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.

JON C. BRUNING, in his official capacity as Attorney General of the State of Nebraska, and DAVID HEINEMAN, in his official capacity as Governor of the State of Nebraska,

Defendants – Appellants.

On Appeal from the United States District Court
For the District of Nebraska, No. 4:03-cv-3155
The Honorable Joseph F. Bataillon, Judge

BRIEF OF *AMICUS CURIAE* CERTAIN CHAPTERS OF PARENTS, FAMILIES & FRIENDS OF LESBIANS & GAYS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, the *amicus* is not a corporation that issues stock, nor does it have a parent corporation that issues stock.

INTEREST OF *AMICI CURIAE*

Parents, Families, and Friends of Lesbian and Gays (PFLAG) is a nation-wide, non-profit, public-policy organization with an interest in promoting the health and well-being of gay, lesbian, bisexual, and transgendered persons, their families, and friends through, among other things, public education and advocacy to end discrimination and to secure equal civil rights. PFLAG provides an opportunity for dialogue about sexual orientation and gender identity, and acts to create a society that is healthy and respectful of human diversity.

Amicus Curie consists of seven local chapters of PFLAG within the jurisdiction of the 8th Circuit, including two in Nebraska – the Lincoln (Cornhusker) Chapter and the Omaha Chapter.[1] PFLAG's Lincoln Chapter has over 450 members and participated, along with many other groups, in the opposition to Initiative 416 which became Section 29 of the Nebraska Constitution.

[1] The seven local chapters of PFLAG submitting this *Amicus* Brief are the Lincoln and Omaha, Nebraska chapters, the Iowa City, Iowa chapter, the Duluth, St. Cloud, and Rochester, Minnesota chapters, and the St. Louis, Missouri chapter.

The Lincoln Chapter of PFLAG participates in Nebraska's Unicameral Lobby Day, and works closely with Nebraska's Citizens for Equal Protection, a non-profit membership organization dedicated to advocating for the rights of gay, lesbian, bisexual, and transgender families in the state of Nebraska. The Lincoln Chapter of PFLAG also supports the six Lincoln Public School high schools' Gay, Lesbian, Bisexual, Transgendered Straight Alliance clubs.

The *amicus* PFLAG chapters submit this brief in support of the Brief of Plaintiffs-Appellees which it adopts and incorporates by reference. The brief of *amicus* PFLAG is filed with the consent of the parties.

SUMMARY OF ARGUMENT

The Nebraska district court, Judge Bataillon, held that Section 29 of the Nebraska State Constitution, which denies the validity or recognition of any same-sex civil union, domestic partnership, or similar same-sex relationship, was invalid under the Equal Protection clause of the U.S. Constitution. The State of Nebraska has appealed and various *amici* have filed briefs in support of the State, including *amici* Nebraska Catholic Conference et al. ("Nebraska Catholic Conference").

Amicus PFLAG submits this brief in support of the Appellees, and in response to some of the arguments submitted by *amici* Nebraska Catholic Conference. In particular, *amici* Nebraska Catholic Conference erroneously argues that if the district court's invalidation of Section 29 is affirmed then, by analogy,

various other state constitutional provisions, including those regarding polygamy, must be invalid as well.

The arguments made by *amici* Nebraska Catholic Conference are flawed and of no help to this Court. In its Brief, *amici* Nebraska Catholic Conference fails to perform any analysis that shows any similarities between Section 29 and the state constitutional provisions it argues would be invalidated. Instead *Amici's* brief is nothing more than a "doomsday" scenario with no legal support or analysis.

ARGUMENT

I. THE ARGUMENT OF AMICI NEBRASKA CATHOLIC CONFERENCE ET AL. (AND OTHERS) THAT VARIOUS OTHER STATE CONSTITUTIONAL PROVISIONS MUST ALSO BE FOUND INVALID UNDER THE DISTRICT COURT'S DECISION IS FLAWED.

The State's *amici* Nebraska Catholic Conference et al. ("Nebraska Catholic Conference") argues four types of state constitutional provisions – constitutional provisions that (1) ban polygamy, (2) prohibit use of public funds to establish a religion, (3) require term limits for elected officials, and (4) deny state franchise to convicted felons – are subject to Constitutional invalidity if this Court affirms the district court's holding below. *See* Brief of *amici* Nebraska Catholic Conference at 20-27. That is simply not the case, and the arguments made by *amici* Nebraska Catholic Conference in that regard are flawed in several respects.

Initially, to even make the state constitutional provision "analogies" that it does, *amici* Nebraska Catholic Conference mischaracterizes the holding of the district court. According to *amici* Nebraska Catholic Conference (and the State's Brief suggests it as well), the district court decision rests solely upon a constitutional right never recognized by the Supreme Court – the "fundamental right to participate equally in the political process." Brief of *amici* Nebraska Catholic Conference at 20-21.

A thorough reading of the district court's decision, however, shows that it did not rely on a heretofore unrecognized constitutional right. Rather, its holding is based firmly in the Equal Protection analysis set forth by the Supreme Court in *Romer v. Evans*, 517 U.S. 618 (1996) - a case directly on point and controlling disposition of the instant case.[2] The following are but examples of the district court's analysis under *Romer*:

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[2] The Colorado State Supreme Court held, after a careful review of Supreme Court Equal Protection jurisprudence, that Colorado's Amendment 2 was in violation of "the fundamental right to participate equally in the political process" under the U.S. Constitution. *See Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993)*. As noted by the district court in this case, that holding was not rejected by the U.S. Supreme Court. *See* District Court's Memorandum at 18 (citing *Romer v. Evans, 517 U.S. at 626*). Rather, the U.S. Supreme Court in *Romer* held that:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

- "The Court finds that Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*. Although not mentioned by name, [Nebraska] has focused primarily on the same class of its citizens as did Colorado . . . Like the amendment at issue in *Romer*, Section 29 attempts to impose a broad disability on a single group. Also, as in *Romer*, the lack of connection between the reach of the amendment and its purported purpose is so attenuated that it provides evidence that Section 29 has no rational relationship to any legitimate state purpose." District Court Memorandum at 30 (referring to *Romer v. Evans*, 517 U.S. 618 (1996) and applying the "rational basis" or "rational relationship" test of Equal Protection).

- "The principle that government and each of its parts remain open on impartial terms to all who seek its assistance is central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection." District Court Memorandum at 31, *citing Romer*, 517 U.S. at 633.

- "The Court finds that Section 29 is a denial of access to one of our most fundamental sources of protection, the government. Such a broad exclusion from 'an almost limitless number of transactions and endeavors that constitute

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Romer, 517 U.S. at 633. (emphasis added)

Thus, the district court decided this case on settled Equal Protection law.

ordinary civic life in a free society is itself a denial of equal protection in the literal sense.'" District Court Memorandum at 32, *citing Romer*, 517 U.S. at 633, 631.

- "The troubling aspect of the amendment at issue in *Romer* was not its retrospective application to existing ordinances, but its prospective effect." District Court Memorandum at 32-33, *citing Romer*, 517 U.S. at 631 (the special disability imposed on gays was forbidding them the safeguards that others may seek from the government).

Thus, it is abundantly clear that the district court carefully determined the deprivations resulting from Section 29 of the Nebraska constitution, and then analyzed them using the Equal Protection analysis set forth in *Romer*, including the traditional "rational basis" test required by Equal Protection jurisprudence. *See* Appellee's Brief at 42-46 (explaining in greater detail how the district court's decision in this case is firmly grounded in the Equal Protection analysis in the Supreme Court's decision in *Romer*).

In any case, assuming *arguendo* that *amici* Nebraska Catholic Conference had properly characterized the district court's holding, *amici*'s Equal Protection analysis of other state constitutional provisions in pages 20-27 of its Brief is wholly incomplete. Essentially, *amici* (1) notes the existence of the various state constitutional provisions, then (2) notes that, to some extent the selected constitutional provisions place a particular group or people at a "comparative

political disadvantage", then (3) concludes, in absolute tautological fashion, that the selected constitutional provisions are therefore invalid if the district court is followed. The flaws in *amici*'s "doomsday" scenario are clear.

First, the Supreme Court has acknowledged many times that most laws classify a particular group or people resulting in a disadvantage to some group or set of people. *See, e.g., Romer*, 517 U.S. at 631; *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-272 (1979). The Supreme Court has taken that fact into account in formulating its "rational basis" Equal Protection jurisprudence. *See Romer*, 517 U.S. at 631; *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). It is by no means the end of an Equal Protection analysis to find that a law disadvantages one group *vis a vis* another.

Second, a*mici* Nebraska Catholic Conference did not apply the traditional "rational basis" analysis required by the Equal Protection clause of the U.S. Constitution. For example, *Amici* did not perform any kind of analysis of the scope or breadth of the constitutional provisions that it tried to analogize to Section 29, it did not investigate the legislative intent or purpose underlying the particular constitutional provisions, and it did not investigate whether any particular group was being disadvantaged due to animus towards them. See *Amici* Brf., pp. 20-27. Moreover, *amici* never contrasted Nebraska's Section 29 with the other state constitutional provisions it raised to determine whether there were differences in

scope, breadth, classification, potential animus, or any other factor important to an Equal Protection analysis.

Thus, *amici* Nebraska Catholic Conference's analogies to other state's various constitutional provisions are not helpful to this Court.

A. *Amici* Nebraska Catholic Conference's Analogy to State Constitutional Provisions Banning Polygamy.

Amici Nebraska Catholic Conference argues that various state constitutions banning polygamy are subject to invalidation should this Court agree with the district court below. Brief of *amici* Nebraska Catholic Conference at 22-23. *Amici* adds that the "authority of the States to prohibit polygamy in their state constitutions is particularly relevant to their authority to prohibit same-sex marriage and deny legal recognition of same-sex, quasi-marital relationships."

This precise argument was rejected in *Romer*. There, the dissent (J. Scalia) cited *Davis v. Beason,* 133 U.S. 333 (1890) for the proposition that, since *Davis* held that the right to vote can be denied to those engaging in polygamy, without an Equal Protection violation, then Colorado's Amendment 2 which prohibited gays from seeking various government protections was also valid under the U.S. Constitution. *Romer*, 517 U.S. 650. The majority in *Romer*, however, quickly disposed of the dissent's point regarding polygamy and found Colorado's Amendment 2 unconstitutional. According to the *Romer* Court:

> [T]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. [Citations omitted]. To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. *See Richardson v. Ramirez*, 418 U.S. 24 (1974).

Romer, 517 U.S. at 634.

The Supreme Court in *Romer* was not concerned at all with any analogies between constitutional provisions like Colorado's Amendment 2 and Nebraska's Section 29 on the one hand, and state laws regarding polygamy on the other. This Court should not be either.

B. *Amici* Nebraska Catholic Conference's Analogy to State Constitutional Provisions Prohibiting Use of Public Funds to Establish Religion.

Again, as noted above, *amici*'s failure to compare and contrast Nebraska's Section 29 with the state constitutional provisions prohibiting use of public funds to establish religion renders its analogy unpersuasive. It simply makes no sense to say that if one state constitutional provision fails under equal protection, then others must as well. One conclusion does not necessarily follow from the other. Analysis of the particulars is needed.

Moreover, it is worth noting that the Supreme Court case that *amici* cites for the proposition that state constitutional provisions prohibiting use of public funds to establish religion pass Equal Protection analysis, *Locke v. Davey*, 540 U.S. 712 (2004), had in its majority the *same* Supreme Court justices (plus Justice Rehnquist) that decided *Romer*. Thus, the Supreme Court has recognized constitutional differences between state constitutional provisions prohibiting use of public funds to establish religion, like the one analyzed in *Locke*, and unconstitutional provisions like Colorado's Amendment 2 in *Romer*, which is no different than Nebraska's Section 29 at issue here. *See* District Court Memorandum at 30 ("The court finds that Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*."); Appellee's Brief at 23-31.

C. *Amici* Nebraska Catholic Conference's Analogy to State Constitutional Provisions Requiring Term Limits for Elected Officials.

The analogy to state constitutional provisions requiring term limits also fails because such provisions are clearly not enacted as a result of animus toward the disadvantaged group.

In *Romer*, the Supreme Court found that it was animus towards gays, and only animus towards gays, that lead to the enactment of Colorado's Amendment 2. *See Romer*, 517 U.S. at 634 ("laws of the kind now before us raise the inevitable

inference that the disadvantage imposed is born of animosity toward the class of persons affected"); *Id.* ("desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); *Id.* at 635 ("it is classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."). That is what the district court found in this case. District Court Memorandum at 31 ("Section 29 goes so far beyond defining marriage that the court can only conclude that the intent and purpose of the amendment is based on crimes against this class.") On the other hand, it is impossible to believe that classification of elected officials who have served a particular number of terms, and the supporters of those officials, was undertaken with any animus to that group. *Amici*'s analogy to state constitutional provisions regarding term limits is nebulous at best.

D. *Amici* Nebraska Catholic Conference's Analogy to State Constitutional Provisions Denying State Franchise to Convicted Felons.

Nor is *amici* Nebraska Catholic Conference's analogy to state constitutional provisions denying franchise to convicted felons persuasive. The Court in *Romer* addressed this argument. According to *Romer,* "[t]o the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable." *See Romer,* 517 U.S. at 634 (citing *Richardson*

v. Ramirez, 418 U.S. 24 (1974)). Thus, analogies, like the one above, are not helpful and provides no guidance to the Court.

Amici Nebraska Catholic Conference's analogies to other state constitutional provisions are nothing more than distractions. In fact, it is important to note that the Supreme Court's *Romer* decision, upon which the district court's decision is based, did not bring in an era of widespread striking of state constitutional provisions. Neither will affirmance of the district court in the instant case.

II. THE DISTRICT COURT'S DECISION DOES NOT INVALIDATE OTHER "DEFENSE OF MARRIAGE AMENDMENTS," WHETHER EMBODIED IN STATE CONSTITUTIONS OR STATUTE.

The Nebraska district court did not, nor could it have been asked to, rule on the constitutionality of other defense of marriage provisions within the 8th Circuit. Neither is this Court being asked that now. The Court's authority and jurisdiction, of course, extend only to the matters before it.

Advocacy groups supporting Appellants, however, have suggested publicly that invalidation of Nebraska's Section 29 threatens all so-called "defense of marriage" laws within the 8th Circuit's member states (and presumably elsewhere throughout the country).[3]

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[3] Laws such as Nebraska's Section 29 are referred to by their proponents as "defense of marriage" laws. Appellees and *amicus* disagree that such laws have

The other "defense of marriage" laws within the 8th Circuit – Article XI, Section 28 of North Dakota's Constitution, Section 25-1-1 of South Dakota's Codified Laws, Arkansas' Amendment 83, Section 2, and Missouri's Article 1, Section 33 – are of different scope than Nebraska's Section 29 and any challenge to their constitutionality would have to take into account those differences in scope.

Nebraska's Section 29 is broad in the scope of its deprivation and narrow in its target. Section 29 prohibits same-sex couples, and only same-sex couples, from obtaining non-discrimination protections, from seeking relationship based protections, and even requires government discrimination in some respects. *See* Appellee's Brief at 26-33 (noting that Nebraska's Section 29 is actually broader in scope that Colorado's invalid Amendment 2). *See also* District Court Memorandum at 30 (finding Nebraska's Section 29 indistinguishable from Colorado's Amendment 2).

North Dakota's Article XI, Section 28 ("Definition of Marriage") recites:

> Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

and Arkansas' Amendment 83, Section 2 recites:

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anything to do with "defending" marriage, and use the term "defense of marriage" in this brief only for convenience.

> Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.

The North Dakota and Arkansas provisions appear to apply to unmarried opposite sex couples, as well as same-sex couples, making them somewhat less targeted. Additionally, those provisions appear to allow same-sex partners to seek some government protections, as long as they do not reach the "substantially equivalent" or "substantially similar" thresholds. Those differences would be taken into account in any constitutional analysis. Therefore, resolution of this case is not dispositive of the North Dakota and Arkansas law by any means.

Similarly, South Dakota's Codified Law Section 25-1-1 recites "Marriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary" and Missouri's Article I, Section 33 recites "that to be valid and recognized in this state, a marriage shall exist only between a man and a woman." On their face, South Dakota and Missouri's laws do not prohibit same-sex partners from seeking protections from the government, as Nebraska's Section 29 effectively does. Again resolution of Nebraska's Section 29 is not dispositive of the constitutionality of South Dakota or Missouri's marriage provisions.

Thus, the 8th Circuit's other "defense of marriage" laws are of different scope and nature than Nebraska's Section 29 and their constitutionality will be

measured, if ever, on their own merits. Invalidating Nebraska's Section 29 will not *de facto* result in invalidation of other "defense of marriage" laws within the 8th Circuit.

CONCLUSION

For the reasons set forth above and in the Brief of Appellee, the Order of the district court should be affirmed.

Dated: November 9, 2005

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CERTIFICATE OF COMPLIANCE

The foregoing Amicus Brief of Certain Chapters of Parents, Families & Friends of Lesbians & Gays in Support of Appellees complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 2,924 words, not counting the sections excepted in Fed. R. 32(a)(7)(B)(iii). The brief was prepared using Microsoft Word 2003. The font is Times New Roman, proportional 14-point type. The brief was downloaded to a diskette that was scanned for viruses and is believed to be free of viruses.

Dated: November 9, 2005

Niall A. MacLeod

CERTIFICATE OF SERVICE

It is hereby certified that on November 9, 2005, two copies of the *Amicus* Brief, together with a diskette containing the *Amicus* Brief, were served on counsel for the parties by placing said copies in the United States Mail, first-class postage prepaid, addressed to the following counsel of record for Appellants and Appellees:

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