No. 05-2604

In the
United States Court of Appeals
For the Eighth Circuit

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CITIZENS FOR EQUAL PROTECTION, INC., *et al.*,
Plaintiffs-Appellees

v.

JON C. BRUNING, *et al.*,
Defendants-Appellants,

———————— ◆ ————————

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

———————— ◆ ————————

Brief *Amicus Curiae* of The National Legal Foundation,
in support of *Defendants-Appellants*
Supporting reversal

———————— ◆ ————————

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501 c(3) public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the issues of marriage and family. The NLF also has a vital interest in the proper application ofconstitutional principles since most of our litigation concerns these principles. We are particularly interested in assuring that constitutional case law not be improperly invoked by one side of a hotly debated political and social issue to the detriment of all those bound by the resulting court decisions.

This Brief is filed pursuant to the consent of all parties.

ARGUMENT

Although this appeal involves multiple issues, this brief will address only the District Court's holdings that Article I, Section 29 denies homosexuals and lesbians access to the government and that the intent and purpose behind Section 29 is based on animus against lesbians and homosexuals.

I. THE RATIONALE UNDER WHICH THE DISTRICT COURT HELD THAT SECTION 29 VIOLATES EQUAL PROTECTION GUARANTEES CANNOT BE A VALID PRINCIPLE OF CONSTITUTIONAL JURISPRUDENCE BECAUSE IT WOULD RENDER NUMEROUS PROVISIONS OF BOTH THE NEBRASKA AND UNITED STATES CONSTITUTIONS UNCONSTITUTIONAL.

The District Court erred when it held that "Section 29 is a denial of access to one of our most fundamental sources of protection, the government." *Citizens For Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1002 (D. Neb. 2005). The court reasoned that those who sought support for same-sex relationships would be disadvantaged by Section 29, and thus the amendment violates the Equal Protection Clause of the United States Constitution. *Id.* at 1002. This rationale is wholly without merit and would lead to absurd consequences if applied in other contexts.

A. The District Court's Reliance on *Romer v. Evans* Is Faulty Because The Constitutional Language at Issue in *Romer* Proscribed A Vast Array of Government Action.

Section 29 states that "[o]nly 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." The Amendment simply defines marriage and states that Nebraska does not recognize "civil unions," "domestic partnerships," or any equivalent legal recognition of same sex relationships.

The court relied heavily on *Romer v. Evans*, 517 U.S. 620 (1996), in which the United States Supreme Court struck down an amendment to the Colorado state constitution, which specifically prohibited the State of Colorado or any of its branches, departments or agencies from "enact[in g], adopt[ing] or enforce[ing]" any "statute, regulation, ordinance or policy" recognizing homosexuals as a protected minority class. *Id*. at 624 (*quoting* the amendment).

The District Court not only relied heavily on *Romer*; it went so far as to say that the Nebraska amendment is "indistinguishable" from the Colorado amendment. 368 F. Supp. 2d at 1002. This is not the case; the two amendments are materially distinguishable. The Nebraska amendment simply inserts into the state constitution a popularly approved definition of the marriage and a clarification of the state's policy regarding same sex -unions. It does not proscribe any further policy making on the issue of homosexuality or homosexual relationships. Homosexual activists are still just as free to petition the government for all other beneficial social change as they were before the amendment was passed. The Colorado amendment at issue in *Romer* went far beyond mere

clarification; it banned all future government action that would recognize that homosexuals are a protected class and (under the Supreme Court's reading) would have left them defenseless in the hands of those who wanted to discriminate against them in all sorts of every day contexts, *Romer*, 517 U.S. at 630.

The District Court claimed that Section 29 similarly has a "chilling effect" on homosexual activists' potential efforts to bring about change in a broad area of issues relating to their economic and political goals. 368 F. Supp. 2d at 1000 n.17. This rationale might have had some credence as applied to the language of the Colorado amendment, because it specifically proscribed future government action. The Colorado amendment would not have precluded political action to change the state of the law with regard to amendment's coverage. However, it is true that it would be more difficult to rally support for policy changes that are prohibited by the state's constitution. Obviously, it would have taken one or more *additional* constitutional amendments to have allowed lesbians and homosexuals to advance their agenda on an entire plethora of issues. This is not the case with Section 29. There is nothing in Section 29 that proscribes future policy making in any area except the definition of marriage. Thus there is no "chilling effect" disco uraging homosexual activists from seeking desired social change, except the fact that they were unsuccessful in *one* of their battles.

B. The District Court proved too much when it declared that the passage of the Nebraska amendment has a "chilling effect" on homosexual activists' efforts to fight for legal changes favorable to their cause.

Moreover, the real issue is that the District Court proved far too much when it declared that the passage of the Nebraska amendment has a "chilling effect" on homosexual activists' efforts to fight for legal changes favorable to their cause. There are myriad examples of social and political issues that have been decided one way or the other—from every point on the political spectrum—whose activists continued their fights even after facing initial defeat. And this has been true even when that defeat was given constitutional status. To name just the most obvious example, the passage of the Eighteenth Amendment to the United States Constitution—the Prohibition Amendment—did not stop the anti-Prohibition forces from repealing that amendment with the Twenty-first Amendment.

Furthermore, applying the District Court's chilling effect rationale in other contexts would lead to absurd results. Numerous provisions of the Nebraska Constitution would be unconstitutional under the United States Constitution. And—were such a thing possible—the United States Constitution would violate itself.

The Nebraska Constitution clearly sets forth limitations that impact specific groups of citizens regarding a variety of issues. One example is the provision of the Nebraska Constitution which declares that '[t]he English language is hereby

declared to be the official language of this state." Neb. const. art. I, § 27. Such a provision impacts those who do not speak English. Under the District Court's Equal Protection rationales (including its chilling rationale), non-English speaking citizens are being singled out by this barrier which denies them access to the government. Thus, this section would be unconstitutional under the District Court's analysis.

Another example is Article I, Section 4 under which '[n]o person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society." Those citizens who might seek an established religion of a particular form are currently barred from achieving their goal. The District Court's ruling dictates that the effects of this barrier are unconstitutional. Furthermore, this example is not as far-fetched as it may sound. While one might be hard pressed to find citizens who would want to establish a particular religion as that term was originally understood, one need look no further than the newspaper to find large numbers of citizens who desire government to engage in activities that amount to an establishment of religion under current (state and federal) Establishment Clause jurisprudence. The fact that these people would have to alter the Nebraska Constitution to achieve their goal

would render the state Establishment Clause unconstitutional under the District Court's reasoning.[1]

Article I, Section 9 of the Nebraska Constitution states that there shall be no "cruel and unusual punishment inflicted" on a person. Many citizens believe that the penalty of death by electrocution is cruel. Yet, because the Nebraska Supreme Court has established that the death penalty by electrocution is not cruel and unusual, *State v. Ryan*, 534 N.W.2d 766, 777 (Neb. 1995), these citizens would have to pass an amendment banning electrocution to prevail. Again, the District Court's opinion would render this section unconstitutional. Presumably, Nebraska would only be able to decide issues of punishment via statute.

To illustrate the reach of the consistent application of the profound danger of this holding, consider the Nebraska Constitutional provision that states "[t]here shall be neither slavery nor involuntary servitude in this state." Neb. Const. art. I, § 2. Human trafficking continues to exist in this country and, conceivably, there are Nebraska citizens who vehemently disagree with the principles behind the slavery restriction. The District Court's decision would automatically provide them Constitutional footing on which to challenge such a provision. If ever there

[1] Obviously, the incorporation of the federal Establishment Clause against the states would invalidate any state constitutional provision allowing for the establishment of a religion. However, that does not negate the point being made here about the operation of the District Court's analysis.

can be a group imagined who would be politically "chilled" by a constitutional provision it is would-be slave traders or slave owners.

On a less dramatic note, Article VI, Section 1 prohibits voting by anyone under the age of eighteen. This provision places the same putative "chilling" burden on those under that age who would seek to vote. It too would therefore fall under the District Court's rationale.

Similarly, the District Court's reasoning would require finding unconstitutional the Nebraska constitutional provision that states "[no] person shall be qualified to vote who has been convicted of felony . . . unless restored to civil rights." Neb. Const. art. VI, § 2. Although this provision specifically prevents imprisoned persons convicted of felony from having voter access to government, it is still—absent the District Court's rationale—valid.

Yet again, a burden is created for any person who is over twenty-one years of age due to the provision that states "[t]he Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Neb. Const. art. VII, § 1. Denying an older person access to free education could impact their entire lifetime. It too is in trouble under the District Court's reasoning.

Furthermore, Article III, Section 24, prohibits all gaming except of the varieties specifically mentioned (which may be authorized by the legislature).

Both those who wish to play prohibited games and those who wish to sponsor such games, including entire industries and major employers, are thereby subject to the "chilling effect." Once again, another provision of the Nebraska Constitution would fall under the District Court's rationale.

As a final example, one can note the constitutional property tax provisions. According to Article VIII, Section 2, certain property must be, and other property may be (pursuant to legislative authorization), exempted from property tax. All other property must be subject to property tax. Clearly, property owners in all but the first two categories face the same Equal Protection and chilling barriers the District Court was concerned about.

Merely reciting the examples above illustrates the problem with the District Court's rationales: Under them, all of the noted provisions of the Nebraska Constitution, and perhaps others besides, would be found unconstitutional under the federal Constitution. If this is not, in and of itself, sufficient to demonstrate the absurdity of the District Court's conclusion, one further matter surely is: Several of these Nebraska constitutional provisions have federal counterparts. Thus, under the District Court's rational, the United States Constitutional would "violate itself." The federal prohibitions on slavery and establishment of religion, as well as its cruel and unusual and voting age clauses, would violate the United States Constitution under the District Court's theory. The

fact that this cannot be true demonstrates that the District Court's rationale cannot be a legitimate principle of constitutional jurisprudence.

Clearly, none of these constitutional provisions create Equal Protection problems. For exactly the same reason, Section 29 also creates no Equal Protection problem.

Furthermore, not only would the District Court's decision jeopardize all of the noted provisions of the Nebraska Constitution, it rests upon a putative "rights" that does not exist. When the Defendant raised this point in its trial brief, the District Court dismissed the arguments, and cited it as evidence that the Defendant simply sought to silence homosexual activists. The District Court cited the following statements from the Defendant's brief: "There is no civil right to contr ol the terms on which a political battle will be fought," and "[t]hey do not have a constitutional right to win or force the battle to be fought on their terms." 368 F. Supp. 2d 980 at 1000, 1007. The District Court then made a vast leap of logic as it concluded that "[t]hese statements make it clear that the intent of Section 29 is to silence the plaintiffs' views and dilute their political strength." *Id.* at 1007. In other words, the District Court concluded that the entire effort to pass Section 29 was motivated by animus. As the following section of the brief will show, this assertion is incorrect and ignores United States Supreme Court precedent to the contrary.

II. THE DISTRICT COURT INCORRECTLY DETERMINED THAT THE PASSAGE OF SECTION 29 WAS BASED ON ANIMUS BECAUSE DEFINING MARRIAGE IS NOT DISCRIMINATION AGAINST LESBIANS AND HOMOSEXUALS.

The District Court incorrectly held that Section 29 was based on animus against homosexual couples. *Bruning*, 368 F. Supp. 2d at 1002. Although lesbians and homosexuals are not specifically identified in the amendment, the District Court reasoned that, because they alone would be participating in same-sex relationships referenced in the wording of the amendment, the intent of the provision was "to make this class of people unequal." *Id.* Even ignoring the fact that what is really at issue here is a political battle between those who want to preserve the definition of marriage and those who want to re-define it—and the fact that homosexuals, heterosexuals, and those who are sexually celibate are very likely to be found on both sides of the issue—the court's logic contradicts the Supreme Court's determination as to what constitutes discrimination against a class.

The Supreme Court rejected the notion that opposition to an action or behavior constitutes discrimination against a class in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-270 (1993). In *Bray*, abortion supporters claimed that opposition to abortion was based on animus against women because only women can obtain abortions. *Id.* The Court disagreed with this logic.

In *Bray*, the Court held that the discriminatory impact of an action is different from purposeful discrimination against a person. *Id.* at 334. The following excerpt from the oral argument in *Bray* vividly illustrates the rationale behind the Court's decision. In this excerpt, then-Deputy Solicitor General, now-Supreme Court Chief Justice nominee, John G. Roberts, Jr., representing the United States as *Amicus Curiae* made the following analogy:

> Consider, for example, an Indian tribe with exclusive fishing rights in a particular river. A group of ecologists get together who are opposed to fishing in the river, because they think it disturbs the ecology. They interfere with the Indians' rights. The impact of their conspiracy is on a particular Indian group, but it would be quite illogical to infer from that they have any animus against Indians. They're opposed to fishing in the river, not Indians, even though only Indians can fish in the river.

Tr. of Oral Argument at 12-13, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985). The Nebraska amendment, like the abortion protests in *Bray,* targets a specific political position or activity, not a people group.

As in *Bray*, where the opposition was directed against an activity (abortion), not a class of people (women), even though only women can receive abortions, the amendment in this case impacts the validity *vel non* of the political goal of redefining marriage and of creating civilly recognized marriage-like institutions. It does not, however, target homosexuals *qua* homosexuals.

In fact, the *Bray* Court's entire animus discussion, 506 U.S. at 269-74, is greatly illuminated by understanding that the Court had the benefit of Judge

Roberts' Indian fishing analogy. It is equally applicable and equally helpful here. Just as protesting against the fishing practice of Indians, or protesting against women who practice abortion does not evince animus, neither does is the passage of Section 29 evince animus towards homosexuals. In fact, this is an easier case. One can easily imagine other groups who might seek to redefine marriage or to create domestic partnerships. These groups would include polygamists, polyandrists, and marriage abolitionists. In the face of political pressure from any of these groups or (to aid in the political opposition does not equal animus analysis) from all of them plus homosexuals combined, Section 29 would be a logical response. There simply is no animus against homosexuals.

Conclusion

For the foregoing reasons and for other reasons stated in the Appellant's brief, this Court should reverse the decision of the District Court.

Respectfully submitted
This 12th day of September, 2005

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CERTIFICATE OF COMPLIANCE

This brief is submitted pursuant to page limit, not word count, and no certification thereto is required.

Pursuant to Eighth Circuit Rule 28A(d)(2) the undersigned certifies that the disk containing the digital version of this brief is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Citizens for Equal Protection, et al. v. Brunikng, et al.,* No. 05-2604, on all required parties by depositing two paper copies and one electronic copy in the United States mail, first class postage, prepaid on September12, 2005 addressed as follows:

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