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

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SUMMARY OF THE CASE

Plaintiffs adopt the State's summary of the case except in two respects. First, the District Court ruled on the equal protection and bill of attainder claims plaintiffs presented; its decision does not depend on the First Amendment. Second, the District Court denied all of the parties' objections to evidence and proceeded with the trial on a written record. Plaintiffs agree with the State that oral argument is warranted and that at least thirty minutes per side is appropriate.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs Citizens for Equal Protection, Inc., Nebraska Advocates for Justice and Equality, and ACLU Nebraska are non-profit corporations incorporated under the laws of Nebraska. None of the corporations has a parent corporation. None of the corporations issues stock to the public.

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

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   Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).

STATEMENT OF THE CASE

The State's statement of the case is satisfactory except that plaintiffs have not advanced a First Amendment claim, the District Court's decision did not rest on such a claim, and, therefore, no such claim is before this Court.

STATEMENT OF THE FACTS

At the November 7, 2000 general election, Nebraska voters adopted Measure 416 by initiative. (App. Vol. I ("AV1") at 42.) Measure 416 is codified at Article I, section 29 of the Nebraska Constitution, and provides 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.

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

On January 14, 2003, Senator Nancy Thompson of the Nebraska Legislature proposed a bill to allow both same-sex and different-sex couples to protect their families at the end of life by authorizing domestic partners to make decisions about funeral arrangements and organ donation. (AV1-43, 123-25; App. Vol. II ("AV2"-) at 552-53.) On March 10, 2003, the Nebraska Attorney General issued an opinion concluding that the proposed

law, if enacted, would be unconstitutional. The Attorney General stated that the bill might have survived if it had been limited to different-sex couples, but failed because "partners of the same sex were not disqualified" as required by Section 29. (AV1-43, 124; AV2-553-54.) Following the issuance of the Attorney General's opinion, Senator Thompson's legislation did not advance out of committee. (AV1-43; AV2-554.)

As the District Court found at trial, plaintiffs are non-profit Nebraska organizations that advocate for legal equality for all Nebraskans as part of their missions, including supporting and lobbying for legislation that addresses discrimination based on sexual orientation. (AV1-38-39; AV2-549-50.) Plaintiff Citizens for Equal Protection, Inc. ("CFEP") has 4,000 members, hailing from nearly every county in Nebraska. (AV1-227.) CFEP has fought to expand the Omaha human rights non-discrimination policy to protect gay citizens.[1] (*Id.*)

Plaintiff Nebraska Advocates for Justice and Equality ("NAJE") similarly lobbies at the state and local level to protect the civil and political rights of gay Nebraskans. (AV1-38, 236-40; AV2-549-50.) NAJE has

[1] Plaintiffs use the generic term "gay" to refer to those who are lesbian, gay, or bisexual and "gay members" to refer to plaintiffs' gay, lesbian, and bisexual members.

lobbied in favor of amending the Nebraska Fair Employment Practices Act to protect gay Nebraskans from employment discrimination. (AV1-237.)

Plaintiff ACLU Nebraska works to protect the civil liberties of all Nebraskans, including through advocacy with legislators. (AV1-39, 253; AV2-550.) ACLU Nebraska has supported laws to protect same-sex couples, including by allowing same-sex couples to marry. (AV1-254.)

All three plaintiff organizations have gay members, including members who are gay public employees. (AV1-38-39; AV2-549-50.) Several of plaintiffs' gay members gave undisputed, sworn testimony regarding the advocacy and lobbying they would do but for the barrier imposed by Section 29. (AV1-262-296; AV2-555-56 & n.7.) The District Court found that Section 29 has "inhibited [plaintiffs and their members] from lobbying for extension of rights to gay and lesbian couples and has interfered with their ability to provide for themselves and their families." (AV2-555.) If Section 29 did not impose its discriminatory barrier, all three plaintiff organizations and their gay members would work to convince state and local government officials to provide protections for people in committed same-sex relationships. (AV1-262-296; AV2-555-56 & n.7.) For example, plaintiffs' gay members would advocate for enactment of a draft state legislative bill proposing a "Financial Responsibility and

Protection for Domestic Partners Act," which would make registered domestic partners responsible for each others' basic living expenses and automatically authorize a registered domestic partner to visit a partner in the hospital, make health care decisions for an incapacitated partner, and make decisions regarding organ donation and funeral arrangements when a partner passes away. (AV1-263, 266, 269, 273, 275, 277, 280, 286.) Plaintiffs' gay members also would advocate with public employers for the adoption of policies to protect people in committed same-sex relationships, such as family and medical leave to care for a same-sex domestic partner and bereavement leave to grieve and attend a same-sex partner's funeral. (AV1-229-30, 238-39, 255, 262-70, 272-73, 275, 277, 279-83, 286-87, 292, 296.)

In its Memorandum and Order, the District Court found "[t]he evidence shows that plaintiffs' members for the most part are gay or lesbian couples, most employed as professionals, who are in long-term committed relationships, many of whom have and are raising children." (AV2-556.) Plaintiffs' member couples include a stay-at-home mom, a software developer, a public relations director, a therapist, a UNL English professor, a Disciples of Christ minister, a Spanish instructor, a development consultant, and a railroad supervisor. (AV1-262, 265, 268, 271, 274, 277, 279, 281,

283.) Two of these couples are raising children, one a nine-year-old daughter and the other a four-year-old son. (*Id.* at 274, 283.)

These couples would lobby and otherwise advocate for relationship protections because they are in long-term committed relationships. Judith Gibson and Barbara DiBernard have shared their lives for seventeen years. (*Id.* at 271.) Jim Kieffer and Gary Lopez have been in a committed relationship for thirteen years. (*Id.* at 279.) The relationships of David Gilsdorf and Robb Crouch, and of Donna Colley and Margaux Towne-Colley, have spanned more than eight years. (*Id.* at 265, 283.) Nancy Brink and Maria Perez have been together for four years. (*Id.* at 277.) And Doreen Moritz and Elsa Friendt were in a committed relationship for ten years before Ms. Friendt's death from cancer. (*Id.* at 271.)

Plaintiffs' gay members wish to lobby for civil recognition of their committed relationships in part because of their shared values of commitment and responsibility. (*Id.* at 277, 281). Like married couples, plaintiffs' gay member couples have built lives together and share in the core human desire to secure their future together and to seek the peace of mind that comes with civil recognition of their relationships. (*Id.* at 281).

The depth of the commitments plaintiffs' gay members have made to one another has been tested in both good times and bad. For example, David

Gilsdorf supported Robb Crouch financially when Robb was laid off from his job, and supported him emotionally when his grandfather died. (*Id.* at 265-66.) Judith Gibson and Barbara DiBernard built a wheelchair-accessible house together in the early 1990s as part of their plan to deal with Judith's degenerative physical condition (*id.* at 265-66), and Judith supported Barbara through the difficulty of coping with her mother's years-long struggle with Parkinson's disease. (*Id.* at 271.) Jim Kieffer and Gary Lopez took turns financially supporting each other so that each could pursue advanced academic degrees. (*Id.* at 279.)

Section 29's discriminatory barrier to advocacy for protection of relationships results not only in exclusion from benefits but also in an inability to take on the reciprocal legal responsibilities that often accompany civilly-recognized committed relationships. For many people, the willingness of a partner to take on such responsibilities helps justify intertwining one's life with another person – emotionally, financially, and otherwise, and to the exclusion of others. (*Id.* at 269.) The willingness to assume legal responsibility for one another reinforces efforts to reconcile when relationships fray and provides for a more orderly and less harmful dissolution should relationships end. (*Id.* at 275.)

Section 29's erection of a barrier to advocacy even for legally enforceable mutual responsibilities is of particularly heightened concern to plaintiffs' members who are parents. They want to be role models for their children regarding the value they place on commitment by undertaking the legal duties of a committed relationship. They also seek to undertake these obligations in order to strengthen the family unit for the benefit of their children. (*Id.* at 275 (Nancy Brink: "The stronger the relationship between [the parents], the more stable the environment in the home."); *id.* at 285-86 (Margaux Towne-Colley: "While we work hard everyday to keep our family intact, the responsible thing to do for our son is to prepare for the possibility that we might one day end our relationship.").) For example, in an effort better to secure their son's relationship to both parents, Donna Colley and Margaux Towne-Colley obtained a "civil union" in Vermont and planned to travel from Omaha to Vermont for his birth (a plan frustrated by his premature arrival) because their civil union would have allowed them automatically to have both their names on their son's birth certificate had the birth occurred in Vermont. (*Id.* at 284-85.)

Section 29's barrier also puts family medical leave off limits for gay public employees in committed relationships. (*Id.* at 269 (Judith Gibson: UNL has no leave policy that would allow "Barbara to take time off from

work to assist me when I have mechanical troubles with my wheelchair"); *id.* at 263 (David Gilsdorf: employer has no leave policy "that would allow Robb to take family leave to care for me if I was injured or became seriously ill").) The same is true for family health insurance from public employers, which in many states is available to the domestic partners of public employees.[2]

The harms that flow from the discriminatory barrier to advocacy with public officials are most starkly revealed in times of crisis, including medical or other emergency situations. (*Id.* at 277.) For example, after their son was born prematurely through Cesarean-section and placed in intensive care for six weeks, Donna Colley and her partner Margaux Towne-Colley feared that their family "would not be recognized as a unit" and might be kept apart by hospital staff. (*Id.* at 284-85.) Other gay families share these concerns. (*Id.* at 277 (Maria Perez: "Without legal recognition of our relationship we will not get the respect we need to best support each other. Legal papers may help, but paper does not create full respect."); *id.* at 266

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[2] Family health insurance can be essential in times of economic uncertainty and as one ages and faces serious health conditions (*Id.* at 269 (ongoing employment of Ms. Gibson, who is 64, is unpredictable due to her post-polio condition; without access to her life partner's health insurance, she is anxious about being able to afford the coverage she needs).) Such insurance also avoids the cost of one family having to pay two deductibles. (*Id.* at 266, 272, 285.)

(Robb Crouch: "Unfortunately, I'm forced to worry about many more 'what if' situations than do my married friends and family.").)

The lack of protections for a committed relationship cuts deeply, even when couples can afford to pay for legal documents to try to make up for the lack of relationship protection. Doreen Moritz cared for her ten-year life partner Elsa Friendt during Ms. Friendt's sickness in the last year of her life. Despite having a variety of documents drawn up by an attorney to give Ms. Moritz decisionmaking authority for Ms. Friendt, Ms. Moritz was not entitled to family medical leave from her state agency employer to take Ms. Friendt to her medical appointments. (*Id.* at 292-94.) After Ms. Friendt's death, Ms. Moritz also was not entitled to bereavement leave. (*Id.* at 295.)

At the time of her deepest grief, Ms. Moritz also faced a funeral home director who challenged her authority to carry out her deceased loved one's wishes, despite a legal document granting Ms. Moritz such authority. (*Id.* at 294.) The funeral director insisted that biological family members were first in line in terms of authority, and those individuals did not want to honor the wishes that Ms. Friendt had entrusted Ms. Moritz to see implemented. (*Id*.) The funeral home director did not relent even when Ms. Moritz persuaded her attorney to rush to the funeral home and explain the law. (*Id.* at 294-95.) Only her attorney's communication with the attorney for the funeral home

prompted respect for the legal documents. (*Id.* at 295.) At a time when she should have been able to focus on coping with grief, Ms. Moritz faced a terrible fear: "During the hours I was waiting to find out if my legal documents would be recognized, I was extremely upset and panicked . . . . I feared that my relationship with Elsa would be disregarded completely, that I would be excluded from her service and not allowed to grieve her death at the service, and that I would not be allowed to have her remains." (*Id.* at 295.) Experiences like this one have demonstrated to plaintiffs' gay members how critically important it is to be able to advocate for relationship protections.

In addition to the concrete protections made unavailable by Section 29, the measure's discriminatory barrier imposes on gay individuals and their families a stigma of inferiority and unworthiness. As plaintiff member Judith Gibson explained, "Section 29 and the official sentiment it represents makes me feel unsafe wherever I am – the grocery store, medical offices, wherever . . . . I worry about things that might go wrong in my life, or times when I may need help from strangers, and that this law may encourage people to assume that I have no rights and, worse, that I deserve to have no rights." (*Id.* at 270.)

In short, Section 29 strips plaintiffs' members of their dignity as equal citizens and denies them equal footing in their efforts to obtain protection for their relationships either through the political process or from government employers.

STANDARD OF REVIEW

The State correctly asserts that this Court reviews issues of law *de novo*. Otherwise, however, the State incorrectly describes the standard of review. At the request of both parties, the District Court tried this action under Fed. R. Civ. P. 52(a) on a written record, much of it based on stipulated facts and the remainder resolved at a hearing on objections to evidence. (AV2-397, 449, 549-51 & n.3.) Where a case is tried on a written record, the Circuit Court reviews factual findings for clear error and the "existence of fact questions will not undermine the result." *John v. State of Louisiana Bd. of Trustees*, 757 F.2d 698, 703 (5th Cir. 1985); *Toney v. Bergland*, 645 F.2d 1063, 1066 (D.C. Cir. 1981) (in actions tried on a written record, trial findings "must be affirmed unless clearly erroneous, with the inferences greatly drawn in the judgment's favor"); *Nielsen v. Western Elec. Co.,* 603 F.2d 741, 743 (8th Cir. 1979) (applying this standard of review when parties treated proceedings below as a trial in part on written

submissions); *Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 718 (8th Cir. 1982) (same).[3]

SUMMARY OF ARGUMENT

Like the State of Colorado before it, Nebraska has drawn a discriminatory and unconstitutional classification based on sexual orientation, imposing on gay people a "special disability" in the political process that "forbid[s] [them] the safeguards that others enjoy or may seek without constraint." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (striking down Colorado constitutional amendment that prohibited anti-discrimination laws that would protect gay people).

Plaintiffs' challenge to Section 29 of Nebraska's Constitution is not about marriage; it is about a basic right of citizenship – the right to an even playing field in the political arena. The Equal Protection Clause prohibits laws that single out one independently-identifiable group of people and make it harder for that group than for anyone else to obtain a broad range of important government protections. Section 29 is just such a law, for it

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[3] The State incorrectly suggests that plaintiffs have asserted only a facial challenge to Section 29. (Brief of Defendants-Appellants ("DB-") at 13.) It was clear in the District Court that plaintiffs also challenged Section 29 as applied to them and to their members. Indeed, the District Court found that Section 29 has "inhibited [plaintiffs and their members] from lobbying for extension of rights to gay and lesbian couples and has interfered with their ability to provide for themselves and their families." (AV2-555.)

imposes a special barrier that requires gay people – and only gay people – to amend the state constitution before they may seek any form of protection for or based on their relationships. Heterosexuals retain full political freedom to lobby local and state governments for such protections even though they already have access to them through marriage. By imposing a discriminatory barrier to obtaining such a broad array of important government protections, Section 29 literally denies gay people "equal protection of the laws." This was the first essential holding of the District Court: that Section 29 cannot be reconciled with the guarantees of the Equal Protection Clause of the federal Constitution.

In addition, as the District Court further held, Section 29 fails even rational basis equal protection review. There simply is no logical connection between banning all forms of relationship recognition for gay people and the State's asserted goal of "steering procreation into marriage" for heterosexuals. Moreover, even putting aside whether prohibiting *all* relationship protections for gay people is a rational way to preserve the "traditional understanding of marriage," a tradition of classifying people based on sexual orientation is not an independent justification for classifying people based on sexual orientation. Reduced to its essence, the tradition argument is very simple: Section 29 makes it harder for gay people to lobby

for relationship recognition in order to keep gay people from obtaining relationship recognition. But rational basis analysis does not permit such circularity; it requires an independent justification. In the absence of any logical or independent justification, Section 29's only conceivable purpose is an unconstitutional one – discrimination for its own sake.

Finally, Section 29 violates the constitutional prohibition on bills of attainder because it advances no legitimate non-punitive purpose and, in fact, was intended to punish gay Nebraskans. By preventing gay people from lobbying for any form of family protection, while leaving others free to do so, Section 29 imposes legislative punishment – disenfranchisement and political banishment – on a specific and disfavored group of people without any of the constitutional protections of a judicial trial. It thus is a quintessential bill of attainder.

This case is not about whether Nebraska must allow same-sex couples to marry or whether a city like Omaha must pass a domestic partnership ordinance. Plaintiffs challenge only the imposition of a discriminatory barrier that makes it harder for gay people to advocate effectively for legal protection of their relationships. That simple fact is underscored by the reality that the judgment appealed from here does not require the State to allow same-sex couples to marry and does not require any Nebraska

government entity to provide any particular protections or benefits to same-sex couples. Instead, the judgment simply ensures that gay Nebraskans once again are free to lobby, on an even playing field, for government protections for their relationships. Whether and to what extent they succeed in that quest remains up to the political process, but the judgment ensures that at least that process will be consistent once again with the guarantee of equal protection and will not violate the ban on bills of attainder.

ARGUMENT

I.
SECTION 29 VIOLATES EQUAL PROTECTION

A. The Framework Established in *Romer v. Evans*

A detailed understanding of the Supreme Court's reasoning in *Romer v. Evans,* 517 U.S. 620 (1996), is crucial to a proper understanding of plaintiffs' claims. In *Romer*, the Court struck down an amendment to the Colorado Constitution that barred "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 . . . protected status or claim of discrimination." *Id.* at 624. The Court explained that Amendment 2 violated equal protection because it imposed a "broad and undifferentiated disability on a single named group." *Id.* at 632. Unlike all

other citizens of Colorado, who still could bring demands for protection against discrimination to the bargaining table of local or statewide politics, gay people had one of their principal needs – protection from discrimination based on sexual orientation – taken off the table completely.

Both the structure and content of the decision reflect the Court's deep concern with the breadth of the deprivation imposed by Amendment 2. That measure "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." *Id.* at 624. And it applied both in the public and private spheres, to prohibit protections against discrimination "in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* at 629.

1. *Romer* Applied Two Strands of Equal Protection Analysis.

Romer applied two separate, though related, strands of equal protection analysis. The first, and less familiar, strand describes the literal violation of equal protection that results when a law singles out one class of people and denies its members an equal opportunity to seek a broad array of legal protections from the government. Because Amendment 2 made it more difficult for gay people than for anyone else to seek a broad array of

protections from the government, the Court found it denied gay people equal protection "in the most literal sense." *Id.* at 633.

The second equal protection strand focuses on the fact that laws like Amendment 2 are so sweeping in nature, taking off the table such a broad swath of legal protections, that it is "impossible to credit" the government's asserted justifications for burdening the disadvantaged group. *Id.* at 635; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973) (expressing "doubt" that law designed to exclude "hippie communes" from food stamps program rationally advanced interest in preventing fraud); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449-50 (1985) (finding "difficult to believe" assertion that zoning regulation barring home for disabled people was intended to decrease liability and reduce density where city permitted boarding and fraternity houses). Under this more "conventional" form of equal protection analysis, it is the absence of a rational connection between the severity of the disability imposed and the governmental purpose asserted that establishes the violation. *Romer*, 517 U.S. at 635. Indeed, in such cases, the absence of any rational basis for the classification is immediately apparent because such sweeping laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. Such "a classification of persons undertaken for its

own sake," *id.* at 635, adopted for the very purpose of denying legal protections to gay people while preserving them for everyone else, cannot possibly serve any legitimate governmental interest and violates equal protection.

Contrary to the State's characterization, the equal protection violation in *Romer* was neither the failure to pass a state-wide anti-discrimination law including sexual orientation (DB-54), nor the repeal of existing local anti-discrimination provisions. (*Id.* at 24.) Instead, it was a political process problem – the "disqualification of a class of persons from the right to seek specific protection from the law" – that violated equal protection. *Romer,* 517 U.S. at 633. As the District Court put it, "[t]he troubling aspect of the amendment at issue in *Romer* was not its retrospective application to existing ordinances, but its prospective effect." (AV2-579). Amendment 2 created a discriminatory barrier that prohibited anti-discrimination ordinances and statutes from protecting gay people (unless a constitutional amendment were passed first), while allowing all others to seek and obtain such protections without impediment.

2. The Supreme Court Rejected the Argument That a Discriminatory Barrier Is Permissible if Protection Is Available Through Laws of General Applicability.

The State mistakenly suggests that the equal protection violation in *Romer* was premised on a construction of Amendment 2 that would have deprived gay people even of the protection of general laws and policies that prohibit arbitrary discrimination. (DB-51.) But the Supreme Court did not strike down the amendment because it foreclosed *all* possible avenues for gay people to seek protection. To the contrary, the Court assumed that Amendment 2 *permitted* the use of laws of general applicability to protect people from discrimination based on their "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships," *Romer,* 517 U.S. at 624, but nevertheless held that Amendment 2 denied gay people "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," *id.* at 631.[4]

[4] Although the Supreme Court noted that Amendment 2 could have been read to preclude application even of general anti-discrimination provisions to protect gay people, it explicitly stated that its opinion did not rest on this interpretation, 517 U.S. at 630, and instead relied on the "authoritative construction" of the Colorado Supreme Court, *id.* at 626, which "did not decide whether the amendment ha[d] this effect," *id.* at 630. Indeed, the Court expressly stated that, if Amendment 2 were interpreted more broadly to prohibit protection of gay people through laws of general applicability, it "would *compound* the constitutional difficulties the law creat[ed]." *Id.* (emphasis added).

The Supreme Court went on to explain that the availability of other avenues for obtaining protection did not cure the equal protection violation:

> [E]ven if, as we doubt, homosexuals could find safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protection does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals 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 pass helpful laws of general applicability.

Id. at 631.

The Court found that Amendment 2 violated equal protection, even if it did not ban the use of generally applicable laws to protect gay people, because the change it effected in "the legal status of gays and lesbians" was "far reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws." *Id.* at 627. The Court took pains to outline the history of modern anti-discrimination laws because it revealed the significance of the exclusion. Barring gay people from obtaining protection in the way that had become ordinary – through specific enumeration in anti-discrimination laws – denied them equal protection because experience had shown that laws of general applicability

did not offer sufficient protection from discrimination. *Id.* at 628 (common-law protections proved insufficient in many instances, and Congress lacked the power to prohibit discrimination in public accommodations, so "most States . . . chose[] to counter discrimination by enacting detailed statutory schemes").

Similarly, in the context of protection for relationships, the trend has been to develop a detailed regulatory system to protect citizens from harm: statutory systems governing marriage rather than the common law, and, more recently, domestic partnership and civil union systems.[5] As in the context of non-discrimination laws, singling out one group of citizens and denying it the political opportunity to seek protection in the kind of systems that are more effective at addressing people's needs is not "equal protection," even if laws of general applicability might provide some measure of protection. Yet this is exactly what Section 29 does. Plaintiffs' members can obtain specific protection for their relationships only by amending the State Constitution or by passing somewhat helpful laws of general applicability. Requiring plaintiffs to seek protection by passing laws that apply to *any* two people – irrespective of their relationship – subjects

[5] As the District Court found, ten states, 162 local governments and 187 colleges and universities provided family health benefits to same-sex couples as of 2003, and "many states and city governments are now offering benefits and rights to same-sex couples." (AV2-582, n.21.)

gay people to an additional political hurdle, for people in different-sex relationships are free to lobby for those same protections in a unified package that turns on civil recognition of a committed relationship. *Romer* makes it clear that singling out gay people and restricting them to such limited avenues for obtaining legal protection violates equal protection.

B. Section 29 Is Broader in Scope Than Colorado's Amendment 2.

Like Amendment 2, Section 29 prohibits gay people from securing protection against *discrimination* based on their relationships across a range of contexts and at all levels of government. But Section 29 also prohibits any "legislative, executive, or judicial action at any level of state or local government," *Romer*, 517 U.S. at 624, that might protect same-sex couples against other harms by adopting a modern system of civil recognition for their committed relationships. It enshrines in Nebraska's Constitution – for gay people, and only for gay people – a prohibition on recognition and protection of the committed, loving relationships that are the foundation of most families and that provide the organizing principle for many of our most critical legal protections. Moreover, Section 29 actually *requires* the government to treat gay people differently, whereas Amendment 2 merely *allowed* such discrimination by private parties.

The State suggests that Section 29 does not impose "an impermissibly broad disability," or affect "an almost limitless number of transactions and endeavors" (DB-42, 43 (quoting *Romer,* 517 U.S. at 631), because it bars protection for gay people based on their "same-sex couple relationships," rather than barring protection for gay people based on their same-sex sexual orientation. (*Id.* at 48.) This is a semantic smokescreen; gay people are the ones who have same-sex relationships, so to deny protection across the board for same-sex relationships is to deny protection for gay people. Rather than minimizing the discriminatory barrier, the fact that Section 29 targets relationships intensifies the sweeping nature of the exclusion. Both *Romer* and *Lawrence v. Texas*, 539 U.S. 558 (2003), clearly rejected the idea that there is any meaningful distinction between discrimination based on sexual orientation and discrimination based on same-sex relationships. *Id.* at 574 (discrimination based on same-sex "orientation, conduct, practices or relationships" is sexual orientation discrimination) (quoting *Romer*, 517 U.S. at 624); *id.* at 579, 581 (O'Connor, J., concurring) (singling out people in same-sex relationships discriminates based on sexual orientation; *State v. Limon,* --- P.3d ---, No. 85,898, 2005 WL 2675039 at *7 (Kan. Oct. 21, 2005) (finding law that distinguished between same-sex and different-sex sexual relationships classified according to sexual orientation).

Of course, Amendment 2 and Section 29 are not co-extensive. Amendment 2 barred some protections that Section 29 permits, and Section 29 prohibits many protections that Amendment 2 did not address. For example, although it technically is true that Amendment 2 went farther than Section 29 by prohibiting protection against discrimination based on gay identity, the Supreme Court has recognized the reality that *all* anti-gay discrimination targets people based on a same-sex relationship or the desire to have a same-sex relationship in the future. Consequently, the line between discrimination based on sexual orientation and discrimination based on being in a same-sex relationship is often blurry. *See, e.g., Shahar v Bowers,* 114 F.3d 1097 (11th Cir. 1997) (en banc) (discussing withdrawal of job offer based on attorney's religious wedding to another woman).

However, it also is true that Section 29 prohibits a vast array of protections that were not denied by Amendment 2. Because family relationships are the premise for such an extensive array of protections provided by the government, and because same-sex relationships play a central role in what it means to be gay, Section 29 sweeps more broadly and cuts more deeply than Amendment 2.

1. The Parties Largely Agree on the Proper Construction of Section 29.

The parties agree that Section 29 "precludes Plaintiffs from obtaining legislative creation of a legal status for same-sex couple relationships without amending the Constitution." (DB-43.) The parties also agree that Section 29 permits plaintiffs' gay members to obtain legal protection for same-sex relationships either by amending the Nebraska Constitution or by passing laws of general applicability.[6]

2. Section 29 Prohibits Non-Discrimination Protections.

Section 29 precludes the very kind of non-discrimination protections that were at issue in *Romer*. Like Amendment 2, it prohibits "any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual . . . *relationships* shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any . . . discrimination." 517 U.S. at 624 (emphasis added). Many states, including Nebraska, prohibit

[6] Notwithstanding the District Court's discussion of more extensive consequences that may flow from Section 29 (*see, e.g.,* AV2-567-70), the parties agree that the plain text of Section 29 applies only to state actors and is targeted at gay people. Nevertheless, even the narrower construction of Section 29 on which the parties agree is broader in scope than the law struck down in *Romer*, and similarly violates the Constitution.

discrimination based on a person's relationship status through bans on marital status discrimination.[7]

Under Section 29, heterosexual people are free to seek and to obtain protection from such discrimination based on their primary relationships, whether they are cohabiting relationships, committed partnerships or marital relationships. In contrast, gay people are barred from obtaining any of the non-discrimination protections discussed in *Romer* – in the areas of "housing, sale of real estate, insurance, health and welfare services, private education, and employment," *Romer*, 517 U.S. at 629 – based on their primary relationships unless they first pass a constitutional amendment. *Compare Koebke v. San Bernardino Country Club,* 115 P.3d 1212 (Cal. 2005) (holding that California law prohibits discrimination in public accommodations as between married couples and registered domestic partners).

3. Section 29 Also Prohibits Relationship-Based Protections.

Because intimate family relationships are central to most people's daily lives, many of the social systems and laws we establish to protect ourselves are organized around our familial relationships. Marriage, and

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[7] *See, e.g.,* Neb. Rev. Stat. §§ 48-1104, 48-1111; Lincoln Mun. Code §§ 11.04.030, 11.06.020, 11.06.050; Omaha Mun. Code §§ 13-84, 13-89, 13-321, 13-322.

more recently civil unions and domestic partnerships, are state-created systems used to organize a broad array of protections ranging from intestate succession rights to hospital visitation rights, medical decision-making authority, and eligibility for tax breaks. Relationship-based protections thus reach into every nook and cranny of modern life.

Section 29 bars any form of civil recognition of committed same-sex relationships. It expressly prohibits recognition of a "civil union," the statutory spousal status that Vermont and Connecticut have created for same-sex couples. 15 Vt. Stat. Ann. § 1202 (1999); Conn. Pub. Act No. 05-10 (2005). It also bars the creation or recognition of a "domestic partnership," a status that provides specific protections for adult relationships and that currently exists in three states (California, New Jersey, and Maine) and in many localities across the country, including in Iowa, Minnesota and Missouri.[8] And, of course, Section 29 prohibits same-sex couples from seeking legislation to end discrimination in marriage.

For example, Section 29 discouraged the legislature from even considering a bill that would have created a domestic partnership registry open to all couples, particularly in light of the Attorney General's opinion

[8] *See* Iowa City Ordinance 94-3647, 11-8-94; Kansas City Article VII Classification and Compensation Plan, §§ 2-1100, 2-1101; Minneapolis City Code of Ordinances, Chapter 142, 18.200 & § 142.70; St. Louis City Rev. Code Chapter 8.37.050.

that such a bill would violate Section 29 because "partners of the same sex were not disqualified." (AV1-43, ¶ 20; *id.* at 124-25). Domestic partnership protections offered at the municipal level in other states illustrate the wide range of basic protections that are essential to everyday life that Section 29 denies same-sex couples. *See supra* note 11. Section 29 bars plaintiffs from seeking or obtaining even these limited forms of protection at the local level.

And, of course, Section 29 also erects a discriminatory barrier to advocacy for the full panoply of rights and obligations that often are linked to marriage.[9] Marriage provides a much broader range of protections than most domestic partner registries, and includes comprehensive survivorship and intestacy rights, the ability to file a wrongful death suit when a spouse is killed, entitlement to an elective share of a spouse's estate, worker's compensation and disability benefits, preferred tax treatment based on spousal status, and mutual obligations of support for children and for one

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[9] While plaintiffs' member couples emphasized in their undisputed testimony that without the barrier of Section 29 they would begin by advocating for domestic partner benefits (and in particular would seek to introduce the "Financial Responsibility and Protection for Domestic Partners Act"), they also stated that they intend to work to persuade legislators to provide their families the protections that only marriage affords. (*See, e.g.,* AV1-280, ¶ 7 (Jim Kieffer: "If the law allowed for it, I would want to work on many changes toward legal recognition of committed gay couples' relationships, including marriage, just like other citizens get to work toward the things they believe should be changed in the law."); *id*. at 263, ¶ 7; *id.* at 275, ¶ 11.)

another (*e.g.*, alimony, maintenance, custody, and division of assets in event of divorce). Marriage comes with the broadest array of benefits and protections government provides.

In addition, Section 29 prevents gay Nebraskans from advocating on equal footing with public employers for critical workplace protections, including bereavement leave for immediate family members and in-laws, family health insurance and family medical leave.

The State's inability to comprehend the sweeping nature of a ban on relationship-based protections for same-sex couples drives home the Supreme Court's point in *Romer* that such protections typically are "taken for granted by those who already have them or do not need them." 517 U.S. at 631. Under Section 29, gay people are shut out of the political process entirely when it comes to seeking protection for relationships, while heterosexuals are entitled to obtain the full panoply of legal protection imaginable either by marrying or by advocating for government recognition of a different-sex domestic partnership or civil union system.

Section 29's discriminatory barrier thus bars gay people from a vast array of protections, from something as basic as the domestic partner benefit of bereavement leave to the largest single set of legal protections that government can convey – marriage. This extraordinary reach makes Section

29 even broader than the ban on non-discrimination laws struck down in *Romer*. 517 U.S. at 624.

4. Section 29 Even Requires Government Discrimination.

Section 29 also works a broader injury than Amendment 2 because the Colorado provision merely allowed private discrimination against gay people, while Section 29 affirmatively *requires* the State to deny recognition to same-sex relationships, thereby mandating, rather than merely allowing, gay people's "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary life in a free society." *Romer,* 517 U.S. at 631.[10]

Indeed, even the example cited by the State highlights the greater breadth of Section 29 in the public sector. Under Amendment 2, a local police chief would have been prohibited from adopting an explicit policy banning discrimination against gay officers (including in the provision of back-up assistance). (DB-52.) But the police chief would not have been prohibited from treating gay officers equally, nor would the police chief

[10] Whether plaintiffs' gay members have a federal constitutional right to recognition of their relationships is immaterial, contrary to the State's suggestion. (DB-54.) Rather, the problem both here and in *Romer* is that state and local legislators can and often do enact laws to protect their citizens even if such laws are not required by the federal constitution, yet Section 29 prevents plaintiffs' gay members from seeking such protections on equal footing with other Nebraskans.

have been required to discriminate. In contrast, under Section 29, not only is a local police chief prohibited from adopting any policy that recognizes the committed same-sex relationships of gay officers (whether it is a general policy prohibiting discrimination based on an officer's same-sex relationship – even in the provision of back-up assistance – or a specific policy providing domestic partners of officers equal death benefits), but the chief and other officers are required to deny gay officers protections for their families that the law provides to other officers.

Section 29 also has broad implications for protection of same-sex couples in the private sector. The Supreme Court concluded that Amendment 2 had far-reaching consequences in the private sphere because it ensured that private discrimination would go unchecked by government intervention. 517 U.S. at 627. Section 29 goes even farther. It denies gay people an equal opportunity to establish any kind of public system or registry on which private protection for their relationships could be premised. Although Section 29 does not prohibit private protection for domestic partners, the absence of any government system for registration and certification of a legal relationship discriminates by creating a substantial hurdle to private recognition and protection, for it requires every

individual business or employer to create its own definition of family and its own system of standards for recognition.

In sum, Section 29's broad sweep makes it even more extreme in key respects than the state constitutional amendment at issue in *Romer*.

C. Section 29 Denies Gay People Equal Protection in the Most Literal Sense.

1. Making It More Difficult for Same-Sex Couples Than for Different-Sex Couples to Seek Legal Protection for Their Relationships Literally Denies Plaintiffs' Members Equal Protection of the Law.

"A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer,* 517 U.S. at 633. Section 29 is such a law, for it declares that, in general, it shall be more difficult for gay people than for all others to seek protection for their committed relationships. Unlike different-sex couples, who may marry and enjoy the host of legal protections that come with marriage, and who remain free to advocate at all levels of government for domestic partnership laws and benefits, a civil union system, or additional protections based on marriage, same-sex couples "can obtain specific protection [for their relationships] only by enlisting the citizenry of [Nebraska] to amend the State Constitution or perhaps . . . by trying to pass helpful laws of

general applicability." *Id.* at 631.[11] Such a literal violation of equal protection "defies" conventional analysis. *Id.*[12]

The "literal violation" inquiry outlined in *Romer* focuses on the dramatic change in legal status that is wrought when one independently identifiable group of citizens is "put in a solitary class," *id.* at 627, and subjected to a "special disability," *id.* at 631; *see also id.* at 627 ("Sweeping and comprehensive is the change in legal status effected by this law."); *id.* ("The change Amendment 2 works in the legal status of gays and lesbians . . . is far reaching."); *id.* at 627 ("Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status are rare."). As with Amendment 2, the special disability imposed by Section 29 is "disqualification . . . from the right to seek specific protection from the

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[11] Section 29's "ultimate effect is to prohibit any governmental entity from adopting . . . protective statutes, regulations, ordinances or policies in the future unless the state constitution is first amended to permit such measures." 517 U.S. at 627 (citing *Evans v. Romer,* 854 P.2d 1270, 1284-85 (Colo. 1993)).

[12] *See also Equality Found. of Greater Cincinnati v. City of Cincinnati,* 128 F.3d 289, 297 (6th Cir. 1997) ("ordinary three-part equal protection query was rendered irrelevant" where state constitutional amendment "deprived a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government" because amendment was "so obviously and fundamentally inequitable, arbitrary and oppressive that it literally violated basic equal protection values").

law[.]" *Id.* at 633. Indeed, Section 29 goes farther than Amendment 2, for it disqualifies gay people from the right to seek a far broader set of protections in an area that is centrally important to most people's daily lives. *See supra* Section I.B.

Section 29 singles out one small group of citizens and imposes on them "a broad and undifferentiated disability," *Romer*, 517 U.S. at 632, the inability to seek any form of protection for their relationships without first amending the constitution. Like Amendment 2, it "identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. After Section 29, both state and local government entities are free to establish a domestic partnership system, so long as same-sex couples are not protected. The legislature is free to amend or to augment the protections available through marriage, so long as same-sex couples are not protected. And government employers are free to provide benefits to the families of unmarried employees, so long as the families of gay employees are not protected.

The State studiously ignores the entire line of reasoning in *Romer* that culminates in the recognition that imposing such a "special disability" – having to amend the constitution to obtain protection – on one group of people violates equal protection in a far more fundamental fashion than

traditional equal protection analysis was designed to reach. The State simply contends, without citation, that because plaintiffs have not asserted that they are entitled to marriage or civil unions as a matter of federal law, the District Court lacked authority for its holding that plaintiffs' gay members are entitled to an equal opportunity to lobby for protection of their relationships. (DB-50, 54.) Of course, the authority for the District Court's ruling is *Romer* itself. 517 U.S. at 628 (explaining that Amendment 2 prohibited lawmakers from choosing to provide protection against discrimination in public accommodation and noting that such protection is *not* required by the Fourteenth Amendment). Whether or not the plaintiffs in *Romer* ultimately could have obtained state-wide protection against discrimination through the legislature, or were entitled to such protection already as a matter of federal law, *see id.*, what troubled the Court was the "across the board . . . disqualification of a class of persons from the right to *seek* specific protection from the law," *id.* at 633 (emphasis added).

Like Amendment 2, Section 29 creates a discriminatory barrier that denies gay people an equal opportunity to lobby for "protections taken for granted by most people either because they already have them or do not need them[.]" *Id.* at 631. Gay people are "forbidden the safeguards that others enjoy *or may seek without constraint*." *Id*. (emphasis added). When a state

adopts such an "across the board" bar to legal protection for same-sex relationships, it renders the entire "class of persons" for whom such protections are essential – gay people – "a stranger to its laws." *Id.* at 635. By denying gay people – and only gay people – the right to seek protection for their relationships, Section 29 violates the central constitutional requirement "that government and each of its parts remain open on impartial terms to all who seek assistance." *Id.* at 633.

Just as Colorado's Amendment 2 was a literal violation of equal protection because it singled out gay people and precluded them from seeking aid from the government – in the form of legal protection against discrimination – Section 29 is a literal violation of equal protection because it singles out gay people and precludes them from seeking aid from the government – in the form of legal protection for same-sex relationships. Indeed, Section 29 takes off the table for gay people an even broader array of far more essential protections. *See supra* Section I.B. Members of same-sex couples, "by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres." 517 U.S. at 627. Imposing on one group of citizens such a sweeping denial of the right to seek protection from the government is a denial of equal protection "in the most literal sense." *Id.* at 633.

2. Like *Romer* and *Washington v. Seattle School District No. 1,* This Case Concerns Equal Access to the Decision-Making Process.

Romer is not the first time the Supreme Court has struck down a constitutional or charter amendment that required one group of people but not others to go to the ballot box to get protection. *See Reitman v. Mulkey,* 387 U.S. 369 (1967); *Hunter v. Erickson,* 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982) ("*Seattle*"). Although plaintiffs' arguments in this case are not based on the Supreme Court's "precedents involving discriminatory restructuring of governmental decisionmaking," *Romer,* 517 U.S. at 625 (citing *Hunter, Reitman, Seattle,* and *Gordon v. Lance,* 403 U.S. 1 (1971)), understanding the *Hunter-Seattle* line of authority helps to illustrate what is constitutionally impermissible about Section 29: it singles out gay people and denies them equal access to the political process.

In *Reitman,* the Supreme Court affirmed a decision striking down a California constitutional amendment that would have permitted racial discrimination in the sale of housing, explaining that the constitutional violation resulted because "the right to discriminate on racial grounds[] was now embodied in the State's basic charter, immune from legislative,

executive, or judicial regulation at any level of the state government." 387 U.S. at 376 (emphasis added).

In *Hunter,* the Supreme Court struck down a charter amendment that prohibited Akron's city council from adopting any ordinance dealing with racial, religious or ancestral discrimination in housing, explaining that only those "who sought protection against racial bias" were required to prevail by referendum rather than by political lobbying of the city council. 393 U.S. at 386. The Court held that the city could "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 392.

And, in *Seattle,* the Court struck down a state initiative that allowed busing for all other purposes, but not to promote desegregation, stating that the "evil condemned" was not the mere existence of a political obstacle, but "the comparative structural burden placed on the political achievement of minority interests." 458 U.S. at 474 n.17. The Court explained that

> 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 power nonneutrally . . . plac[ing] *special* burdens on racial minorities within the governmental process, thereby making it *more* difficult for certain racial

> and religious minorities than for all other members of the community to achieve legislation that is in their interest.

Id. at 470 (citation and internal marks omitted) (emphasis in original).

Reitman, *Hunter* and *Seattle* all involved federal equal protection challenges to laws that removed *specific* racial issues from local or legislative bodies and put them in the hands of the populace (discrimination in housing in *Reitman* and *Hunter* and segregation in schools in *Seattle*). In each case, the discriminatory classification drawn was not between racial groups but between issues of particular importance to racial minorities and all other issues. As the Supreme Court explained in *Hunter,*

> It is true that the section draws no distinctions among racial and religious groups. [African Americans] and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But [the challenged law] nevertheless disadvantages those who would benefit from laws barring racial, religious or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.

393 U.S. at 390-91.

As the District Court noted below, the Colorado Supreme Court's decision in *Romer* relied on *Hunter* and *Seattle.* (AV2-565.) However, the Supreme Court made it clear that it saw Amendment 2 as a far more

egregious type of law. *Romer,* 517 U.S. at 633 ("disqualification of the right to seek specific protection from the law is unprecedented in our jurisprudence"). Rather than making it harder to get protection against one specific aspect of sexual orientation discrimination, such as discrimination in housing, Amendment 2 made it harder for gay people to get any anti-discrimination protection at all. The Supreme Court explained that such a sweeping barrier to protection for one group of people denied equal protection "in the most literal sense" and simply struck it down without using the conventional equal protection "tier analysis" applied in *Reitman, Hunter* and *Seattle*. *Id.* Amendment 2 "confound[ed] th[e] normal process of judicial review because it "identifie[d] persons by a single trait and then denie[d] them protection across the board." *Id.* at 633. In other words, it literally denied gay people "the protection of equal laws." *Id.* at 634 (citation omitted).

The State seriously misunderstands both *Seattle* and *Romer* when it argues that this case does not involve "equal access to the decisionmaking process." (DB-31.) As in *Seattle,* this case involves a challenge to a law that creates a separate decision-making process. And, as the Supreme Court explained at great length in *Romer*, it was the discriminatory hurdle of having to amend the state's constitution – or to pass laws of general

applicability rather than specific laws designed to protect gay people – that violated the principle "that government and each of its parts remain open on impartial terms to all who seek assistance." 517 U.S. at 633.

Section 29 shares the very same constitutional flaw, requiring gay people to amend the state constitution to obtain specific protection while allowing anyone else who wants protection to go directly to the legislature, local government or government employers. In other words, Section 29 creates "a separate decision-making process" (DB-32), when it comes to protection for gay people's relationships.

Because Section 29 sweeps so broadly, denying gay people any form of protection for their relationships, this case is governed by *Romer*. Although the *Hunter-Seattle* cases also concerned "equal access to the decisionmaking process" (DB-31), those decisions simply provide helpful background and are not necessary to the Court's decision in this case.

3. The State Misconstrues the District Court's Background Discussion of Broader Constitutional Principles That Support Its Holdings.

A literal violation of equal protection runs afoul not only of the Equal Protection Clause, but of a core organizing principle of our democracy: "the principle that government and each of its parts remain open on impartial terms to all who seek assistance." *Romer,* 517 U.S. at 633. That principle is

"[c]entral *both to the idea of the rule of law* and to our own Constitution's guarantee of equal protection." *Id.* (emphasis added). The District Court's assessment that it was important to "elucidat[e] the constitutional deprivation at issue," (AV2-557), before ruling on plaintiffs' equal protection and bill of attainder claims reflects its recognition that a law like Section 29 has serious implications that extend beyond the parameters of the Equal Protection Clause alone because a system of representative government cannot retain its authority if it ceases to be open on equal terms to *all* of the people it governs.

Plaintiffs did not assert below and do not contend on appeal that Section 29 unlawfully burdens their rights to intimate or expressive association. Nor do Plaintiffs' equal protection claims rest on the right to petition the government for redress of grievances or the associated right to participate in the political process. The distinct constitutional provisions that guarantee intimate and expressive association and the right to petition were not part of the analysis in *Romer* and are unnecessary to the analysis here. Moreover, although the State contends otherwise, the District Court's decision rests expressly and independently on the claims actually advanced by plaintiffs below.

Reflecting the approach taken by the Supreme Court in *Romer*, the District Court's opinion contains an introductory discussion of Section 29's broad implications. (AV2-556-70.) In *Romer,* the Supreme Court devoted an entire section of its opinion to consideration of the various harms that did – or that might – flow from a state constitutional amendment that targeted gay people for disadvantage, including consequences not central to disposition of the case. 517 U.S. at 630 ("If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates."). That broad preliminary review helped to frame the Supreme Court's later determination that the challenged law was so "broad and undifferentiated," *id.* at 632, that it was "unprecedented" in the Court's jurisprudence, *id.* at 633, and "defie[d]" conventional constitutional inquiry, *id*. at 632.

The District Court likewise framed its discussion of related constitutional concerns as a preliminary review of Section 29's potential effects, (AV2-556), observing that a finding of a burden on intimate association was "not central to disposition of this case," (*id.* at 567), and concluding that it "need not discuss the more stringent level of scrutiny" under the First Amendment given its independent resolution of the case on equal protection grounds. (*Id.* at 557 n.8.) As the District Court recognized,

even if Section 29 implicates important liberties protected by other provisions of the Constitution, plaintiffs' claims sound exclusively in equal protection.

Nevertheless, the First Amendment and due process principles discussed by the District Court do help to clarify the unusual nature of this sort of law in our American tradition. *See Romer,* 517 U.S. at 633 ("disqualification of a class of persons from the right to seek specific protection from the law" is not within "our constitutional tradition"). Thus, the District Court's "Constitutional Deprivation" section is best understood as a catalog of parallel constitutional commitments that highlight the critical importance to a government of the people and by the people of ensuring that the government remains open to all citizens on equal terms.

In the American tradition, we recognize governmental authority to make and to enforce laws because, as members in a self-governing democracy, "we" are the government. Under that tradition, Section 29 is a denial of equal protection "in the most literal sense," *id.*, not because the disadvantage imposed is inexplicable by the asserted justifications, as is true with any equal protection violation, but because the *rule of law* itself cannot be sustained if the government is permitted to "deem a class of persons a stranger to its laws," *id.* at 635 (emphasis added). As in *Romer,* the rule of

law – our very system of representative government – is undermined by Section 29 because it denies an independently-identifiable class of people the opportunity to participate in self-government on equal terms with all other Nebraskans.

Although the other constitutional provisions discussed by the District Court apply in other contexts to ensure that citizens retain the elements of liberty,[13] freedom of speech,[14] and the right of petition[15] necessary to protect their ability to participate in a meaningful way in the democratic system, this Court need not reach beyond the Equal Protection Clause to understand the exceptional and impermissible nature of Section 29, which likewise undermines the democratic process. The violation in this case is virtually identical to the one in *Romer*. Section 29 violates the Equal Protection Clause, and there is no need to rely on other constitutional provisions to reach that conclusion.

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[13] (AV2-558 (citing *Roberts v. U.S. Jaycees,* 468 U.S. 609, 619 (1984).) *See also Lawrence,* 539 U.S. at 562.

[14] (AV2-557 (citing *First Nat'l Bank of Boston v. Belloti,* 435 U.S. 765, 776 n.12 (1978).)

[15] (AV2-564 (citing *Kramer v. Union Free Sch. Dist. No. 15,* 395 U.S. 621, 626 (1969), *Vieth v. Jubelirer,* 541 U.S. 267 (2004), and *Hunter,* 393 U.S. at 390-91.)

4. The Court Should Not Render Advisory Opinions on the Hypothetical Constitutional Questions Posed by the State.

In an attempt to reframe the litigation, the State has argued at some length that Section 29 violates equal protection only if a statutory provision restricting marriage to a man and a woman would violate equal protection, *i.e.*, only if the Equal Protection Clause prohibits states from excluding same-sex couples from marriage. (DB-54-55.) There are two critical problems with this argument. First, the State's argument would require the Court to resolve a hypothetical constitutional question not raised by the current controversy, an approach prohibited by Article III's requirement that Court's refrain from rendering advisory opinions. *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993).

Second, the State's hypothetical question ignores the very essence of what makes Section 29 a literal violation of equal protection. The literal violation ruling in *Romer* was premised not on the fact that Colorado passed a constitutional amendment but on the fact that Colorado deprived state and local government officials of authority to address certain issues when gay people sought protection – but retained their authority to address those same issues for everyone else. Unlike Section 29, state-wide *legislation* restricting marriage to a man and a woman would not deprive gay people of equal footing in the political arena; their opportunity to lobby for equality in

Nebraska's definition of marriage would be the same the day before such legislation passed as the day after enactment. Consequently, such legislation would not take anything off the political table for gay people. The opportunity to lobby the state legislature would remain, and there would be no meaningful deprivation of other political rights because local government bodies have no power to end discrimination in marriage.[16]

D. Section 29 Also Fails the Conventional Rational Basis Test Because It Does Not Rationally Further a Legitimate State Interest.

In addition to constituting a literal denial of equal protection, Section 29 violates equal protection under conventional rational basis review because it does not rationally advance any government purpose that is both legitimate and independent of the classification Section 29 draws between same-sex and different-sex couples. The lack of any rational connection between denying gay people relationship protection and advancing the State's purported interests reveals that the measure's real purpose was to disadvantage gay Nebraskans. Such discrimination for its own sake is

[16] Nor is it necessary or appropriate for the Court to resolve whether the legislature could enact Section 29 as a statute, though *Romer's* logic makes it doubtful that such legislation could survive equal protection review. State-wide legislation along the lines of Amendment 2 would strip gay people – and only gay people – of the ability to go to local government to seek protection from discrimination in employment, housing and public accommodations – protection that all others either take for granted or may seek without constraint at the local level.

impermissible. Moreover, in light of Section 29's improper purpose, no other asserted interest can be credited because no other interest is substantiated in the record.

1. Equal Protection Requires a Rational Connection Between a Law's Classification and an Independent and Legitimate Government Interest.

Under rational basis equal protection review, a challenged classification must at least rationally advance a government interest that is both legitimate and independent of the classification. *Romer*, 517 U.S. at 631; *see also Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring). If any one of these elements is missing – if there is no connection (or an insufficient connection) between the classification and the asserted objective, or if the asserted objective is not legitimate or is not independent of the classification, the law fails the rational basis test.

First, there must be a "link between classification and objective," *Romer*, 517 U.S. at 632, *i.e.*, "some relation between the classification and the purpose it serve[s]," *id.* at 633.[17] When it is logically impossible for a classification to advance the asserted purpose, the law fails rational basis

[17] Of course, it is the *classification* – the challenged discrimination – and not the law as a whole that must rationally advance a legitimate governmental interest. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out").

review. For example, in *Hooper v. Bernadillo County Assessor*, 472 U.S. 612 (1985), the state of New Mexico enacted a tax exemption for veterans living in New Mexico before May 8, 1976. The state argued that the limitation to veterans who arrived before 1976 furthered the state's interest in encouraging people to move to New Mexico. The Court rejected that argument, pointing out that the law hardly could have encouraged anyone to move to New Mexico before 1976 when it was not passed until 1981, five years after the deadline. *Id*. at 619-20. As there was no logical connection between the classification and the purpose, the law failed.

A classification also fails rational basis review when its connection to the asserted purpose is not totally lacking, but is "so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. For example, in *Romer,* Colorado defended its ban on protection from discrimination by asserting that it rationally furthered two state interests: respecting the religious liberties of landlords and employers and conserving state resources to fight discrimination against other groups. 517 U.S. at 635. The Supreme Court held that the decision to classify based on sexual orientation (by prohibiting protection against discrimination for gay people but not for anyone else) was "so far removed" from these asserted purposes that it could not be seen rationally to advance them. *Id*.

Second, equal protection requires an asserted purpose to be "independent" of the classification. *Id.* at 633. For example, a classification that excludes disabled people cannot be justified by a purpose to exclude disabled people; that purpose does not explain the differential treatment, it merely repeats it. Without an independent purpose, a law becomes "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635.

Finally, the purpose advanced by the classification must be a legitimate one. As the Court has made clear for over three decades, a purpose to disadvantage a group of people is not a legitimate state interest: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534 (emphasis added).[18] The goal of rational basis review is to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633. In other words, the bare negative attitudes of the majority – whether framed

[18] Justice O'Connor explained this principle recently in her concurring opinion in *Lawrence*: "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law." 539 U.S. at 583.

as disapproval, morality, discomfort, or blatant bias – cannot justify disadvantaging a minority. *Cleburne*, 473 U.S. at 448; *Moreno*, 413 U.S. at 534.

2. Section 29 Violates Equal Protection Because There Is No Logical Connection Between Section 29's Classification and the Asserted Purpose.

Section 29 fails rational basis review because it does not rationally advance any independent and legitimate government interest. The State asserts that prohibiting protection for gay people's relationships rationally advances its interest in "steering procreation" into marriage. (DB-57, 60.) But a moment's reflection demonstrates that there simply is no logical connection between Section 29's classification and this purported purpose: making it harder for gay people to obtain formal recognition of their relationships does not rationally induce heterosexual people to procreate or to marry, much less to procreate within marriage. Put another way, barring the legislature from creating a domestic partnership registry for same-sex couples is not rationally connected to ensuring that different-sex couples marry before they procreate. This is precisely the sort of illogical connection that led the Court in *Hooper* to strike down a law under rational basis review. 472 U.S. at 619-20.

Indeed, Section 29's classification *disserves* the purported goal of steering procreation into marriage because heterosexuals remain free to lobby for relationship protections *other* than marriage, including domestic partnership benefits. Making it easier for different-sex couples to obtain protection for their relationships outside of marriage cannot conceivably help to steer procreation into marriage.

The State tries to sidestep the absence of a logical connection by failing to apply the rational basis analysis at all. The State argues that, "[b]ecause 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." (DB-60.) But the State's argument fails to address Section 29's *actual* classification, which bars *all* forms of legal recognition for same-sex couples' committed relationships. And, as noted above, the classification, rather than the law as a whole, is what must further the proffered interest. *See supra* note 20.[19]

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[19] Similarly, no one could rationally believe that a law preventing the government from providing any form of recognition for the relationships of same-sex couples would promote the welfare of children. While several oppositional *amici* rely on junk social science or distortions of valid social science to fabricate rationales for Section 29, the State rightly has chosen not to advance any of these theories, and represented to the District Court that the related lay opinion evidence in the record was not offered "to prove the truth of those opinions" but rather to reflect voters' motivation. Defendants' Reply Brief to Plaintiffs' Consolidated Motion to Exclude at July 30, 2004.

To the extent the State asserts that Section 29's purpose is to preserve the "traditional understanding of marriage," that justification fails because it is not independent of the classification. *Romer*, 517 U.S. at 633. The classification in Section 29 excludes gay people from relationship recognition; the "tradition" objective is to continue to exclude gay people from relationship recognition. That objective does not explain the classification, it merely repeats it, rendering it "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635.

In addition, Section 29 does not rationally advance the goal of preserving the traditional understanding of marriage. As the District Court correctly found, a "total prohibition on any future establishment or recognition of domestic partnerships, civil unions, or undefined [same-sex]

The nation's pre-eminent experts thoroughly have discredited attacks on the parental fitness of gay couples. *E.g.*, Am. 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 children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."); 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/content/full/pediatrics;109/2/341 (setting forth formal conclusion of the American Academy of Pediatrics 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.").

relationship 'similar to' marriage does not advance [the] goal [of preserving the traditional definition of marriage] and may, in fact, prevent it," (AV2-581-82), by permitting civil unions or domestic partnerships for heterosexual couples and thereby providing heterosexual couples options outside of traditional marriage.

Thus, the explanations offered by the State or manufactured by its *amici* either fail to explain the classification logically or fail to offer an independent justification for the exclusion. Section 29 therefore fails rational basis review.

3. Section 29's Only Purpose Is to Disadvantage Gay People.

a. Section 29's broad scope raises an inference of animus.

The discontinuity that logic alone exposes between Section 29's classification and the "reasons offered for it" is so stark that Section 29 "seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632.[20] Indeed, Section 29's focused removal of such a broad range of protections can be explained *only* by a desire to disadvantage

[20] The State mistakenly argues that Section 29 was not born of animosity because the sponsors claimed not to hate gay people. (DB-66-68.) But when the Supreme Court refers to animosity in equal protection jurisprudence, it is not restricted to hatred and bigotry. A classification is driven by animus whenever it is adopted "not to further a proper legislative end but to make [the disadvantaged group] unequal to everyone else." *Romer,* 517 U.S. at 635.

gay people; no other explanation for such a sweeping measure makes any sense. *See Romer*, 517 U.S. at 634 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."). A law adopted for such an illegitimate purpose violates equal protection. *See supra* Section I.D.1.

b. When there is an inference of animus, the Court does not defer to unsubstantiated justifications.

At the very least, when it appears that a classification's purpose is to disadvantage one class of citizens, the Court should not determine whether there is any hypothetical justification that *might* explain the law because there is no longer a presumption of judicial deference to the State's lawmaking process. Once there is an inference of animus, any asserted purpose must be substantiated before it can be credited.

"The Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions eventually will 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 it is evident that a classification's purpose is to disadvantage one class of citizens, however, there *is* "reason to infer antipathy," and the rationale

for judicial deference to the State's lawmaking process and remedial capacity no longer exists. In such circumstances, an inference arises 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)). 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*, 473 U.S. 432, 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.[21]

The Supreme Court often has spoken of this skeptical approach in terms of a search for "substantiation." For example, in *Cleburne*, the Court struck down a law that required a group home for the developmentally disabled to get a special use permit but that did not require a fraternity or an

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[21] *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," particularly "where, as here, the challenged legislation inhibits personal relationships."); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("[where] there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified").

apartment building to get a special permit. 473 U.S. at 448. The measure had passed in response to the negative attitudes of nearby property owners and allegedly addressed concerns about possible harassment of the disabled by local junior high students. *Id.* at 448, 449. The Court found that such negative attitudes, "*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 Court then went on to analyze closely the credibility, logic, and factual support for other reasons offered for the City's differential treatment of developmentally disabled people and – without hypothesizing any reasons 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).[22]

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[22] Specifically, the Court rejected posited concerns such as the size of the homes, the number of occupants, and difficulty evacuating residents during floods as lacking credibility, especially given the lack of evidentiary support showing why these were taken into account only as to the mentally retarded. *Cleburne*, 473 U.S. at 449, 450 ("[T]his record does not clarify how . . . the characteristics of the intended occupants of the [Cleburne

Similarly, in *Moreno*, the Court struck down a law that denied food stamps to households that contained unrelated individuals because its purpose was to "discriminate against hippies." 413 U.S. at 534-35. The Court went on to 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 rejected these explanations both as "wholly *unsubstantiated*" and, in any event, insufficient to support a status-based ban on otherwise eligible food stamp participants. *Id*. (emphasis added).[23]

Living Center] rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.").

[23] 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). The State mistakenly relies on this inapposite precedent. Those cases did not necessarily involve legislation with illegitimate purposes, and the State therefore wrongly challenges the District Court's more searching inquiry into the asserted purpose. (DB-63-64.)

As discussed below, the inference that Section 29 was driven by animus is overwhelming and is evidenced both by Section 29's broad and undifferentiated sweep and by sponsor statements that were presented to the public. *See infra* Section I.D.3.c. Consequently, the Court should respond with healthy skepticism in evaluating any other asserted purposes to determine whether the democratic process will be able to correct for an "improvident decision." *Vance*, 440 U.S. at 97; *Romer*, 517 U.S. at 633. Where, as here, the challenged discrimination distorts the democratic process, such skepticism is particularly important. In the absence of any factual support in the record to substantiate the contention that Section 29 was intended to advance some other purpose, Section 29 fails equal protection review for this reason as well.

c. Section 29 was motivated by an illegitimate purpose, and fails on that basis alone.

The totality of the record here, however, creates more than a mere inference that Section 29 was motivated by an improper purpose. Each of the constitutional problems discussed above – the breathtaking sweep of the disqualification that Section 29 creates and the inability of the State to explain the classification logically – independently requires the invalidation of Section 29. Taken together, they lead to the inescapable conclusion that the amendment is in fact based on a desire to disadvantage gay people in

Nebraska. As if any more were needed, this conclusion further is supported by the record of sponsor statements regarding the amendment during the lead-up to the election. *See* discussion *infra* Section II.C.3.

Such an illegitimate purpose invalidates the amendment. *See Romer*, 517 U.S. at 633. Like Amendment 2, "in making a general announcement that gays and lesbians shall not have any particular protections from the law," Section 29 "inflicts on them immediate, continuing and real injuries that outrun and belie *any* legitimate justifications that *may* be claimed for it," *id.* at 635 (emphasis added), because its purpose is simply "to make [gay people] unequal to everyone else," *id.*

Singling out a group simply to codify the group's disfavored status in society is not a legitimate basis for differential treatment by the government. Laws embodying such animus cannot be reconciled with the Equal Protection Clause. Thus, for all of the reasons set forth above, Section 29 fails conventional rational basis review.

E. A Judicial Determination That Section 29 Violates the Equal Protection Clause Would Not Mandate Invalidation of Other Laws.

Section 29 suffers from a number of specific flaws that violate the Constitution's guarantee of equal protection of the laws. Unable to refute the strength of plaintiffs' arguments, the State and its *amici* recount a list of other constitutional provisions that, they claim, would have to be struck

down as well in an attempt to distract this Court from the constitutional issue presented by this case. These arguments have no merit.

First, most of the amendments discussed take a particular topic – *e.g.,* gambling – off the table for *all* citizens in Nebraska. For example, state constitutional provisions prohibiting the use of public funds to support religion affect all religions, not just particular faiths. Term limits likewise affect all public officials in a particular branch of government and restrict equally the ability of voters to send incumbents back to office. The same can be said of laws that allow for executive appointment of judges rather than their election. Section 29, to the contrary, takes the issue of family protection off the table *only* for gay Nebraskans. By contrast, all heterosexual relationships – marital or non-marital – can be the subjects of lobbying and legislation.

Second, as noted above, the breadth of Section 29 distinguishes it from the other amendments cited by the State and its *amici*. As described above, family relationships permeate every part of an individual's existence, far more than, for example, gambling does. The recent constitutional amendments in other states that define marriage as the union of one man and one woman still leave open the possibility that other types of relationships (including domestic partnerships of gay and straight couples alike) can

secure lesser forms of protections for their relationships. *See, e.g.*, *Nat'l Pride at Work v. Granholm*, No. 05-368-CZ (Ingham County, Mich., Cir. Ct., Sept. 27, 2005) (finding no conflict between provision of domestic partner health care benefits to state workers and marriage amendment to Michigan constitution that is narrower than Section 29) (Appendix Exh. A); *Knight v. Schwarzenegger*, 26 Cal. Rptr. 3d 687 (3d Dist. Ct. App. 2005) (finding no conflict between state-wide comprehensive domestic partnership law and initiative-passed California statute restricting marriage to a man and a woman). Just as the invalidation of Colorado's Amendment 2 did not result in the widespread nullification of other laws throughout the country, neither would a ruling in favor of plaintiffs here.

Third, the Court has been asked to find Section 29 in violation of the Equal Protection Clause in part because it was driven not by any rational basis but rather by voter animus. Likewise, plaintiffs have demonstrated that Section 29 is completely disconnected from any legitimate interest that the State might proffer in support of this amendment. The calculus required by each of these queries is inherently specific to each particular law that is challenged. Holding that Section 29 fails rational basis would not dictate the outcome in different equal protection challenges that might be brought in the future.

II.
SECTION 29 IS AN UNCONSTITUTIONAL BILL OF ATTAINDER.

The District Court also was correct in holding that Section 29 is an unconstitutional bill of attainder.[24] The standard for determining whether a law is a bill of attainder is well established: "To be considered a bill of attainder, a legislative act must (1) apply to named individuals or easily ascertainable members of a group, (2) inflict punishment, and (3) be without judicial trial." (AV2-584 (citing *United States v. Lovett*, 328 U.S. 303, 315 (1946).) *See Selective Serv. Sys. v. Minnesota Public Int. Resource Group,* 468 U.S. 841, 847 (1984). As explained below, the District Court's determination that Section 29 contains all of these elements is legally sound and should be affirmed.

The constitutional prohibition on bills of attainder is designed to prevent the majority from depriving minorities of the full social and political benefits of citizenship through legislative punishment. This focus on protecting minorities runs throughout the bill of attainder jurisprudence. Thus, the Supreme Court explained in *South Carolina v. Katzenbach*, 383 U.S. 301(1966), that the Bill of Attainder Clause protects individuals and

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[24] Article I, Section 10 provides: "No State shall . . . pass any Bill of Attainder[.]"

groups "who are peculiarly vulnerable to nonjudicial determinations of guilt." *Id*. at 324.

The Founders recognized that, during times of social change and upheaval, disfavored groups were likely targets of legislative punishment. Based on their experience as British subjects, they knew that "the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 480 (1977). Where the popular constituency acts directly against an unpopular group, these same concerns are present. *See Cummings v. Missouri*, 71 U.S. 277, 328-29 (1866). As Alexander Hamilton explained,

> 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. Of this kind is the doctrine of disqualification, disfranchisement and banishment by acts of legislature. . . . [I]f it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense.

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) (hereinafter "*History of the Republic*") (quoting Alexander Hamilton)).

Fortunately, these fears have come to fruition on relatively few occasions in our nation's history. For example, ex-Confederates were singled out for legislative punishment after the Civil War, as were Communists during the height of the so-called "Red Scare." But the fact that bills of attainder are relatively rare in this country does not immunize Section 29 from invalidation as an unconstitutional bill of attainder. And this Court can take judicial notice of the fact that our nation currently is embroiled in a passionate national debate regarding the status of gay families in society, which bears a striking resemblance to the social upheaval that marked the Reconstruction and Cold War eras.

The Bill of Attainder Clause is a constitutional safeguard designed to ensure that disfavored groups will not be ejected from the political process. By targeting gay Nebraskans for legislative punishment, Section 29 violates this constitutional guarantee.

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

The Bill of Attainder Clause prohibits legislative punishment of "specifically designated persons or groups." *Brown,* 381 U.S. at 447. This

specificity requirement is met whenever a law applies "either to named individuals or to easily ascertainable members of a group." *Id.* at 448-49. The District Court correctly reasoned that gay people are the easily ascertainable members of the group Section 29 designates for deprivation: people who form same-sex intimate relationships. (AV2-585; AV1-27-28.)

Because the bill of attainder provision is designed to protect minorities against exclusion from full participation in civil society, specificity is a critical component of the bill of attainder analysis. Laws of general applicability, which by their very nature apply to everyone, are rarely effective as tools of political or social repression. By contrast, if the majority is permitted to disadvantage a specific group of people, it becomes very easy for the majority to distort an otherwise neutral political system by imposing special limitations that prevent the minority group from advancing its interests. In *Brown,* for example, the Supreme Court explained that a statute disqualifying Communists from labor union employment was unconstitutional because it failed to set out a generally applicable rule and instead designated "in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability – members of the Communist Party." 381 U.S. at 450.

The specificity requirement focuses on the importance of preventing the legislature from "singl[ing] out its enemies – or the politically unpopular – and condemn[ing] them *for who they are*." *See* Akhil R. Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 210 (1996) (emphasis added) (hereinafter "Amar"). Thus, African-American plaintiffs argued that Jim Crow laws worked an attainder because they stigmatized black people not for what they did but for who they were. *Id.* at 208-09. And when the House of Representatives singled out a specific individual for disfavored treatment in immigration matters, Justice Powell and then-Circuit Judge Kennedy both noted the serious bill of attainder concerns presented by such targeted legislative action. *Id.* at 213-14.

A bill of attainder, however, need not identify individuals by name to satisfy the specificity requirement. *Brown*, 381 U.S. at 461 (bills of attainder often "inflict[ed] their deprivations upon relatively large groups of people, sometimes by description rather than [name]"). It also need not designate a particular group of people based on past conduct. To the contrary, bills of attainder frequently were applied based on a person's lineage, associations or status rather than on conduct. *Id.* at 441-42; *see also* Laurence H. Tribe, American Constitutional Law §10-4 (2d ed. 1988).

Accordingly, the Eighth Circuit has held that "legislation which inflicts a deprivation on named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, as in this case, discouraging future conduct." *Crain v. City of Mtn. Home,* 611 F.2d 726, 729 (8th Cir. 1979).

In this case, Section 29 specifically designates gay people by description. Because having or desiring a same-sex relationship is what it means to be gay, a law that forbids any form of governmental protection for same-sex relationships inherently targets gay people based on who they are. *See Lawrence,* 539 U.S. at 575 (noting that law targeting same-sex couples served as "an invitation to subject homosexual persons to discrimination"); *id.* at 581 (O'Connor, J., concurring) (laws punishing people based on same-sex sexual relationship target "people who have a same-sex sexual orientation").

Section 29 singles out gay people based on who they are, and prevents them from lobbying for protections for the personal relationships that only they form. Accordingly, the District Court held that "Section 29 applies to an easily ascertainable group" because "[b]y its terms, [it] 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.'" (AV2-585.) (*See also* AV1-28 (finding that "plaintiffs have shown Section 29 applies to an easily ascertainable group").)

The State insists that Section 29 does not single out gay Nebraskans because all people who *support* relationship protections for same-sex couples are equally burdened. (DB-81-83.) The Supreme Court's analysis in *Romer*, however, demonstrates the fallacy of this argument. Colorado's Amendment 2, which banned civil rights laws for gay people, affected all those – gay and straight – who supported the enactment of such laws. Nevertheless, the Supreme Court had no difficulty understanding that Amendment 2 targeted gay people because they were the ones who would be directly affected by whether or not the substantive protections provided by such laws would be foreclosed. 517 U.S. at 632 ("[The] amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group.").

Section 29 thus clearly satisfies the first prong of the bill of attainder analysis.

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

Section 29 is the quintessential legislative determination of guilt without trial that the Bill of Attainder Clause was designed to prohibit. As

the District Court observed, Section 29 nowhere provides for any type of judicial trial prior to the infliction of punishment on people in same-sex relationships. (AV2-585 ("There is no dispute that Section 29 operates without judicial trial before preventing the legal recognition of same-sex relationships. All parties appear to concede this issue, and the court concludes that this requirement has likewise been satisfied."); AV1-28 ("A reading of Section 29 establishes that there is no judicial trial before preventing the legal recognition of same-sex relationships.").) Accordingly, this prong of the bill of attainder analysis is easily satisfied.

The State does not actually dispute that Section 29 fails to provide for a judicial trial. Rather, the State insists that Section 29 neither constitutes a determination of guilt nor inflicts punishment. (DB-78-80, 84-88.) As plaintiffs explain in further detail in Section II.C, *infra*, Section 29 clearly punishes gay Nebraskans. The State's fixation on the fact that Section 29 does not result in a criminal conviction of guilt manifests its fundamental misunderstanding of why the Supreme Court invalidated Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 as a bill of attainder. Section 504 was unconstitutional because it designated all Communists as unfit to lead labor organizations. The fact that the statute was enforceable through criminal penalties, while presenting additional Fifth

Amendment concerns, did not affect the bill of attainder analysis.[25] While a Communist party member could be tried and convicted of violating 29 U.S.C. § 504, mere membership in the Communist party, without more, was the basis for exclusion from union leadership. It was the equation of Communist party membership with culpability and blameworthiness that violated the proscription on bills of attainder. *Brown*, 381 U.S. at 450 ("The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability--members of the Communist Party.")

For these reasons, the State's argument regarding this prong of the bill of attainder analysis is fatally flawed. As explained in greater detail below,

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[25] The Ninth Circuit had ruled that Section 504 also violated the Fifth Amendment because membership in the Communist Party was sufficient to trigger criminal liability, *Brown v. United States*, 334 F.2d 488, 496-97 (9th Cir. 1964). Resting its holding on the bill of attainder clause, the Supreme Court did not reach the other grounds relied upon by the Court of Appeals to invalidate the statute. *Brown*, 381 U.S. at 440.

the fact that the punishment inflicted upon gay Nebraskans is disenfranchisement, rather than incarceration, does not immunize Section 29 from constitutional scrutiny.[26] Just like the statutes invalidated as unconstitutional bills of attainder in *United States v. Brown,* 381 U.S. 437 (1965), *United States v. Lovett*, 328 U.S. 303 (1946), *Ex parte Garland*, 71 U.S. 333 (1866), and *Cummings v. Missouri*, 71 U.S. 277 (1866), Section 29 eviscerates the constitutionally-mandated boundary between legislating for the general populace, on the one hand, and determining individual guilt and punishment, on the other, and in doing so, violates the constitutional proscription against bills of attainder.

C. Section 29 Imposes Punishment by Depriving Gay Nebraskans of Their Civil and Political Rights to Lobby Their Governmental Representatives and Employers to Protect Their Intimate Relationships and by Singling Them Out for Moral Censure.

The third question that a court must address when determining whether a law is a bill of attainder is whether the law imposes punishment. In many ways, this question is the most important part of the analysis, because the Bill of Attainder Clause is "to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity,

[26] For example, in *Lovett*, the punishment was the withholding of salaries due and the payment of any salary in the future. 328 U.S. at 305. In *Cummings*, 71 U.S. at 277, and *Ex parte Garland*, 71 U.S. 333 (1866), the punishment was exclusion from certain professions, including the practice of law.

of specifically designated persons or groups." *Brown,* 381 U.S. at 447. The core purpose of the prohibition is to prevent the majority from distorting the political process by disqualifying or disenfranchising disfavored individuals or groups in order to prevent them from bringing about some social or political change.

The question of whether a law inflicts punishment within the meaning of the Bill of Attainder Clause depends on:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further non-punitive legislative purposes;" and (3) whether the legislative record "evinces a congressional intent to punish."

Selective Serv., 468 U.S. at 852 (quoting *Nixon,* 433 U.S. at 473, 475-76, 478 (internal marks and citations omitted)).

Although courts typically examine a law under each of these three tests, *see Brown*, 381 U.S. at 447, a law constitutes punishment under the bill of attainder clause even if only *one* of the tests is met. *See Nixon,* 433 U.S. at 475-76 (describing need to look beyond historical experience and outlining alternative functional and motivational tests); *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey,* 167 F.3d 458, 465 (8th Cir. 1999).

1. Historical Test

The first test is whether the disability imposed by Section 29 is punishment in light of the historical understanding of that term in the bill of attainder context. The District Court correctly found that, because Section 29 "operates as a legislative bar for . . . specified groups," it therefore falls within the historical meaning of the term punishment. (AV2-587; *see also* AV1-29.) In reaching this conclusion, the District Court turned to our nation's founders for guidance regarding the types of "punishment" that the Bill of Attainder Clause was designed to prohibit:

> [O]f this kind [of punishment] is the doctrine of disqualification, disenfranchisement, and banishment by the acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disenfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or oligarchy.

(AV1-29 (quoting *Brown*, 381 U.S. at 444 (quoting Alexander Hamilton in *History of the Republic* at 34)); *see also* AV2-586.) As the Supreme Court has reiterated on numerous occasions, legislative enactments that single out disfavored groups for unique sanction fall squarely within this definition of "punishment." (AV1-31.) *See also Brown*, 381 U.S. at 458-59 (barring Communist Party members from serving as labor union leaders); *Lovett*, 328

U.S. at 315 (cutting salary of three government employees); *Cummings*, 71 U.S. at 323-32 (disqualifying former Confederates from practicing as clergy); *Ex parte Garland*, 71 U.S. at 333 (barring former Confederates from practice of law).

The deprivations imposed by Section 29 fall within the historical meaning of punishment in three distinct ways.

a. Political disqualification and disenfranchisement

First, as the District Court explained, Section 29 disqualifies and disenfranchises gay people by depriving them of the civil and political right to advocate in the legislature for the creation of laws and policies that would protect their committed relationships. (AV2-586-87 ("[Because] Section 29 is directed at gay, lesbian, bisexual and [transgender] people and is intended to prohibit their political ability to effectuate changes opposed by the majority, . . . Section 29 operates as a legislative bar for these specified groups. Accordingly, the court finds that the challenged legislation falls within the historical meaning of punishment."); AV1-25 ("Section 29 acts as a barrier to plaintiffs' participation in the political process.").)

Contrary to what the State has argued, legislative punishments like Section 29 cause actual, as opposed to merely theoretical, harm by making it more difficult for members of same-sex relationships to obtain legal

protections than for members of different-sex relationships. (AV1-24-26 (rejecting argument that plaintiffs lacked standing for lack of harm).) As the Supreme Court explained in *Northeast Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993), a group suffers a tangible and redressable injury when the state imposes a barrier that makes it more difficult for one group to obtain a benefit than it is for another group.[27]

In *Cummings*, the U.S. Supreme Court made clear that "[t]he deprivation of *any* rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." 71 U.S. at 320 (emphasis added). Before the adoption of Section 29, all citizens had the same right to seek protection for their relationships at any level of government. Section 29, however, singled out gay people and denied them that political right, while leaving everyone else free to exercise that right unhindered by a constitutional amendment. Section 29 thus disqualifies and disenfranchises one group of Nebraskans by making it impossible for them to use any of the ordinary political processes to protect their families. *Cf. Foretich v. United States,* 351 F.3d 1198, 1220 (D.C. Cir. 2003) (noting that law depriving father of parental rights was

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[27] *See infra* Section III for a fuller discussion of standing.

comparable to other types of burdens traditionally recognized as punitive for purposes of Bill of Attainder Clause analysis).

Section 29 disenfranchises gay people whether they seek a domestic partnership ordinance from the city government or a civil union or marriage law from the state legislature. As the Attorney General himself explained in an advisory opinion, a law authorizing all domestic partners to make decisions about funeral arrangements and organ donation upon a partner's death would be prohibited, because the State interprets Section 29 to require that same-sex couples be "disqualified" from all laws that offer protection of personal relationships. (*See* AV1-43, ¶¶ 19-21; *id.* at 113-25) This sort of disqualification from the political arena is well within the historical meaning of punishment.

b. Denial of opportunity to lobby for employee benefits

Second, Section 29 deprives gay employees of the opportunity to obtain critical benefits of government employment that potentially were available to them before the passage of Section 29. In *Lovett*, the Supreme Court concluded that "perpetual exclusion" from compensation for government employment constituted a traditional form of punishment for purposes of the Bill of Attainder Clause. 328 U.S. at 316. Although Section 29 does not prohibit state and local government from hiring gay people, it

effects the same sort of perpetual exclusion by prohibiting state and local government from providing gay employees with family health insurance, retirement benefits and other forms of compensation that, taken together, often make up as much as 40% of an employee's compensation.[28] Just as a law that required the government to restrict gay people to half-time jobs or to pay gay people half the normal salary would constitute punishment, a law that requires the government to withhold from gay people the family benefits that are offered to other employees constitutes punishment. Although a law that denies one group of people a form of governmental benefits "will not be deemed punishment if the statute leaves open perpetually the possibility of qualifying for aid," *Planned Parenthood,* 167 F.3d at 465 (internal quotation omitted), Section 29 perpetually forecloses, rather than leaving open, the possibility that gay public employees in Nebraska may be able to qualify for health insurance for their same-sex partners.

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[28] *See* Heidi Eischen, *For Better or For Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. Tol. L. Rev. 527, 531 (2000); Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164, 1194 (1992). *See also* Katherine A. O'Hanlan, *Domestic Partnership Benefits at Medical Universities*, 28 Med. Stud. JAMA 1286, 1289 (1999) ("At present, an employee's benefits package can represent as much as 30% to 40% of value added to a base salary.").

c. Denunciation and public censure

Third, Section 29 falls within the historical meaning of punishment because it singles out gay people for denunciation and public censure. As distinguished from equal protection, "[t]he vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated." *Brown,* 381 U.S. at 449 n.23. The sponsors of the initiative that led to Section 29 made it clear that the very purpose of Section 29 was to express moral censure for gay people. (AV1-104-12.)[29] In the early years of the Republic, James Madison expressed the view that a congressional denunciation of the Jacobin Clubs would constitute legislative punishment for purposes of the Bill of Attainder Clause. *See* 3 Annals of Cong. 934 (1794). By declaring that gay people are unworthy of any form of government recognition for the same-sex relationships that are at the core of their identities as gay people, Section 29 functions as a legislative denunciation of all gay Nebraskans.

For all of these reasons, Section 29 easily falls within the historical definition of punishment.

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[29] *See infra* at Section II.C.3 for further discussion of Section 29's supporters' clear "intent to punish" gay Nebraskans.

2. Functional Analysis

Under the second inquiry of the bill of attainder "punishment" analysis, instead of asking whether the form of punishment is traditional, a court must consider whether a legislative enactment, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475-76. This test recognizes and protects against the possibility that "new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Id.* at 475. Because the functional analysis often is considered to be "the most important of the three," courts repeatedly have noted that a legislative enactment imposing burdens that fall outside the historical definition of punishment may still qualify as a bill of attainder if it lacks any legitimate nonpunitive purpose. *Foretich*, 351 F.3d at 1218. *See also Nixon*, 433 U.S. at 476 ("Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.").

The burden on the State to put forth legitimate nonpunitive purposes is not an insignificant one. "[T]he nonpunitive aims must be sufficiently clear and convincing before a court will uphold a disputed statute against a bill of attainder challenge." *Foretich*, 351 F.3d at 1221 (internal quotation

omitted). Moreover, if the court can "discern no *wholly* non-punitive purpose," the legislation imposes punishment. *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 351 (2d Cir. 2002) (emphasis added). Accordingly, a statute is not valid simply because it is motivated by a desire *both* to punish *and* to relieve others from the feared negative consequences that might result were those targeted by the statute left unpunished. *Id.* at 351-54 (holding that law prohibiting electric company from increasing rates to cover cost of outage at nuclear plant was bill of attainder even though it advanced both nonpunitive purpose of protecting innocent third parties from increased costs and punitive purpose of imposing cost on responsible party). In the absence of an entirely nonpunitive objective, a statute inflicts punishment for purposes of the bill of attainder analysis.

Finally, when determining whether legislation is punitive in nature, a court must assess whether the burdens imposed are wholly out of proportion to the nonpunitive interest the State purports to advance. *See Nixon*, 433 U.S. at 482. "A grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends." *Foretich*, 351 F.3d at 1222. As a result, the State cannot defend an enactment against a bill of attainder challenge

> simply by positing any nonpunitive purpose, regardless of the nature of the burden imposed or the relationship between that burden and the asserted goal. . . . The law is clear that if there exists an extraordinary imbalance between the burden imposed and the alleged nonpunitive purpose, and if the legislative means do not appear rationally to further that alleged purpose, then the statute in question does not escape unconstitutionality merely because the Government can assert purposes that superficially appear to be nonpunitive.

Id. at 1223.

In this case, the District Court found that "Section 29 is distinguishable from statutes that serve nonpunitive purposes" because no legitimate governmental objective is served by depriving gay people of the political right to seek protection for their intimate personal relationships from the government. (AV2-589.) The fact that Section 29 prohibits all levels of government, including government employers, from recognizing same-sex relationships *in any form* belies the State's assertion that Section 29 has the nonpunitive purpose of retaining the traditional meaning of marriage as being between a man and a woman.

Rather, the broad scope of the amendment demonstrates that Section 29's plain purpose is to relegate gay people to second-class citizenship by, among other things, disqualifying gay public employees from eligibility for a variety of standard employment benefits and by denouncing gay people

and their relationships, thereby encouraging both public and private discrimination against them in every other aspect of their lives. *See Lawrence,* 539 U.S. at 574.

In addition, the burdens imposed by this law far outweigh any allegedly nonpunitive purpose that Section 29 could be said to advance. As the District Court recognized, "[i]f the purpose, as offered by the proponents of Section 29, were merely to maintain the common-law definition of marriage, there would be no need to prohibit all forms of government protection or to preclude domestic partnerships and civil unions." (AV2-589; *see also* AV1-31-32.)

Therefore, a functional analysis of Section 29 likewise demonstrates that it inflicts punishment.

3. Motivational Test

A law also imposes punishment where those enacting the provision *intended* to punish those disadvantaged by the law. The record demonstrates that this factor also is satisfied in this case.

As a preliminary matter, the very language of Section 29 reflects that it was motivated by a desire to disadvantage and disenfranchise gay people, and the Court need not look past that language. In addition, however, the record includes evidence demonstrating that messages widely disseminated

to the voters by Section 29's sponsors made clear that this constitutional amendment was crafted for the specific purpose of expressing disapproval of homosexuality.

As the District Court acknowledged, the broad disability contained in the language of Section 29 by itself evidences an unconstitutional intent to punish by excluding gay people – and only gay people – from being able to seek protections for their relationships through the normal political process. (AV2-588 ("The evidence supports plaintiffs' contention that the adoption of Section 29 was motivated, to some extent, by either irrational fear of or animus toward gays and lesbians.").) Noting the similarity between Section 29 and Colorado's Amendment 2, the District Court properly found that "[l]egislation that 'identifies persons by a single trait and then denies them protection across the board,'" and that results in the "'disqualification of a class of persons from the right to seek specific protections from the law'" amounts to punishment. (AV2-588 (quoting *Romer*, 517 U.S. at 633).)

The District Court found that the language and effect of Section 29, standing alone, demonstrate an intent to punish. The very purpose of Section 29, the District Court explained, was "to silence the plaintiffs' views and dilute their political strength" by limiting their access to the political process. (AV2-587.) This assessment of voter intent, sufficiently

established on the face of Section 29, also finds ample support in the record. (*See* AV1-104-12.)[30] For example, Guyla Mills, who led the petition drive to place Initiative 416 on the ballot (*see id.* at 108-09), and was the spokeswoman for the "Defense of Marriage Amendment Committee" in support of Section 29 (*see id.* at 40-41, ¶¶ 10-12), explained the purpose of Section 29 in numerous widely-disseminated public statements prior to the election. (*See id.* at 104-12.)[31] Mills stated that Section 29 was intended to prevent "the havoc that would result by putting 'homosexual marriage' on the public policy freeway" and warned about the dire consequences that would flow from "venturing down a path where children are taught in schools that homosexual and heterosexual marriage are equal or where adoption into homosexual homes is normalized." (*See id*. at 104.)

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[30] *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 196-97 (2003) (where there is no legislative body or official record, "statements made by decisionmakers or referendum sponsors *during deliberation* over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative") (emphasis added).

[31] The record contains only a sampling of the materials that were disseminated during the campaign to pass Section 29 and the news reports regarding the campaign that appeared in the Omaha World-Herald (circulation 240,026) and the Lincoln Journal Star (circulation 82,346) Circulation estimates were taken from http://www.accessabc.com/reader/top100.htm (last visited Oct. 27, 2005).

The record is also replete with evidence that the voters intended to send a message of moral disapproval of gay people. Specifically, in the months leading up to the election, voters were bombarded with messages explaining how the adoption of Section 29 was necessary to communicate a strong message about homosexuality – *i.e.*, "that homosexuality is a sin and should not be sanctioned even by 'quasi-marriage' unions such as domestic partnerships and civil unions." (*See id.* at 109 (attributed to Guyla Mills, spokeswoman for the "Defense of Marriage Amendment Committee" in support of Section 29).) Similarly, in statements that were widely reported by the Nebraska state media, Pastor Al Riskowski and other proponents of Section 29 urged voters to adopt the amendment, which bars *any* recognition of same-sex relationships, including civil unions or domestic partnerships, on the ground that, in their view, homosexuality is wrong. (*See id*.; *see also id.* at 112 ("Mills, 44, said Leviticus' characterization of homosexuality as a sin is as true today as it was in the Old Testament days.").) Through these messages, voters were instructed that it was not sufficient for Section 29 simply to define marriage as off-limits to gay people. Rather, the sponsors explained, the broad scope of Section 29 was crucial "to send[ing] a message to society about homosexuality . . . [*i.e.*,] 'that heterosexuality and homosexuality are not morally equivalent.'" (*Id.* at 106 (quoting Mills).)

Finally, Section 29's proponents also made clear that it was not enough for the electorate merely to pass a statute. Rather, it was imperative in their view that the voters express their moral disapproval of same-sex relationships through a constitutional amendment, which would be less vulnerable to future legislative override or judicial invalidation. (*See, e.g., id.* at 105-07, 110-11.) In light of all of these considerations, it is clear that, by adding Section 29 to their state constitution, the voters of Nebraska joined the initiative's sponsors in sending a "strong message" condemning homosexuality.[32]

* * * *

As the District Court noted, "'the vice of attainder is that the legislature has decided for itself that certain persons possess certain

[32] The *amici* brief of 34 Law Professors ("Law Professor Br.") presents a laundry list of Eighth Circuit cases in an attempt to buttress the claim that Section 29 does not constitute legislative punishment for purposes of the bill of attainder clause. *See* Law Professor Br. at 25-27. None of these cases, however, involved the disqualification from the political process of a specifically named and disfavored group of people. *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005) (revisions to evidentiary rule); *Planned Parenthood*, 167 F.3d at 458 (allocation of state funding); *Jensen v. Heckler*, 766 F.2d 383 (8th Cir. 1985) (same); *WMX Techs., Inc v. Gasconade County*, 105 F.3d 1195 (8th Cir. 1997) (commercial zoning provision). No bill of attainder claim was even raised in *Locke v. Davey*, 540 U.S. 712 (2004), a case involving the question of whether the Free Exercise Clause obligated states to subsidize religious instruction. None of those decisions are dispositive in this case, where gay people have been disenfranchised permanently from the normal legislative process and completely barred from lobbying for any form of government protection for their families.

characteristics and are therefore deserving of sanction . . . .'" (AV2-588 (quoting *Brown*, 381 U.S. at 449 n.23).) A law like Section 29, which is designed to express moral censure of a particular group of people because of "who they are," is a classic bill of attainder, and violates one of the most fundamental guarantees of the American constitutional system. *See* Amar, 95 Mich. L. Rev. at 210; *see also* J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2352 (1997) ("Laws that single some persons out for disfavored treatment because of their identity are in tension with our constitutional tradition, and should be strongly disfavored.") (internal quotation omitted).

Under all three definitions of the term "punishment," Section 29 imposes legislative punishment in violation of the Bill of Attainder Clause. Both the U.S. Supreme Court and the Eighth Circuit have insisted that "legislation which inflicts a deprivation on named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, as in this case, discouraging future conduct." *Crain,* 611 F.2d at 729 (citing *Brown*, 381 U.S. at 458). Regardless of whether Section 29 was designed to penalize gay Nebraskans because of bias and moral disapproval or whether it was meant as a purely prophylactic measure to thwart any prospects for gay Nebraskans to protect their families in the

future, this state constitutional amendment cannot be reconciled with the protections contained in the federal constitution.

D. A Determination That Section 29 Is a Bill of Attainder Does Not Mandate Invalidation of Other Laws.

Appellants and the law professor *amici* who support the State's position present the Court with a list of numerous other provisions that would have to be invalidated, in their view, should the Court find that Section 29 violates the Bill of Attainder Clause. For a number of reasons, this is not the case.

First, only laws like Section 29, which single out one disfavored group and impose upon it burdens that others will not share, are vulnerable to a bill of attainder challenge.[33] As noted earlier, and notwithstanding the State's (and its *amici*'s) arguments to the contrary, Section 29 is *not* a law of general application. Rather, the amendment singles out gay Nebraskans and denies them any hope of securing even the most minimal protections for their families. *See* Neb. Const. art. I, § 29 ("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.") (emphasis

[33] For precisely this reason, this Court recently found that a law revising the rules of evidence, while having a significant impact in a particular case, was not a bill of attainder. *Palmer,* 408 F.3d at 433 (noting that law was "generally applicable to all cases in which a crime of violence is alleged" and did not "distinguish[ ] between persons charged with a crime").

added). Heterosexual couples, whether married or single, still have the full range of options available to them for protecting their relationships and families. Those in consanguineous and under-age relationships have greater ability to argue for protections (short of marriage) for their relationships than do same-sex couples. Only same-sex couples have been denied access to the political avenues normally available to citizens wishing to protect their interests.

Second, other statutes and constitutional amendments can be justified on the basis of the nonpunitive interests that they promote. For example, the state could posit numerous nonpunitive interests to justify constitutional amendments rectifying the common law incapacities of married women, repealing anti-miscegenation laws, prohibiting polygamy, or declaring English to be the official language for state records, proceedings and publications. *See* Law Professor Br. at 19-20. In this case, by contrast, even assuming that a law restricting marriage in Nebraska to one man and one woman had a non-punitive purpose, the District Court properly found that excluding gay Nebraskans from the political process with respect to *all* family protections, even domestic partner benefits, could not be justified by reference to a nonpunitive purpose. (AV2-589; *see also* AV1-31-32.)

Finally, some provisions cited by the State and its *amici* – like the felon disenfranchisement law – would not be susceptible to a bill of attainder challenge because punishment is only triggered after a judicial trial, with all of the constitutional protections which that entails. Whereas felons are stripped of constitutional rights only after they have been found guilty beyond a reasonable doubt of some specific crime by a jury of their peers, Section 29 strips gay people, by contrast, of their ability to lobby for relationship protections simply because they are in or want to form same-sex relationships.[34]

For all of these reasons, Section 29 of the Nebraska Constitution is an unconstitutional bill of attainder.

III.
THE STATE WAIVED ITS ARGUMENT FOR SEVERABILITY, WHICH IN ANY EVENT IS WRONG ON THE MERITS.

The State argues for the first time on appeal that Section 29 can be severed. (DB-89-90; AV2-571 n.14 ("[T]he State has not briefed or argued that Section 29 can be severed.").) This Court should reject the new argument for two reasons. First, the State waived this argument both by failing to raise it as an affirmative defense and by failing to raise it at any

[34] Plaintiffs leave for another day and other litigants the question of whether felon disenfranchisement laws suffer from other constitutional deficiencies.

other point before the District Court. Second, the argument is wrong on the merits.

This Court typically refuses to consider arguments raised for the first time on appeal. *Haghighi v. Russian-Am. Broad. Co.*, 173 F.3d 1086, 1088 (8th Cir. 1999); *Browning v. President Riverboat Casino-Missouri*, 139 F.3d 631, 637 (8th Cir. 1998). In a similar context, the Sixth Circuit rejected a severability argument because it was untimely raised at the *trial* level:

> Defendants raised their issue regarding severability for the first time in their motion for reconsideration, filed in the District Court after the injunction had been issued. By bringing this issue before the District Court in such an untimely fashion, defendants effectively waived their argument on severability and have no basis to assign failure to sever as an error on this appeal.

Am. Meat Inst. v. Pridgeon, 724 F.2d 45, 47 (6th Cir. 1984). The State accordingly waived the severability argument by failing to raise it below.

Even if the State had raised the issue at some point, it still would have waived the severability argument by failing to assert it as an affirmative defense. Under Fed. R. Civ. P. 8(c), a defendant "shall set forth" any affirmative defense. Affirmative defenses include a "matter constituting avoidance." *Id.* A matter of avoidance arises apart from the elements of plaintiffs' causes of action and yet could avoid the full relief requested as a remedy, such as contributory negligence, res judicata, or statute of

limitations. *Id.* It is "extrinsic to [plaintiffs'] cause of action, a new matter which will bar an otherwise meritorious claim for relief." 27 Fed. Proc., L. Ed. § 62:79 (July 2005). Severability of a challenged law is an affirmative defense, because it is extrinsic to plaintiffs' cause of action and avoids a substantial portion of the remedy requested, namely that the entire law be struck down.

A defendant waives an affirmative defense by unjustifiably failing to plead it. *Day v. Toman*, 266 F.3d 831, 836 (8th Cir. 2001) (appellant did not properly plead the affirmative defense, and "may not now raise it on appeal."); *United States v. Big D Enters., Inc.,* 184 F.3d 924, 935 (8th Cir. 1999); *Okeson v. Tolley Sch. Dist. No. 25*, 760 F.2d 864, 867 (8th Cir. 1985).

Here plaintiffs "specifically argue[d] that Section 29 in its entirety violates the Equal Protection Clause in their Complaint and throughout their trial brief in this case." (AV2-571 n.14.)[35] Indeed, the entirety of Section 29 is what the State was litigating, too, as amply demonstrated by a principal heading of one of the State's arguments in its trial court briefing: "The People Have a Valid Interest in Preserving Marriage." (AV2-466.)

[35] Aside from the Complaint's declarative statements challenging *all* of Section 29, (AV2-522-23), the core of plaintiffs' challenge in this case throughout has been the vastness of Section 29's sweep, which of course includes its bar to marriage. (*See, e.g.,* AV2-418-19, 422.)

In its Answer, the State asserted three affirmative defenses, none of which addressed the severability of Section 29. (AV1-35-36.) Likewise, the State did not raise severability in its motion to dismiss or at trial. The State waived any argument regarding severability, and should not be heard to raise it now.

Even if this Court's rules regarding untimeliness and waiver were disregarded, the State is wrong on the merits of its severability argument as well. In *Duggan v. Beerman*, 544 N.W.2d 68 (Neb. 1996), the Nebraska Supreme Court held that a constitutional amendment that would have imposed term limits on federal officials was unconstitutional and concluded that the portion of the amendment that imposed term limits on state officials was not severable despite the existence of a severability clause in the measure. But the predicate for *Duggan's* analysis is missing in this case. Whereas in *Duggan* the plaintiffs challenged a law under the Elections Clause, this case involves a challenge under the Equal Protection Clause. The distinction is critical. It made sense in *Duggan* to consider whether the voters would have passed the part of the amendment that imposed term limits on state officers because what made the amendment unconstitutional was not the voters' motivation, as in an equal protection case, but the fact that the Elections Clause simply did not authorize voters to impose term

limits on federal elected officials. In contrast, in an equal protection case, it is the illegitimate motivation of the voters that makes the amendment unconstitutional. Once such animus is identified, it is impossible to conclude that one part of the amendment was driven by animus while another was driven by a legitimate governmental interest.[36] Accordingly, on an equal protection challenge, an amendment must rise or fall as one indivisible piece.

Here, the District Court rightly held that Section 29's purpose was to disadvantage gay people. (AV2-588.) But once it is clear that there is no legitimate purpose for a measure, the constitutional inquiry is done. There is no final round to determine whether the law that is unconstitutional as a whole is, in addition, unconstitutional in its parts. That would conflict with the finding that the entire law was motivated by dislike for a minority. Voters in the voting booth did not, and indeed could not, compartmentalize

[36] In fact, the various organizations that sponsored the amendment, and who now appear as *amici* in support of the State, concede that the two sentences of Section 29 must be considered as a single concept. *See, e.g., Amicus* Brief of Nebraska Family Council at 6 ("The purpose of both sentences of the Amendment is singular – to protect the institution of marriage."); *Amici* Brief of Nebraska Catholic Conf., *et al.* at 14 (both sentences of the amendment were necessary to achieve the sponsors' aim of "preserving the substance of traditional marriage, not just its form"). The Nebraska State Senators who appear as *amici* agree. *Amici* Brief of Hon. Tom Baker, *et al.* at 19-20 ("[Section 29] contains two sentences but one purpose: to protect the unique status as the union of husband and wife in Nebraska law.").

the purpose of expressing dislike for a group to some provisions and not others. Thus *Duggan* is inapposite and the State's discussion of "a workable plan" if Section 29 is severed, and whether the voters experienced "inducement," is beside the point. Section 29, unlike other challenged laws that may break down into constitutional and unconstitutional provisions, is an indivisible law, fused together by the illegitimacy of its purpose.[37]

Thus, this Court should reject the State's new argument regarding severability, first because the argument has been waived and alternatively on the merits.

IV.
THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS HAVE STANDING AND THAT PLAINTIFFS' CLAIMS ARE RIPE.

A party seeking to invoke a federal court's jurisdiction must demonstrate three things: 1) an injury in fact; 2) a causal relationship between the injury and the challenged law; and 3) a likelihood that the injury

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[37] The State's failure to raise the severability issue in the trial court concretely prejudices plaintiffs. The issue at trial was whether Section 29, considered in its entirety, violated equal protection by removing all government authority to consider any protections for same-sex relationships. Had the State raised the defense of severability below, plaintiffs would have been forced to consider developing a record for an alternative argument about whether Section 29, carved up into pieces in a way not considered by the voters, violated equal protection by removing the legislature's power to protect same-sex relationships through marriage. That is a different question than the one presented by both parties to the District Court.

will be redressed by a favorable decision. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993) ("*Northeastern"*), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26 (1976). Here the District Court correctly held, in denying the State's motion to dismiss, that the injury in a case of this variety is the denial of equal treatment resulting from the imposition of a barrier to seek a benefit, not the ultimate inability to obtain the benefit. (AV1-25.)[38]

Supreme Court standing doctrine could not be more clear:

> Singly and collectively, [the 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. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the

[38] Although the imposition of the discriminatory barrier is adequate on its own to establish injury in fact, plaintiffs suffer an additional injury upon which the District Court did not rely. Denying all forms of recognition for same-sex couples' relationships is an injury because it labels a group of citizens as "innately inferior" and "therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (citation omitted). This infliction of "serious non-economic injuries" gives plaintiffs an alternative basis for standing. *Id*.

> barrier, not the ultimate inability to obtain the benefit.

Northeastern, 508 U.S. at 666. In *Northeastern*, contractors challenged preferential treatment to minority-owned businesses for city contracts. The Court found that the injury in fact was "the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id*. Thus, the contractors' allegation that they "would have bid on contracts set aside pursuant to the city's ordinance were they so able" sufficed to establish standing. *Id*. at 668-69. *Northeastern* establishes that the "injury in fact" requirement is satisfied by a plaintiff who faces a discriminatory barrier when seeking government benefits; the ultimate ability or inability to obtain the benefits is irrelevant.[39]

In light of this clear legal precedent, the District Court correctly found it "obvious" that plaintiffs have standing to challenge Section 29 because it subjects plaintiffs' members to a discriminatory barrier by making it more difficult for members of one group – gay people – to obtain a benefit than it

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[39] The Supreme Court has reaffirmed this black letter law on standing on numerous occasions. *See*, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 261-63 (2003) (applying *Northeastern* to hold that student had standing to challenge affirmative action program that he contended made it more difficult for him to secure government benefit); *Grutter v. Bollinger*, 539 U.S. 306, 317-18 (2003) (same); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

is for members of another group – heterosexual people. (AV1-6.)[40] Indeed, the District Court correctly found that the injury here is "indistinguishable" from the one at issue in *Romer*. (AV2-577.) Accordingly, plaintiffs' gay members have standing to sue,[41] and plaintiffs have standing to sue on their behalf.[42]

The State asserts that plaintiffs' members lack standing because they "can obtain benefits they allegedly desire by other means." (DB-26.) As

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[40] Nebraska's Attorney General made that added difficulty for plaintiffs' gay members all the more apparent when he issued an opinion concluding that a proposed "domestic partners" bill in the State's Legislature, if adopted, would be unconstitutional because "partners of the same sex were not disqualified" as required by Section 29. (AV1-124.) Whether or not the Attorney General believes his own opinions to be worthless, it is obvious that the legislative process is "more difficult" for advocates when the state constitution prohibits the very laws they want to enact.

[41] All plaintiffs and their members who were witnesses testified that, but for Section 29, they would lobby elected officials and public employers to provide domestic partner benefits (such as family health insurance) and responsibilities (such as the obligation for a partner's basic living expenses). (AV1-229-230, 238-239, 255, 263, 266, 269, 272-73, 275, 277, 280, 281, 286.)

[42] The State never contested plaintiffs' associational standing to assert claims that their members could bring in their own right. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343-344 (1977) (state agency has associational standing); *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 426 n.6 (8th Cir. 1988). The parties stipulated at trial that plaintiffs' missions include advocacy to advance the civil rights of gay people, so striking down Section 29 is germane to plaintiffs' purposes, and each plaintiff has members who are gay (AV1-38-39.) The parties further stipulated that the ten individuals in committed same-sex relationships who gave sworn testimony are members of the plaintiff organizations. (AV1-44-45, 262, 265, 269, 273, 275, 277, 279, 281, 283.)

already discussed, like the State of Nebraska here, the State of Colorado argued in *Romer* that the plaintiffs there had recourse to laws of general application, but the Supreme Court rejected the idea that such a possibility meant the plaintiffs had suffered no harm. *Romer*, 517 U.S. at 631.[43] Assuming plaintiffs could manage to work around Section 29's discriminatory barrier and obtain *all* of the protections that different-sex couples already have or are free to pursue without restriction, that fact has no bearing on their standing because the constitutional injury that motivates plaintiffs' challenge is not the denial of those protections – either individually or as a whole. Rather, the injury is being subjected to a different and more difficult *process* for obtaining such protections. Thus the State's assertion that plaintiffs' gay members can obtain protections through other means merely highlights the injury.

The State similarly asserts that plaintiffs lack standing because *unmarried* different-sex couples also do not have this vast array of protections and responsibilities. (DB-27.) That argument misses the point. Different-sex unmarried couples remain free to lobby for any and all items

[43] This explanation from the *Romer* Court also exposes the State's mistaken assertion that there is no injury because plaintiffs theoretically could enlist the citizenry of Nebraska to amend the State Constitution to repeal Section 29. (DB-21.) As with Amendment 2 in Colorado, it is always true that unconstitutional laws might in theory be repealed, but that does not insulate them from judicial review while they remain in force.

in the vast array of protections, although many simply would choose marriage instead, accessing the entire package by virtue of one solitary act.

Recognition of this disparity lays bare the State's flawed argument that the injury to plaintiffs' gay members is intangible because that injury supposedly is "shared by all Nebraskans that are ideologically opposed to section 29." (DB-18.) Again, that argument misunderstands the Supreme Court's holding and reasoning in *Romer.* As in *Romer,* the injury that the District Court recognized flows from Section 29 is not the inability to obtain legislation consistent with one's ideological views. Rather, it is the discriminatory barrier to plaintiffs' gay members' efforts to obtain protection for their *own* relationships. Section 29 targets gay people, and plaintiffs have sued on behalf of their members who are gay people. Where a "plaintiff is [the] object of [a government] action, plaintiff ordinarily has standing" to challenge that action. *Miller v. Moore*, 169 F.3d 1119, 1122 (8th Cir. 1999). Others who allege they are merely ideologically opposed to Section 29 are not similarly injured.

Indeed, the State's own analogy proves the point. (DB-18.) While not everyone who disagreed with Nebraska's voter-initiated constitutional amendment on "term limits" had standing to challenge it, those citizens who alleged a diminished likelihood that candidates of their choice would prevail

established a "sufficiently concrete and particularized injury" to have standing. *Miller*, 169 F.3d at 1123. In *Miller*, a "diminished likelihood" was sufficient; here, Section 29 does far more than diminish the likelihood that plaintiffs' members will be able to advocate for domestic partner benefits, or eventually marriage – it negates the possibility altogether.

Finally, the State seeks to distinguish *Northeastern* because plaintiffs' gay members had a level playing field when Section 29 passed. (DB-25.) But even though the plaintiff non-minority businesses in *Northeastern* had the opportunity to oppose enactment of a set-aside for minority businesses, those plaintiffs had a constitutional injury because, post-enactment, it was more difficult for them than for others to seek benefits from the government. Similarly, the plaintiffs in *Romer* had the opportunity to oppose enactment of Amendment 2 in Colorado, but still suffered a cognizable injury as a result of the amendment's passage.

As to the requirements of causation and redressability, the District Court correctly ruled that plaintiffs satisfy the second and third elements of the standing inquiry. (AV1-25-26.) Once the "injury in fact" is properly defined in this variety of equal protection cases, causation and redressability follow as a matter of course. *Northeastern*, 508 U.S. at 666 n.5; *see also Arkansas Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558,

560 (8th Cir. 1998); *Minnesota Citizens Concerned for Life v. Fed. Elec. Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997) (quoting *Lujan*, 504 U.S. at 561-62 (when government action or inaction is challenged by a party who is a target or object of that action "there is ordinarily little question that . . . a judgment preventing or requiring the action will redress it.")). Here the removal of Section 29's barrier would put plaintiffs' gay members on an equal footing with others in efforts to persuade government employers and elected officials to protect relationships and families. That is concrete relief, not "psychic satisfaction." (DB-33.)

The case also is ripe, as the District Court correctly held. (AV1-26-27.) "Ripeness 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. Prods. Co.*, 473 U.S. 568, 580 (1985) (claims ripe because constitutional questionability of arbitration scheme already felt in a concrete way by pesticide industry), *citing Reg'l Rail Reorg. Act Cases*, 419 U.S. 102 (1974). *See also Employers Ass'n, Inc. v. United Steelworkers of Am.*, 32 F.3d 1297, 1300 (8th Cir. 1994) (an actual attempt by the union to enforce a statute against management was unnecessary for management to have standing to

challenge the statute, because the effects on the "ground rules of collective bargaining" were sufficient to render the dispute ripe).

It would be absurd to require plaintiffs to wait to challenge Section 29 until after they pass legislation that both parties agree would be unconstitutional under Section 29 (assuming that ever could be accomplished in the first place) and then to wait to have that legislation, as suggested by the State, "struck down on the basis of Section 29." (DB-34.) The State's suggested approach ignores the constitutional injury identified in *Romer* and in operation today in Nebraska: gay people face a discriminatory barrier to their efforts to obtain protections from the government. Like Amendment 2, in making it more difficult to obtain protections from government, Section 29 inflicts "immediate, continuing and real injuries." *Romer*, 517 U.S. at 635. There is nothing abstract about that injury. [44]

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[44] In an oppositional amicus brief, a few Attorneys General outside of Nebraska also assert that there are no proper defendants here. But that was a matter to which the parties appropriately stipulated, based on Nebraska law. (AV1-39.) For example, the Attorney General enforces constitutional provisions like Section 29 against any legislative acts viewed as contradictory, *e.g.*, *Stenberg v. Moore*, 258 Neb. 738 (Neb. 2000) (action to void a campaign finance statute based on constitutional provisions); *Stenberg v. Douglas Racing Corp*., 246 Neb. 901 (Neb. 1994) (action to void "telewagering" statute); *State ex rel. Spire v. Northwestern Bell Tel. Co*., 233 Neb. 262 (1989) (action to void statute about telephone rate-making). As a result, he is a proper defendant against whom to seek relief from Section 29 under the United States Constitution. *See*, *e.g.*, *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (9th Cir. 1991) (corporation's action against Attorney General

CONCLUSION

Plaintiffs respectfully request affirmance of the District Court's judgment below

October 31, 2005

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challenging on federal constitutional grounds a state constitution provision regarding nonfamily farms); *Omaha Nat'l Bank v. Spire*, 223 Neb. 209 (1986) (bank's action against Attorney General challenging on federal constitutional grounds an initiative amendment to the Nebraska Constitution).

CERTIFICATE OF SERVICE

I certify that on October 31, 2005, I caused to be served two copies of the Plaintiffs-Appellees' Brief 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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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28A(d)

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that a diskette has been furnished to the Court containing the Brief of Plaintiffs-Appellees in Portable Document Format, which was generated from Word, and was scanned for viruses using the Norton AntiVirus program and was found to be virus free.

Dated: October 31, 2005

_____
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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

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 total of 23,919 words.

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, Times New Roman, in font size 14.

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