

No. 05-2604

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITIZENS FOR EQUAL PROTECTION, INC., a non-profit organization
incorporated under the laws of Nebraska, NEBRASKA ADVOCATES FOR
JUSTICE AND EQUALITY, a non-profit organization incorporated under the
laws of Nebraska, and AMERICAN CIVIL LIBERTIES UNION, a non-profit
organization incorporated under the laws of Nebraska,
Plaintiff/Appellee,

vs.

JON C. BRUNING and DAVE HEINEMAN,
Defendants/Appellants.

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

**BRIEF OF AMICUS CURIAE
SUSAN ANN KOENIG, ESQ.
KOENIG & TIRITILLI P.C., L.L.O.
IN SUPPORT OF THE APPELLEE
AND AFFIRMATION OF THE DECISION BELOW**

Bill J. Hays, KS Bar #15314
Neely L. Fedde, KS Bar #21084
Tim J. Riemann, KS Bar #21737
Jana L. Torok, KS Bar #19807
SHOOK, HARDY & BACON L.L.P.
84 Corporate Woods
10801 Mastin, Suite 1000
Overland Park, Kansas 66210-1669
Telephone: 913/451-6060
Facsimile: 913/451-8879

Attorneys for Amicus Curiae
Susan Ann Koenig, Esq.
Koenig & Tiritilli P.C., L.L.O.

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CORPORATE DISCLOSURE STATEMENT

Susan Ann Koenig is a shareholder in the firm Koenig & Tiritilli, a professional corporation and limited liability organization. There is no parent corporation and no stock.

STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Fed. R. App. P. 29(c)(3), Susan Ann Koenig (“Amicus”) is a general family law practitioner who is currently licensed and practicing law in the State of Nebraska. As a general and family law attorney, Amicus is dedicated to providing thorough, effective, and accurate advice to clients in matters of family, estate, taxation, and criminal law, as well as numerous other areas within the realm of the general practitioner. Nebraska's Marriage Amendment, Article I, Section 29 of the Nebraska Constitution, jeopardizes Amicus’ ability to provide cogent advice to clients because Section 29 renders uncertain numerous provisions of the Nebraska Revised Statutes, including sections of the code pertaining to taxation, decedents' estates, and the Uniform Interstate Family Support Act, among others, all of which are contingent or rely, at least in part, on marital status. Section 29 also prospectively invalidates any changes in these laws Amicus might advocate in order to serve her clients. Specifically, with respect to all matters of spousal benefits, Section 29 eliminates the right of same-gender partners to advocate and lobby government for protection under these laws.

Amicus files this brief to make certain that the interests of all of her clients, including those of the lesbian, gay, bisexual, and transgendered community, are equally protected by the laws of Nebraska and to ensure that critically important aspects of Nebraska law are not denied by the over-reaching of Section 29. Amicus is intent on ensuring that she, and others like her, are free to advocate on behalf of all of their clients for the adoption of new protections and benefits under the law concerning committed relationships, an ability that has been drastically impaired by Section 29. Amicus files this brief in conjunction with her motion for leave to file in accordance with Fed. R. App. P. 29(a), (b).

ARGUMENT

I. INTRODUCTION

When Nebraska voters adopted Section 29 of the Nebraska Constitution, they worked a sweeping disability on gay and lesbian Nebraskans. Section 29 denies a significant Nebraska minority group recourse to the halls of government and puts Nebraska decisively out of step with the United States Constitution's basic guarantee of free and open government intended to provide equal protection to all.

The stigmatizing of gays and lesbians, which is manifested in Section 29, cannot be ignored or excused. Although Section 29 is seen by its proponents and current state officials as embodying a defense of "traditional

values,” the values it purports to advance prosper only by denigrating the values of others. Section 29, by its most obvious aim and impact, directly discriminates against gays and lesbians in committed partnership relationships, while serving no rational or legitimate state purpose.

In a highly polarized country in which matters of personal morality and religious belief have become the mainsprings of political power, the heartfelt actions of otherwise right-minded citizens can unintentionally punish those without political power. Fortunately, the United States Constitution protects against such latent discrimination. The Constitution makes no room for a state constitutional amendment that forecloses access to the protection of government and law, and stigmatizes and punishes a clearly identified minority.

This brief will focus specifically on spousal benefits now available to Nebraska different-sex partners that Section 29 has forever and unconstitutionally foreclosed to Nebraska same-sex partners.

II. SECTION 29 FUNDAMENTALLY CHANGES NEBRASKA LAW.

Article I, Section 29 of the Nebraska Constitution was adopted by a majority of Nebraska voters on November 7, 2000, after an intense and well-financed initiative campaign. *See* Brief of Plaintiffs-Appellees, p. 2 (citing App. Vo. I (“AVI”) at 42). Shortly after its adoption, the impact of Section 29 was made clear. On January 14, 2003, Nebraska Senator Nancy Thompson proposed

legislation to allow same-sex and different-sex domestic partners to make end of life funeral and organ donation decisions for a deceased partner. The Nebraska Attorney General reviewed this proposed legislation and found that it did not comply with Section 29 because “partners of the same sex were not disqualified.” *See* Brief of Plaintiffs-Appellees, p. 3 (citing AVI-43, 124; AV2-553-54). Accordingly, Section 29 makes advocacy for this and all similar domestic partner legislation that would confer some benefit upon same-sex partners futile because the Attorney General has deemed such legislation facially unconstitutional.

A. Section 29 Bans Same-Sex Marriage and Forecloses Any Other Relationship That Would Confer Benefits or Protections on Same-Sex Partners.

The purpose of Section 29 is plain to any who read it: to foreclose the legal protections of marriage to same sex couples, and to prospectively ban any similar relationship, including civil unions and domestic partnerships, that could provide marriage-like protections to same-sex couples. The amendment fundamentally alters the law and structure of government in Nebraska by providing:

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. As a result, no Nebraska same-sex relationship that confers spousal benefits on its members can now be validly established or recognized by the Nebraska legislature, or enforced in a Nebraska court, without the Nebraska Constitution first being amended.

Same-sex partners who live in Nebraska have traditionally lobbied the Nebraska legislature for recognition of their committed relationships because they share the same values of duty and responsibility which are reflected in the accepted institution of marriage. *See* Brief of Plaintiffs-Appellees, p. 6 (citing AVI-277, 281). Like married couples, Nebraska same-sex partners need to secure their lives and their futures by the sanctity of law. *Id.* Section 29 deprives these committed Nebraskans of those protections and from any hope of securing those protections in the future. Section 29 unambiguously advises same-sex Nebraska couples that the government in their state is closed to their entreaties concerning spousal benefits.

B. The District Court Correctly Held That Section 29 Was a Violation of the Constitutional Guarantee of Equal Protection

The District Court correctly noted that “[v]arious state and federal laws have historically granted benefits and protections to spouses.” *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980, 998 fn. 15 (D. Neb. 2005). Section 29, however, precludes same sex couples from advocating for or achieving any extension of these rights, and prevents same-sex couples from enforcing private rights that benefit same-sex couples in Nebraska courts.

In *Romer v. Evans*, the United States Supreme Court addressed a similar constitutional amendment adopted in Colorado. *Romer* held as follows:

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.

517 U.S. 620, 633, 116 S.Ct. 1620, 1628 (1996).

Despite this, Section 29 does exactly what the *Romer* court held impermissible. Section 29 forever prevents same-sex couples from achieving any of the hundreds of benefits and protections afforded to married couples under Nebraska law.

C. Section 29 Unconstitutionally Denies Same-Sex Partners the Right to Advocate for Legal Protections Concerning Every Aspect of Domestic Life

Because the ultimate effect of Section 29 “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,” *Romer*, 517 U.S. at 627 (citations omitted), Section 29 is a “literal violation” of the Equal Protection Clause of the United States Constitution. This equal protection violation also violates a core principle of American democracy, which is “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. Section 29

violates this principle by denying Nebraska same-sex partners impartial access to the protections available to marital partners.

The preferential rights now enjoyed by married Nebraskans vary from the relatively inconsequential (spouses need not obtain a certificate to transfer ownership or possession of a handgun from one spouse to another) to the supremely important (surviving spouses of police officers, judges and public employees are guaranteed death benefits). *See* Neb. Rev. Stat. §§ 69-2403, 69-2409, 16-1010, 24-707, 23-2321. In part, it is because spousal privileges are so widely available to heterosexual couples, that prohibiting same-sex partners from being classified as married or from receiving spouse-like benefits violates the Equal Protection Clause of the United States Constitution.

According to the 2000 United States Census, there are 2,332 same sex unmarried partner households in Nebraska. Of these 4,664 Nebraskans, none may now take advantage of any of Nebraska's spousal benefits available to married couples. None may seek from the unicameral the spousal benefits available under the laws of other states where they may have lived or worked. None may ask their public employers for the same spousal benefits provided to heterosexual couples. And, none may advocate for a change of these rights short of a constitutional amendment.

The range of affected benefits is broad. The District Court noted the numerous affidavits offered by plaintiffs in the proceeding below to illustrate how the right of advocacy blocked by Section 29.

Plaintiffs offered numerous affidavits stating that plaintiffs' members would advocate, absent Section 29, at state, local and private levels for rights, obligations and benefits, including (1) those who wish to advocate for passage of the Financial Responsibility and Protection for Domestic Partners Act: Ex. 49, ¶¶ 19-20 (a homemaker); Ex. 47, ¶ 7 (a health care consultant); Ex. 46, ¶ 5 (a college instructor); Ex. 45, ¶¶ 10-11 (a minister); Ex. 43, ¶ 15-16; Ex. 42, ¶¶ 8-9 (a not-for-profit director of public relations); Ex. 41 (a software developer); Ex. 40, ¶¶ 19-22 (the ACLU); Ex. 39, ¶¶ 17-20 (the President of NAJE); (2) those who wish to advocate for local ordinance and city changes: Ex. 39, ¶¶ 17-20; Ex. 38, ¶¶ 21-23 (CFEP); and (3) those who want to advocate for change in laws for public and corporate employers: Ex. 44, ¶¶ 12-13; Ex. 42, ¶ 7; Ex. 41, ¶ 9 (a software developer); Ex. 48, ¶ 4 (a corporate supervisor); Ex. 39, ¶¶ 17-20; and Ex. 38, ¶ 21-23 (CFEP).

The denial of rights effected by Section 29 is even more offensive given that many of the spousal benefits which have been foreclosed to same-sex partners were never intended to promote heterosexual marriage. Instead, they exist because certain basic protections are central to making and planning a life with one other individual, regardless of the gender of the parties.

For example, Uniform Probate Code § 5-310(a)(4) dictates that a spouse has first preference—ahead of children and parents—for the appointment of a guardian for an incapacitated person. This public law, like most laws providing a

spousal benefit, represent policy makers' recognition of the need to assist individuals who are or were dependent on one other individual. Under Section 29, however, granting a same-sex partner the same status as a spouse is not allowed because it would be akin to granting legal status to the same-sex relationship. Same-sex partners cannot now achieve benefits on par with that of spouses, and are unable even to advocate for such a change in the Uniform Probate Code without first repealing Section 29 – an impossibility for this or any minority group.

Section 29 also prohibits Nebraska's 4,664 same-sex partners from achieving the benefit or effectively lobbying the Nebraska legislature to change laws that grant a spouse the first right to claim a person's remains or to make anatomical gifts. *See* Neb. Rev. Stat. § 71-1339. An effort to advance these rights for same-sex partners was already pronounced unconstitutional under Section 29 by the Nebraska Attorney General. Additionally, Nebraska's 4,664 same-sex partners are also without the right to sue for the wrongful death of a spouse, or to lobby for such a right. *See* Neb. Rev. Stat. § 30-810. Indeed, the prohibition wrought by Section 29 is injurious to virtually every aspect of committed relationships not involving heterosexual couples.

Spousal standing grants surviving spouses the right to an intestate share of a decedent's estate equal to at least one-half the estate (Neb. Rev. Stat. §§ 30-2302 and 30-2313) and the right to a \$7,500.00 homestead allowance if the

decedent was domiciled in Nebraska (Neb. Rev. Stat. § 30-2322). These are benefits that provide legal continuity following the death of a partner in a committed relationship. These benefits promote stability for families when one partner dies, and provides the assurance of care for dependents who are left behind. But Section 29 forecloses these benefits to all same-sex partners and forecloses the political process to gays and lesbians, and their friends and advocates, who would seek these benefits in the future.

Section 29 also precludes any legislative effort to craft general protections for same-sex partners short of marriage. Legislative enactments like the “civil union” statutes in Connecticut (Conn. Pub. Act. No. 05-10 (2005)) and Vermont (15 Vt. Stat. Ann. § 1202 (1999)) are expressly forbidden by Section 29. Domestic partnerships, a status that provides specific protections for same-sex partnerships in California, New Jersey, and Maine, are also banned by the plain language of Section 29.

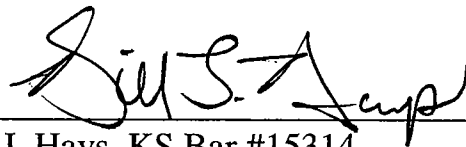
Because the far-reaching implications of Section 29 affect nearly every area of general and family law for same-sex partners in Nebraska, practitioners like Amicus will be unable to provide adequate guidance for clients, will be unable to ensure clients’ interests are protected, and will be prevented from advocating effectively for the protection of client rights. This denial of rights to the minority clients of Amicus is an unconstitutional and literal violation of the

Constitution's guarantee of equal and open government. This Court should remedy that violation and restore the rights of Nebraska's same-sex partners to seek the protection of government like all other Nebraskans.

III. CONCLUSION

The preemptive restriction of legal protections for same-sex couples in committed relationships is the reason Section 29 was enacted. By constitutionalizing the disparate treatment of same-sex partners, Section 29 forecloses access to the courts and legislature on core issues of domestic life. The right sought by Plaintiffs in the District Court, and which Amicus advances here, is the right of same-sex couples to advocate at all levels of government for domestic partnership laws and benefits to protect themselves and their loved ones. Section 29 denies that right and should be overturned.

Respectfully submitted:



Bill J. Hays, KS Bar #15314

Neely L. Fedde, KS Bar #21084

Tim J. Riemann, KS Bar #21737

Jana L. Torok, KS Bar #19807

SHOOK, HARDY & BACON L.L.P.

84 Corporate Woods

10801 Mastin, Suite 1000

Overland Park, KS 66210-1669

Telephone: 913/451-6060

Facsimile: 913/451-8879

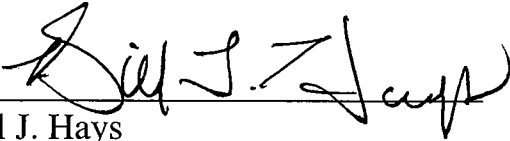
ATTORNEYS FOR AMICUS CURIAE
SUSAN ANN KOENIG, ESQ.
KOENIG & TIRITILLI P.C., L.L.O.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,421 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii). I relied on my Microsoft Word 2000 word processing software to obtain the count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman.

3. There were no privacy redactions required and the document as submitted to the Court in digital form is an exact copy of the written Response. The digital submission has been scanned for viruses using McAfee Virus Scan software, version 8.0.0 dated 9/25/05 rev. 6, and according to the program, the document is virus free.



Bill J. Hays

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2005, I mailed, postage prepaid, two true and correct copies of the above and foregoing, together with a diskette containing the Brief, to:

Jon Bruning, Attorney General
Matt McNair, Deputy Attorney General
Dale A. Comer, Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920

Amy A. Miller, #21050
American civil Liberties Union Foundation of Nebraska
941 O Street, Suite 706
Lincoln, NE 68508

David S. Buckel
Lambda Legal – New York
120 Wall Street, Suite 1500
New York, NY 10005

Fred B. Chase
Lambda Legal Defense and Education Fund
3325 Wilshire Blvd., Suite 1300
Los Angeles, CA 90010

Tamara Lange
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004


James D. Esseks
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400

Robert F. Bartle, #15010
Bartle, Geier Law Firm
1141 H Street
P. O. Box 83104
Lincoln, NE 68501-3104

Sharon M. McGowan
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400

L. Steven Grasz
Blackwell Sanders Peper Martin
2100 Dodge Street, Suite 2100
Omaha, NE 68102

James D. McFarland
1327 H Street, Suite 101
P. O. Box 94772
Lincoln, NE 68509-4772


Attorneys for Amicus Curiae