected a law that limited food stamp benefits to households of related persons. Looking to legislative history, although scant, the Court found it "indicate[d]" that the measure was designed to exclude "hippies" and "hippie communes" from the program and rejected this

"bare congressional desire to harm a politically unpopular group" as an illegitimate governmental interest. *Id*. at 534.

The Court went on to consider and reject arguments that the measure nevertheless should be sustained as serving an interest in preventing fraud because households of unrelated persons conceivably might have been thought to be "relatively unstable" as well as more likely to contain individuals inclined to commit fraud. *Id*. at 535. The Court found these explanations both "wholly unsubstantiated" and, in any event, insufficient to support a status-based ban on otherwise eligible food stamp participants. *Id*. Noting there were independent statutory provisions designed to address fraud, the Court found "these provisions necessarily cast[] considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses." *Id*. at 536-37.[14]

[14] In contrast, in *Beach Communications*, in which no illegitimate government interests were operative and no group was targeted on the face of the law, the Court upheld the FCC's distinction between cable television facilities serving buildings that were commonly owned and those that were separately owned. The Court looked only at whether there was "any reasonably conceivable state of facts that could provide a rational basis for the classification" and upheld the law on a ground suggested by a member of the Court of Appeals. *Beach Communications*, 508 U.S. at 313, 314-15. *See also Heller*, 509 U.S. at 320 (upholding classification based on mental retardation based on "conceivable basis" test and imposing burden on plaintiffs where there was no indication of illegitimate purpose behind the legislation).

Here Section 29 on its bare terms raises the inference of antipathy because of its broad and undifferentiated sweep. Thus, were this Court to reach defendants' purported rationale for Section 29's discriminatory barrier under the rational basis test, it must do so with a more searching eye for pretext and in light of the requirement that the connection between the classification and its asserted purpose be substantiated.

2. Barring same-sex couples from advocating for civil recognition of their committed relationships does not rationally further the steering of heterosexual procreation into marriage

To the extent that defendants have articulated a rationale for the discriminatory barrier to advocating for family safeguards, it is that "the state has an interest in steering procreation into marriage." Def. Br. at 21.[15] Defendants note that heterosexuals surely will procreate, but utterly fail to mention, let alone substantiate, *how* a bar to civil recognition of committed same-sex relationships will steer heterosexual procreation into marriage. Indeed, Section 29 leaves heterosexuals at full liberty to lobby for relationship protections other than marriage. There is simply no way that the classification furthers the purported interest. This Court should find as did the *Romer* Court: "The breadth of the

[15] Defendants loosely refer to the "historic meaning of marriage," and if that purports to be a rationale for discrimination it fails under the authority previously cited with regard to discrimination not justifying itself. Pl. Open. Tr. Br. at 29 n. 8.

amendment is so far removed from these particular justifications that we find it impossible to credit them." *Romer*, 517 U.S. at 635.

Moreover, upon closer examination of its real and important goal, the asserted interest actually is *disserved* by Section 29's classification. Steering procreation into marriage reflects a broader and valid concern about children, namely that, to the maximum extent possible, they should have the benefits and protections of marriage when there are two parents. Plaintiffs and their members embrace that concern; indeed, through this very lawsuit they seek to address that concern via the democratic process by advocating for same-sex parents who "want to be role models for their children regarding the value they place on commitment, by undertaking the legal duties of a committed relationship" and otherwise assume marital obligations "to strengthen the family unit for the benefit of their children." Pl. Open. Tr. Br. at 11-12.[16] Thus the State's interest in promoting marriage for the sake of children is not rationally furthered by a discriminatory barrier to committed same-sex couples advocating for any civil recognition of their relationships, even including domestic partnerships. "The task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws," *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (2003), let alone outliers to any civil recognition of their relationships at all. Further, harming the children of same-sex

[16] Two of the plaintiff member couples have children. Pl. Open. Tr. Br. at 7.

couples does nothing to encourage different-sex couples to marry before procreating. Thus, defendants' one clear articulation of a purported justification for Section 29's harm contradicts itself.[17]

Plaintiffs here do not ask the Court to fix the broader problem of children being harmed – namely they do not ask for any form of civil recognition of their relationships – but only ask for a level playing field on which they can use the democratic process themselves in an attempt to fix that problem. This Court should find that Section 29 fails the rational basis test because defendants have failed to assert a rationale that even begins to explain how Section 29's targeting of same-sex couples rationally furthers the interest in children being raised by married parents, when in fact Section 29 interferes with that very interest. [18]

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[17] "The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'" *Goodridge,* 798 N.E.2d at 972 (Greaney, J., concurring).

[18] To the extent defendants are attempting to suggest a rationale that does not relate to children, but instead is limited merely to promoting procreation by heterosexuals, Section 29 does not further such an interest in any rational way because it is no more likely that harming committed gay couples will increase the level of heterosexual procreation than it is that it would steer such procreation into marriage. Further, the door of marriage is open to a vast number of non-procreating heterosexual couples, including those who do not want to have children, to those who prefer to adopt children, and to those who cannot have children biologically, such as elderly or infertile couples.

II. SECTION 29 IS AN UNCONSTITUTIONAL BILL OF ATTAINDER

Although plaintiffs agree that bills of attainder are relatively rare in the history of this nation, Def. Br. at 31-34, this fact in no way immunizes from constitutional scrutiny legislative enactments like Section 29, which targets a disfavored group of people for legislative punishment. Plaintiffs have demonstrated that each of the elements comprising a bill of attainder is present in this case. Accordingly, Section 29 must be found unconstitutional.

A. Section 29 Specifically Targets Nebraskans in Same-Sex Relationships

As demonstrated above, Section 29 plainly singles out a specified group and denies its members the right to secure protections for their relationships from the legislature. Specifically, Nebraskans who enter same-sex relationships – *i.e.*, gay, lesbian and bisexual Nebraskans – are explicitly named and saddled with a burden that other Nebraskans will not share. Whereas heterosexual Nebraskans are still eligible to advocate for and potentially receive protections for their unmarried relationships, gay Nebraskans are not.

Defendants demonstrate their fundamental misunderstanding of the nature of plaintiffs' grievance when they suggest that the relevant group for purposes of the bill of attainder analysis is all Nebraskans who voted against Section 29. Section 29 is not a bill of attainder simply because those who disagree with it must pass another constitutional amendment to repeal it. Rather, Section 29 is a bill of

attainder because, from the larger group of Nebraskans who form intimate relationships, it explicitly targets those who are in same-sex relationships and strips from that group alone the ability to secure any protection from the government for their relationships.

Defendants suggest that Section 29 is neutral as to sexual orientation, Def. Br. at 39, but that assertion cannot be squared with the text of the amendment, which bans recognition for same-sex relationships while allowing the Unicameral to continue to legislate about heterosexual relationships. In fact, the Attorney General issued an opinion confirming that legislation of general applicability regarding relationship protection could only survive Section 29 by excluding lesbian and gay couples from coverage. Joint Stip. ¶ 20; Ex. 28, p. 2 (Filing # 45). By punishing gay Nebraskans and leaving heterosexual Nebraskans untouched, Section 29 blatantly classifies on the basis of sexual orientation.

Defendants attempt to minimize the harm caused by Section 29 by suggesting that not all gay people desire government recognition of their same-sex relationships, but that is beside the point. Some heterosexual people may prefer that the government not recognize their relationship in any formal way either. The fact remains, however, that gay and lesbian people are structurally precluded by law from ever receiving relationship protections from their state legislature.

Because this law so obviously targets Nebraskans in same-sex relationships, this Court had no trouble finding that "plaintiffs have shown Section 29 applies to an easily ascertainable group." 290 F. Supp. 2d at 1009. Only the defendants seem to think that Section 29 is "neutral" with regard to sexual orientation, and only they seem to be confused about who is targeted by Section 29.

B. Section 29 Constitutes a Determination of Guilt Without Judicial Trial

Defendants grasp at straws in suggesting that Section 29 does not satisfy this prong of the bill of attainder analysis. For all of the reasons presented in plaintiffs' opening brief, Pl. Open. Tr. Br. at 34-48, and reiterated below, Section 29 designates gays and lesbians as worthy of blame and punishment, and as unworthy of any legal protection from the legislature. Section 29 is the quintessential legislative determination of guilt without trial that the Bill of Attainder Clause was designed to prohibit. This Court has already recognized that the consequences of this determination of guilt – "preventing the legal recognition of same-sex relationships" – was made without any type of judicial trial, and defendants point to nothing in the record that would alter the basis for that finding. 290 F. Supp. 2d at 1009.

C. Section 29 Punishes Lesbian and Gay Nebraskans, and Was Intended to Do So

As explained in plaintiffs' opening brief, Pl. Open. Tr. Br. at 34-48, Section 29 falls within any of the three definitions of punishment for purposes of the bill of attainder analysis. Defendants try to mask the punitive consequences of Section 29 by insisting that "Section 29 prohibits something that Plaintiffs never had and do not claim a right to in this litigation." Def. Br. at 42. This statement demonstrates defendants' fundamental misunderstanding of plaintiffs' argument. Prior to the passage of Section 29, plaintiffs were indisputably eligible to advocate for and potentially receive relationship protections from their legislature. Section 29 stripped gay Nebraskans, but not heterosexual Nebraskans, of that opportunity. Therefore, plaintiffs have clearly been deprived of a civil and political right that they "previously enjoyed." *Cummings v. Missouri*, 71 U.S. 277, 320 (1866).

Defendants also try to evade the infirmities of Section 29 by repeatedly questioning whether this provision would be constitutional if it had been passed as a statute rather than as a constitutional amendment. But the fact that Section 29 is in the constitution, rather than in a statute, is part of the very essence of the constitutional violation here. Defendants ignore the fact that it was the *sponsors* of Section 29 who sought to amend the constitution, rather than to pass a simple statute, because they *intended* to impose precisely the kind of extraordinary and unequal burden that only a constitutional amendment could achieve. Section 29

was passed in response to the efforts of gay and lesbian people to raise awareness about their families and to seek the protections that many heterosexual couples can take for granted. As a constitutional amendment, Section 29 ensured that same-sex couples would never have the opportunity to convince their legislators about their need for relationship protections.

Plaintiffs certainly do not claim in this lawsuit that they have the right to force the legislature to provide protections for same-sex relationships. Plaintiffs simply seek an equal opportunity to approach the legislature, but Section 29 renders their lobbying futile. By contrast, all other groups remain eligible to seek protections for their relationships. In this way, Section 29 dramatically transformed the playing field in Nebraska and imposed a sweeping form of legislative punishment on Nebraskans in same-sex relationships.

1. The punishment imposed by Section 29 fits the historical definition of punishment

As Alexander Hamilton explained, bills of attainder are acts "of disqualification, disenfranchisement and banishment by . . . the legislature." *United States v. Brown*, 381 U.S. 437, 444 (1965) (quoting III (John C.) Hamilton, *History of the Republic of the United States* 34 (1859) (in turn, quoting Alexander Hamilton)). For the reasons already demonstrated, Section 29 clearly fits this historical definition. By placing lesbian and gay Nebraskans outside of the normal political process by which other groups can protect the interests of their families,

Section 29 disqualifies, disenfranchises and, for these purposes, politically banishes this group of people.

Here again, defendants insist that plaintiffs have not been punished in this historical sense because gay Nebraskans remain free to petition the legislature for protection, so long as they do not actually ask for it in terms of the (same-sex) relationships that need protection. *See* Def. Br. at 45-46. As explained above, with respect to plaintiffs' equal protection claim, the fact that plaintiffs can still lobby for laws of general application in no way diminishes the fact that plaintiffs have been punished because of what *has* been taken away from them. Moreover, the Supreme Court has already rejected this argument as pure sophistry. *Romer*, 517 U.S. at 631 ("even if, as we doubt, homosexuals could find some safe harbor in laws of general application. . . . the amendment imposes a special disability upon those persons alone"). Section 29 thus punishes lesbian and gay Nebraskans by "forbidd[ing]" them the relationship protections "that others enjoy or may seek without constraint," *id.,* and therefore is properly characterized as legislative punishment.

Defendants insist that "there is no authority for saying that . . . 'denunciation and public censure' constitutes historical punishment for bill of attainder purposes." Def. Br. at 47. Defendants choose to ignore the fact that both the Framers of the Constitution and the United States Supreme Court have clearly

stated that public denunciation of a disfavored group constitutes punishment. *See* 3 Annals of Cong. 934 (1794) (Madison) (noting that a congressional denunciation of the Jacobin Clubs would constitute legislative punishment for purposes of the bill of attainder clause); *Brown*, 381 U.S. at 449 n.23 ("the vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction"); *id.* at 453-54 (noting that a bill of attainder incorporates a judgment "censuring or condemning" the targeted individual or group). Although such legislation is rare, the fact remains that "a statute will be particularly susceptible to invalidation as a bill of attainder where its effect is to mark specified persons with a brand of infamy or disloyalty." *Foretich v. United States*, 351 F.3d 1198, 1219 (D.C. Cir. 2003) (citing *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. 425, 474 (1977)).

Contrary to defendants' characterization, Section 29 did not simply "preserve[] . . . [the] status quo." Def. Br. at 46. Prior to the passage of Section 29, gay and lesbian Nebraskans had the opportunity to lobby their legislature for domestic partner benefits, family leave policies and other such laws and policies that would lessen the disparity in treatment between same-sex and different-sex relationships. This was the status quo prior to the passage of Section 29, and the passage of this amendment dramatically changed the political landscape.

As the Supreme Court explained in *Cummings*, for purposes of the bill of attainder analysis, punishment is not restricted "to the deprivation of life, liberty or property, but also embrace[s] deprivation or suspension of political or civil rights." 71 U.S. at 322. Section 29's political ex-communication of gay Nebraskans with regard to relationship protection is legislative punishment within the scope of the Bill of Attainder Clause.

2. Section 29 also constitutes punishment under the functional analysis

In the absence of an independent and wholly non-punitive purpose, legislation is deemed punitive for purposes of the bill of attainder analysis. *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 351 (2d Cir. 2002). Defendants put forth two purportedly non-punitive purposes for Section 29: (1) "resolving the political battle Plaintiffs initiated over recognition of same-sex relationships;" and (2) "steering the procreation that will occur between opposite-sex couples into marriage." Def. Br. at 47. The former rationale is really just another way of saying that plaintiffs got what they deserved, and the latter simply makes no sense.

Defendants insist that "the voter initiative that led to Section 29 was the culmination of a political battle initiated by Plaintiffs themselves." Def. Br. at 47. Defendants fail to articulate, however, how this is a non-punitive purpose. A desire to harm a group that seeks its equal liberty to protect familial relationships is not a non-punitive purpose. Similarly, structurally disqualifying that group from

achieving any kind of legal protection for their families, no matter how small, is not a non-punitive purpose – it purposefully disadvantages Nebraskans in same-sex couples by making it significantly more difficult for them to obtain protection for their relationships. No amount of insistence otherwise can make that a non-punitive purpose.

Second, Section 29 cannot be justified as a measure designed to promote the non-punitive purpose of steering heterosexual procreation into marriage. If this were, in fact, the purpose of Section 29, the group targeted would have been unmarried heterosexuals rather than gay people. As it stands now, unmarried heterosexuals, who defendants concede are exceedingly likely to procreate, can nevertheless seek a wide array of relationship protections outside of marriage. Only gay Nebraskans are precluded from securing protections from the legislature for their families. This justification is too illogical to be taken seriously by this Court.

Finally, the requirement of a legitimate non-punitive purpose is the answer to defendants' fevered suggestion that other constitutional provisions, and even statutes, would be stricken willy-nilly as bills of attainder. Here plaintiffs have demonstrated that there is no legitimate, non-punitive purpose that would justify Section 29, and that demonstration is a burden that would have to be met by any litigant challenging a constitutional or statutory provision on the grounds that it is a

bill of attainder. Presumably the State would be able to defend other challenged provisions as advancing legitimate government interests, such as the need to promote public health or eliminate societal costs associated with discrimination, and in those instances, where appropriate, the challenges would fail. This is all the more likely with the defense of statutes, which could not present the kind of structural burden inherent in the constitutional provision at issue here. And this of course all presumes the analysis has otherwise gotten past the requirements relating to the law's targeting of a specified group. Section 29 is challenged as a law reflecting discrimination *for its own sake* because it takes an issue that affects all Nebraskans – government protection for intimate relationships – off the table only for one targeted disfavored group of people. For this reason, Section 29 is vastly different from a constitutional amendment like Article III, Section 24, which regulates the operation of casinos, but does so for all Nebraskans. Section 29, in contrast, does not regulate all people who enter into intimate relationships. Rather, it targets a disfavored group of people -- *i.e.*, gay and lesbian people -- and imposes upon them a burden that others do not share. Defendants' suggestion that, if Section 29 is stricken as a bill of attainder, the rest of Nebraska law will fall as well is utterly undisciplined analysis.

3. The intent behind the enactment of Section 29 was to punish lesbian and gay Nebraskans

As already noted above, defendants cannot seriously maintain that Section 29 was not about punishing same-sex couples. The language of the amendment speaks for itself and is the clearest proof of the voters' intent to punish. Although the Court need not consider any other evidence, extrinsic evidence further shows what is obvious in the language of the law. The entire campaign in support of the amendment, from the statements of the proponents to the media advertisements, demonstrates that lesbian and gay Nebraskans were deemed to be a public threat because of efforts of gay people in other states to change the traditional definition of marriage.

The events leading to the Measure 416 initiative drive also reveal that the amendment was motivated by an intent to punish gay people. Defendants candidly admit that the initiative efforts were driven by the fact that the Unicameral failed to pass legislation restricting marriage to different-sex couples. *See* Ex. 4; Exh. 206 ¶¶ 3-4. Only after the decision of the Vermont Supreme Court in *Baker v. State*, 744 A.2d 864 (Vt. 1999), and the subsequent passage of the civil union statute by the Vermont legislature, did the opponents of relationship recognition for same-sex couples decide to take the more dramatic step of launching an initiative campaign to amend the constitution. The hysteria surrounding the events in Vermont

produced precisely the kind of passionate outburst against an unpopular group that Alexander Hamilton feared, and against which the Bill of Attainder Clause defends. *See Brown*, 318 U.S. at 444 (quoting III (John C.) Hamilton, *History of the Republic of the United States* 34 (1859) (quoting Alexander Hamilton) ("Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves.").

Flip-flopping in their analysis, defendants relied for their equal protection argument on record statements in support of the referendum, Def. Br. at 27-30, but then assert for their bill of attainder argument that the same statements are not relevant, *id*. at 49. Defendants fail to acknowledge that extrinsic evidence of animus is pertinent to both analyses should the Court reach beyond the bare text of Section 29. As part of their situational reasoning, defendants rely on *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986). But that case states the rule under Nebraska law. The federal rule, in contrast, holds that "statements made by decisions makers or *referendum sponsors* during deliberations . . . may constitute relevant evidence of discriminatory intent." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 196-97 (2003). And in this case, the widely

disseminated statements of the sponsors of Initiative Measure 416, the only evidence that sheds any light on voter intent, could not have been clearer. [19]

Guyla Mills repeatedly justified the need for this amendment by telling voters that homosexuality is a sin, Exs. 24, 26, and that Section 29 was necessary "to send a message to society about homosexuality . . . [*i.e.*,] 'that heterosexuality and homosexuality are not morally equivalent.'" Ex. 23. Many of the other materials widely disseminated to the voters by sponsors of Section 29 likewise reveal an unabashed desire to express moral disapproval of lesbians and gay men. *See, e.g.*, Pl. Open. Tr. Br. at 44-47.

Even the statements to which defendants point in an effort to demonstrate the "neutral" reasons for supporting Section 29 reflect the fact that gay and lesbian Nebraskans were declared a public nuisance whose political efforts needed to be crushed. For example, one of the radio spots insists that gays and lesbians "do not

[19] Plaintiffs have presented evidence demonstrating that the public message of the sponsors of Measure 416 reflected an intent to punish gay Nebraskans. Pl. Open. Tr. Br. at 44-47. Only the sponsors' widely publicized public statements, as opposed to their private thoughts and internal briefing memoranda, provide any insight as to what motivated those who voted for Section 29. By contrast, evidence submitted by defendants such as (1) materials that were not shown to have been before the voters during their deliberations (*i.e.,* Exs. 3, 6, 16-21, 201), or (2) after-the-fact statements regarding the motivations of several sponsors and one voter (*i.e.,* Exs. 201, 203, 204, 209) do not have any meaningful probative weight. Should the Court decide to give this evidence any weight, it should examine skeptically the purportedly "neutral" explanations that always arise as post-hoc justifications for discriminatory laws.

have the right to redefine marriage for the rest of us." Ex. 15. Another accuses gays and lesbians of trying to confuse the children of Nebraska. *Id.* This is the very language of the intent to punish.[20]

Section 29 contains all three hallmarks of a bill of attainder, and must be struck down as unconstitutional.

[20] Defendants' repeated suggestions that plaintiffs "had it coming" merely underscore that Section 29 had no legitimate *non-punitive* purpose. *See, e.g.,* Def. Br. at 51 ("[Plaintiffs] initiated the battle for legal recognition of same-sex relationships in Nebraska. . . . They simply lost the battle they started.").

CONCLUSION

Defendants have failed in the attempt to defend Section 29. Plaintiffs respectfully request that the Court lift the discriminatory barrier to advocacy for committed relationships and families.

December 15, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I served a copy of the above and foregoing Plaintiffs' Rebuttal Brief upon the Defendants by electronic filing with the CM/ECF system which will send electronic notice to Matt McNair and Dale Comer of the Nebraska Attorney General's office, 2115 State Capitol, Lincoln, Nebraska, 68509-8920, on this 15th day of December, 2004.

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