

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CITIZENS FOR EQUAL PROTECTION,)	CASE NO. 4:03CV3155
etc., et al.,)	
)	
Plaintiffs,)	
)	
v.)	DEFENDANTS' BRIEF
)	IN SUPPORT OF
ATTORNEY GENERAL JON BRUNING,)	MOTION TO DISMISS
in his official capacity, GOVERNOR)	
MICHAEL O. JOHANNNS, in his official)	
capacity,)	
)	
Defendants.)	

INTRODUCTION

Defendants Jon Bruning and Michael O. Johanns file this brief in support of their motion to dismiss Plaintiffs' claims pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6).

Under Rule 12(b)(1), once the Defendants challenge subject matter jurisdiction, the Plaintiffs have the burden of proof to establish jurisdiction by a preponderance of the evidence. *Makarova v. Unites States*, 201 F.3d 110, 113 (2d. Cir. 2000).

Under Rule 12(b)(6), the burden of proof for this motion lies with the Defendants as the moving parties. Defendants must show that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Under both Rules 12(b)(1) and 12(b)(6), for purposes of this motion all of Plaintiffs' well-pleaded allegations are presumed true. See *Mich. So. R.R. v. Branch & St. Joseph Counties Rail Users Ass'n*, 287 F.3d 568, 573 (6th Cir. 2002); *Albright v. Oliver*, 510 U.S. 266, 267(1994).

PROCEDURAL HISTORY

Citizens for Equal Protection, Inc., Nebraska Advocates for Justice and Equality, and ACLU Nebraska, all Nebraska non-profit corporations ("Plaintiffs"), served their complaint on Attorney General Jon C. Bruning and Governor Michael O. Johanns ("Defendants") in their official capacity on May 9, 2003. Plaintiffs allege claims under 42 U.S.C. §§ 1983 and 1988, and assert jurisdiction based on 28 U.S.C. §§ 1331, 1343 and 2201. Complaint ¶¶ 5-6.

On May 28, 2003, this Court granted Defendants' request for an extension of time to answer or otherwise respond to the Complaint. Defendants now move to dismiss this case, and submit this memorandum in support of the motion.

BACKGROUND

The issue in this case is whether same-sex couples have a constitutional right to seek and obtain benefits based on their status as couples, rather than as individuals. The challenged provision of the Nebraska Constitution prohibits these individuals from receiving benefits based on their status as couples, but does not prohibit them from receiving benefits as individuals.

Initiative 416 was adopted by Nebraska voters in 2000, and Governor Johanns signed a proclamation incorporating the initiative into the Nebraska Bill of Rights as Article I, Section 29 ("Section 29"). Complaint ¶ 13. Section 29 reads:

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.

Section 29 prevents recognition in Nebraska of same-sex marriage or marriage imitations. It prohibits piecemeal redefinition of marriage through granting benefits on the basis of same-sex relationships or giving official recognition to such relationships.

Plaintiffs, Nebraska organizations with lesbian, gay and bisexual members, are advocates for lesbian, gay, bisexual and transgender “civil rights.” Complaint ¶¶ 1, 8-10. They seek to have Section 29 declared unconstitutional because the second sentence, according to Plaintiffs, bars “lesbian, gay and bisexual people from using the ordinary political process to seek important legal protections that all other Nebraskans already have or may seek without constraint.” Complaint ¶¶ 1-2. Plaintiffs allege that opposite-sex couples may seek and obtain legislation and government employment policies that protect their “domestic partnerships,” but same-sex couples are prevented from doing so. Complaint ¶ 15. They claim that Section 29 bars same-sex couples from using “ordinary political channels” to obtain legal protection for their relationships. Complaint ¶ 16. Absent Section 29, Plaintiffs allege that they “would work to convince state and local government in Nebraska to provide legal protections for people in committed same-sex relationships.” Complaint ¶ 23. Plaintiffs complain that the Attorney General issued an opinion on March 10, 2003, stating that a proposed bill giving certain rights based on domestic partnership status would violate Section 29. Complaint ¶ 18.

Plaintiffs expressly deny that they are making any claim of a right to same-sex marriage in this litigation. Complaint ¶ 4. Further, they do not allege that Section 29 prevents them from seeking and obtaining rights as individuals rather than as same-sex couples.

SUMMARY OF ARGUMENT

To satisfy Article III standing requirements, the Plaintiffs must demonstrate that they have suffered an injury-in-fact, that the Defendants' actions caused these injuries, and that the injury is capable of judicial redress. Plaintiffs do not have standing because they cannot satisfy the three parts of this test. Plaintiffs' generalized, ideological grievance cannot be satisfied by the Court. Article III courts do not adjudicate generalized grievances such as those now before the Court. Plaintiffs are in essence asking this Court for an advisory opinion on the constitutionality of Section 29.

The only injury that Plaintiffs have articulated is the purported denial of their right to participate in the political process to seek recognition of same-sex relationships. Under this theory, everyone that opposes a state constitutional amendment has a generalized grievance similar to that of Plaintiffs', and would have standing to challenge the amendment in federal court. Obviously, this is not true.

Plaintiffs' complaint is *not* that same-sex couples cannot obtain legal benefits and protections they desire, but merely that they cannot obtain benefits and protections *on the basis of their same-sex relationships*. However, Nebraska law did not grant these protections to same-sex couples prior to Section 29, and Plaintiffs do not allege that they could succeed in gaining the protections absent Section 29. Moreover, Plaintiffs' members already possess many of the rights as individuals that they claim they cannot seek through the political process. They have the ability, consistent with Section 29, to seek the other rights they allegedly desire *as individuals*. Thus, Plaintiffs have failed to allege the injury-in-fact necessary for Article III standing.

Plaintiffs' equal protection claims are not ripe. Apart from their generalized ideological grievance, Plaintiffs do not allege that there is any present or imminent domestic partnership law or

policy that would likely be enacted in the absence of Section 29. No action has been taken by Plaintiffs or any other person that even approach a justiciable controversy. Plaintiffs have voluntarily chosen not to lobby for such legislative and regulatory change, which is their right, but they cannot at the same time claim injury.

Finally, Section 29 is not a Bill of Attainder, as it inflicts no cognizable harm on Plaintiffs. Accordingly, the Court should dismiss the Complaint for lack of a justiciable controversy.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 29

There are three requirements that constitute the “irreducible constitutional minimum of standing”:

First and foremost, there must be alleged (and ultimately proved) an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be causation—a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04 (1998) (citations and internal quotation marks omitted). A plaintiff’s failure to prove any one of these requirements requires a court to dismiss the case for lack of standing. *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

"The rule against generalized grievances precludes Article III courts from entertaining ‘citizen’ or ‘taxpayer’ lawsuits in which the only injury claimed by the plaintiff is the shared harm experienced by all citizens and taxpayers when the government fails to comply with the Constitution

or laws of the United States. . . . In the Court's view, it is simply inadequate to premise standing on nothing more than a generalized claim that the government must comply with the law. See *Frothingham v. Mellon*, 262 U.S. 447 (1923)(no taxpayer standing to challenge federal spending measure as inconsistent with the Tenth Amendment); *Ex parte Levitt*, 302 U.S. 633 (1937) (no citizen standing to challenge judicial appointment alleged to be in violation of the Emoluments Clause); *United States v. Richardson*, 418 U.S. 166 (1974) (no citizen standing to challenge secrecy of CIA budget)." Christopher N. May & Allan Ides, *Constitutional Law: National Power and Federalism* at 107 (2d ed. 2001).

“To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature, and open the Judiciary to an arguable charge of providing ‘government by injunction.’” *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974).

Plaintiffs in the present case allege only a generalized injury. They do not complain that Section 29 denies them any marriage, civil union, or domestic partnership that would otherwise be available to them. If Section 29 were struck down tomorrow, Plaintiffs’ members would still not be able to marry or form a recognized domestic partnership because Nebraska statutory law does not recognize such relationships.

The only injury Plaintiffs allege is that the mere existence of Section 29 discourages them from seeking to enact future, speculative laws that would provide them with marriage, civil unions, or domestic partnerships. This “injury” is shared by all Nebraskans that are opposed to Section 29, and is thus too abstract, too speculative, and too generalized to provide Article III standing. Because they

have suffered no specific injury, Plaintiffs seek no more than an advisory opinion from this Court regarding the constitutionality of Section 29.

A. Plaintiffs Have Alleged no Injury in Fact

Plaintiffs have failed to allege a concrete injury in fact. Indeed, Section 29 made no substantive change in Nebraska law, and provides no impediment to any effort by Plaintiffs to amend the Nebraska Constitution. The supposition that Plaintiffs would have a better chance of obtaining desired legislation absent Section 29 is purely hypothetical. Moreover, the benefits Plaintiffs have identified in the Complaint that they cannot obtain purely by reason of a same-sex relationship could be pursued on alternative bases.

Instead of a concrete injury, Plaintiffs' alleged injuries are merely intangible and ideological in that Section 29 prevents them from redefining marriage without going through the same political process that led to Section 29. This alleged injury is the same as that of anyone else that wishes to redefine marriage in Nebraska. Under Plaintiffs' theory of injury, anyone who is ideologically opposed to any constitutional provision would have standing to challenge it in federal court. Taken to its logical conclusion, Plaintiffs' argument would mean that no constitutional amendment would ever be valid, because anyone that opposed a constitutional amendment would be required to pass an additional constitutional amendment to make any changes, and would thus have been denied access to the political process.

Plaintiffs are advocates for lesbian, gay, bisexual and transgender "civil rights." Complaint ¶¶ 1, 8-10. Nothing in Section 29 prevents Plaintiffs from advocating such rights. Nothing in Section 29 prevents Plaintiffs from asking the Nebraska legislature to amend the Constitution to rescind

Section 29 or to revise it.¹ Nothing in Section 29 prevents Plaintiffs from pursuing a voter initiative to repeal or amend Section 29.² Nothing in Section 29 prevents Plaintiffs from asking state or local government bodies for benefits for dependents or the designee of their choice. The one thing they cannot do under Section 29 is succeed in pressuring local or state-wide governmental entities to treat their relationships as quasi-marriages without allowing all Nebraska voters to participate in the political process. That is not a concrete injury.

A concrete injury or “injury in fact” requires interference with “a legally protected right.” *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 772 (2000). The only right at issue is the right to participate in the political process, a right with which Section 29 does not interfere. Plaintiffs have equal access to the political process of changing the definition of marriage in Nebraska – no group may make a radical change in the definition of marriage without a constitutional amendment. Plaintiffs simply do not like the political process that is available to them.

Section 29 did not repeal any existing rights or prevent Plaintiffs from obtaining additional individual rights. Nebraska law did not recognize same-sex relationships prior to Section 29, and Plaintiffs do not allege that they could succeed in gaining legal recognition for same-sex relationships

¹The legislature may propose a constitutional amendment if approved by 60 percent of the legislators, and it will become law if approved by a majority of voters. NE Const. Art. XVI, § 1.

²The citizens of Nebraska may amend the Constitution without legislative approval if 10 percent of registered voters sign a petition in favor of the amendment, and a majority of the voters approve it at the next general election. NE Const. Art. III, § 2.

absent Section 29. Section 29 simply prevents same-sex couples from having their relationships treated as marriage equivalents. The first sentence of Section 29 defines marriage; the second sentence prohibits establishing same-sex marriage under another name. A significant aspect of Plaintiffs' claimed constitutional injury is that the Nebraska voters adopted Section 29 as a constitutional amendment rather than as a statute. The Complaint does not allege that Section 29 would be unconstitutional if it were a statute, i.e., that Nebraska citizens do not have the right to use the political process to enact a law with the provisions of Section 29. If the definition of marriage is not unconstitutional, neither is the process for changing it. The fact that the Nebraska electorate chose to incorporate these provisions into the Constitution instead of enacting them in a statute does not inflict a concrete injury on Plaintiffs.

Section 29 is about preserving the definition and meaning of marriage, not about benefits. Nebraska voters used the political process to maintain the distinction between opposite-sex marriage and domestic partnerships, and Plaintiffs were able to participate in that process just as vigorously as any other citizen of the state. Plaintiffs do not complain that they were excluded from that political process, they are merely in court because they were unsuccessful in that process. Plaintiffs are free to engage in the political process to try to change the definition of marriage, but they are foreclosed from bypassing the political process by means of a judicial end-run.

1. Plaintiffs' alleged injuries are hypothetical because Section 29 did not change Nebraska law

Nebraska has never given legal status to same-sex relationships under any circumstances. Accordingly, Section 29 did not change Plaintiffs' legal status, and any injuries are purely hypothetical.

The hypothetical nature of these “injuries” is highlighted by Plaintiffs’ description of “the fate of a recent bill in the Nebraska legislature.” Complaint ¶ 18; 2002 Neb. LB 671. Plaintiffs complain that the “Attorney General issued an opinion on March 10, 2003 stating that the proposed law would be unconstitutional under Section 29.” *Id.* However, the fate of the bill was not determined by the Attorney General’s opinion. The Attorney General’s opinion did not prohibit the legislature from introducing, debating, or voting on the legislation, it would not bind any court, and thus the opinion did not have any effect on making Plaintiff’s alleged injury any more concrete. Plaintiffs assert only that the Attorney General believes the legislation to be unconstitutional. This alone cannot support Plaintiffs’ claim of injury, particularly in the face of other legislation recently adopted (discussed below) that addresses other concerns raised by Plaintiffs. To allege a concrete injury, Plaintiffs would at least need to suggest that the bill would have passed had it been introduced, which it could have been, but was not. As it now stands, LB 671 is simply one of many bills on which the Nebraska Legislature failed to vote this year.

Plaintiffs speculate that all efforts to enact statutory protections for same-sex couples are futile, yet they offer no facts to support this assertion. Plaintiffs do not allege that they or their members have made efforts to introduce or lobby on behalf of domestic partnership legislation or any other legislation that would expand funeral leave provisions, family and medical leave, mutual support requirements, or health insurance on the basis of same-sex relationships. Nor do they allege that such legislation would have a chance of succeeding but for Section 29. Instead, Plaintiffs allege that “[b]ut for the barrier created by Section 29, plaintiffs and their members, including those identified in this Complaint, would work to convince state and local government in Nebraska to provide legal protections for people in committed same-sex relationships,” and “would advocate with public

employers for the adoption of policies to protect people in committed same-sex relationships.” Complaint ¶¶ 23-24. Without allegations that Plaintiffs could hope to succeed in their efforts, their alleged injuries are conjectural or hypothetical, and thus fail to constitute injury in fact. *Steel Co.*, 523 U.S. at 103 (injury in fact cannot be “conjectural or hypothetical”); see also *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219 (1974) (“Abstract injury is not enough”) (citation omitted).

As stated above, Section 29 did not make any affirmative changes to Nebraska law as it affects the rights or status of Plaintiffs. The effect (or lack thereof) of Section 29 is in direct contrast to the effect of Colorado’s Amendment 2, which was at issue in *Romer v. Evans*, 517 U.S. 620 (1996).³ Amendment 2 created a concrete injury cognizable by the courts because, “[t]he immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation.” *Id.* at 626. Amendment 2 thus had a dramatic impact on the law as it existed in Colorado at the time of Amendment 2’s passage. Conversely, Section 29 had no effect on the status or rights of any person in Nebraska. Plaintiffs have all of the rights and privileges that they enjoyed prior to the passage of Section 29. No statutes, regulations, or ordinances were repealed by Section 29. The only thing that was changed by Section 29 was that Plaintiffs are now required to seek a constitutional amendment, just as the supporters of Section 29 did, to change the definition of marriage. Because Plaintiffs in the

³ Standing was not an issue in *Romer*, which was originally filed in state court, not an Article III court.

present case have not suffered any change in status or change in rights or privileges, they have suffered no concrete injury.

2. Plaintiffs can obtain the benefits they allegedly desire by other means

Central to Plaintiffs’ complaint is the allegation that Section 29 denies Plaintiffs equal opportunity to advocate for numerous rights and benefits that opposite-sex couples could theoretically obtain through legislative means other than a constitutional amendment. Plaintiffs articulate 7 specific rights that they claim Section 29 prohibits them from seeking or obtaining.⁴ However, paragraph 4 of the Complaint makes it clear that Plaintiffs want these benefits as “legal protection” for “same-sex relationships” rather than as individual rights or benefits. It is only the legal recognition of same-sex relationships that Section 29 prohibits. Although Plaintiffs are prohibited from receiving the benefits they seek based on their status as same-sex couples, they can already obtain most of these benefits by other means.

Same-sex couples already have the right to visit each other in the hospital and to make medical decisions for each other if they choose, they just cannot do so solely on the basis of the same-sex relationship. In 2002, two years after adoption of Section 29, the Nebraska legislature adopted legislation enabling any adult nineteen years of age or older or any emancipated minor to designate orally or in writing up to five individuals not legally related by blood or marriage who are to be accorded the same hospital visitation rights as immediate family members. Neb. Rev. Stat. § 71-20,120 (2002). Additionally, the legislature had earlier authorized any “competent adult to designate

⁴These rights include: hospital visitation (Complaint ¶¶ 3, 17, 23), medical decision-making (Complaint ¶¶ 3, 17, 23), bereavement leave (Complaint ¶¶ 3, 19, 24), end-of-life decision-making authority (Complaint ¶¶ 3, 17, 18, 23), responsibility to provide for living expenses (Complaint ¶¶ 17, 23), family and medical leave (Complaint ¶¶ 19, 24), and health insurance (Complaint ¶ 19).

another person to make health care and medical treatment decisions if the adult becomes incapable of making such decisions.” Neb. Rev. Stat. § 30-3401, et seq. (1992). Thus, Plaintiffs already have many of the rights they claim they seek, just not based on same-sex couple status.

Many other rights that Plaintiffs purport to seek, such as end-of-life decision-making authority and responsibility to provide for living expenses, are available to Plaintiffs as individuals through a variety of other contractual means including powers of attorney or wills. Again, it follows that Plaintiff’s complaint stems from the fact that these benefits are not granted based on same-sex couple status.

As for the rights that Plaintiffs seek that they may not be currently entitled to, such as family and medical leave, bereavement leave, and health insurance, these benefits are not available to unmarried opposite-sex couples either. More importantly, Section 29 does not prohibit the State of Nebraska from allowing citizens to designate adults living in the same household to receive these benefits, so long as the benefits are not granted based on same-sex couple status.

Nothing prevents Plaintiffs from introducing or lobbying for legislation providing all the other rights they allegedly desire. If they seek the rights as individuals rather than as same-sex couples, the legislation will not conflict with Section 29.⁵ Therefore, Plaintiffs are not prohibited from seeking the

⁵The constitutional infirmity under Section 29 in the proposed legislation attached to the Complaint as Exhibit A is that it attempted to premise rights upon “recognition of a domestic partnership; a partnership which could comprise same sex couples.” Complaint ¶ 18. The legislation would not have been inconsistent with Section 29 if it had been drafted to permit competent adults to designate a person of their choice to make decisions about funeral arrangements and organ donation.

benefits they purportedly desire through legislation, they are only prohibited from seeking those benefits based on same-sex couple status.

B. Invalidating Section 29 Would Not Redress Plaintiffs’ Alleged Injuries

Notwithstanding Plaintiffs’ claimed deprivations, as described above, Section 29 does not prevent Plaintiffs from obtaining those rights on some basis other than the recognition of a same-sex relationship. Given that Plaintiffs could obtain such benefits through other means, the only “injury” they have suffered is deprivation of the satisfaction of being able to seek rights in a way that affirms their relationships. Overturning Section 29 would simply provide Plaintiffs with the satisfaction of being able to attempt to validate same-sex relationships through seeking benefits based on those relationships. Such “psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (“psychological consequence presumably produced by observation of conduct with which one disagrees” does not confer standing). In any event, since Plaintiffs have not alleged that domestic partnership laws would be enacted in the absence of Section 29, any such claim is hypothetical and speculative, and therefore not a present or imminent injury in fact.

II. ANY PURPORTED FUTURE INJURY IS NOT RIPE

Depending on future events, Plaintiffs may someday be able to present a justiciable controversy based upon Section 29. However, no action has yet been taken that are cognizable by this Court. Only in the event that legislation is passed and subsequently invalidated would Plaintiffs’ claims be ripe. This has not yet happened. Plaintiffs’ previously-discussed claim about the effect of

an Attorney General's opinion on proposed legislation has absolutely no impact on the ripeness of their claim. Plaintiffs do not allege that the Attorney General's opinion prevented passage of the legislation, or would have had any effect on whether the legislation was subsequently invalidated. Nor is there any basis to believe that the legislation would have passed regardless of the Attorney General's opinion or Section 29. Accordingly, Plaintiffs' alleged deprivation of a right to equal protection in the political process is not ripe.

“The ripeness doctrine flows both from the Article III ‘cases’ and ‘controversies’ limitation and also from prudential considerations for refusing to exercise jurisdiction.” *Missouri Soybean Ass’n v. United States EPA*, 289 F.3d 509, 512 (8th Cir. 2002) (citation omitted). It “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. Prod. Co.*, 473 U.S. 568, 580 (1985) (citations and internal quotation marks omitted). “To be ripe for decision a case must be fit for judicial resolution and the parties must experience hardship if the court withheld consideration of the case’s merits.” *Missouri Soybean Ass’n*, 289 F.3d at 512; *National Park Hospitality Ass’n v. Department of the Interior*, 538 U.S. ____, 2003 WL 21210427 at 5 (2003).

Plaintiffs will experience no hardship if the Court declines to consider the merits of their claim. While they strongly assert that Section 29 denies them the right to participate as equals in the political process, they have neither suffered actual exclusion from equal participation in the political process, nor can they allege that such an exclusion is imminent. What they have alleged is that opposite-sex couples “may seek and obtain legislation and government employment policies that protect their domestic partnerships, [while] same-sex couples are prevented from doing so.” Complaint ¶ 15. However, Plaintiffs have not alleged that opposite-sex couples have sought or

obtained legislation and government employment policies on the basis of domestic partnerships, or that there is a likelihood that they will do so.

This is not a voting rights case in which Plaintiffs have suffered dilution or elimination of their legal right to participate in the political process. *Cf. Branch v. Smith*, 123 S.Ct. 1429 (2003). Quite to the contrary, Plaintiffs and their members have exactly the same rights today that they possessed prior to the adoption of Section 29 in November 2000. Plaintiffs may still “advocate, at all levels of government, for legislation that would advance the social, economic and educational interests of people who are discriminated against or denied the equal protection of the laws.” Complaint ¶ 3. Plaintiffs may still lobby elected officials. Plaintiffs may still submit public testimony for or against pieces of legislation. Plaintiffs’ members may still vote for or against legislators based on their political preferences. Plaintiffs have in no way been silenced or excluded from political participation.

Seeking to bolster arguments that they have been denied political access, Plaintiffs assert that but for Section 29, they would advocate for a variety of legislative and regulatory changes which would extend benefits to same-sex partners. Complaint ¶¶ 23-24. Fundamentally, if Plaintiffs have chosen not to lobby for such legislative and regulatory change, that is a voluntary decision. The only injury that Plaintiffs have suffered is that they disagree with the policy choices made by the majority of Nebraska voters when they enacted Section 29. Article III courts are not the appropriate place to debate differences of opinion regarding such policy choices. No government agent has prohibited or threatened to enjoin Plaintiff’s exercise of their freedom to petition elected officials.

The Supreme Court’s decision in *Renne v. Geary*, 501 U.S. 312 (1991), where it vacated a judgment because the claims were not ripe, is instructive. In *Renne*, Republicans and Democrats had challenged an amendment to the California Constitution that prohibited political parties from

endorsing candidates for nonpartisan offices. In arguing that the case was ripe, the Democrats claimed that they had refrained from endorsing candidates for fear of prosecution under the constitutional provision. But because there was no claim that the constitutional section had prevented the Democratic Party from endorsing a particular candidate for a particular office, the Court rejected the general allegations as unripe. *Id.* at 321. On the flip side, in the same litigation, the Court also rejected the arguments of the Republican Party, which had endorsed candidates despite the constitutional prohibition. Here, the Court held that the Republican Party's claim was not ripe in that no action was taken to enforce the provisions in question, and the Republican Party suffered no adverse impact due to their apparent violation of the constitutional provision. *Id.* In both cases, the Court withheld review in the absence of an imminent injury.

If the Supreme Court could find no ripe injury where the plaintiffs had violated a constitutional provision without adverse consequences, the Plaintiffs' claims in the present case can hardly be ripe. In the present case, no injury has occurred, because the challenged section imposes no direct or imminent burden on Plaintiffs' right to participate in political processes. Should the Plaintiffs successfully pass legislation inconsistent with Section 29 and later have the measure struck down, the Court might be faced with a ripe controversy. Meanwhile, in the absence of imminent injury to Plaintiffs' right of access to ordinary political processes, this Court should dismiss the complaint for lack of ripeness.

III. SECTION 29 IS NOT A BILL OF ATTAINDER

Section 29 is not a bill of attainder as a matter of law. "To constitute a bill of attainder, the statute must (1) specify affected persons, (2) impose punishment, and (3) fail to provide for a judicial trial." *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458,

465 (8th Cir. 1999). With respect to specification of affected persons, a statute becomes a bill of attainder when it specifically names an individual, or when it describes an individual in terms of conduct which, because it is *past* conduct, operates only as a designation of particular persons. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984). In the present case, the portion of Section 29 at issue does not name particular individuals; nor does it deal in any way with past conduct, since civil unions, domestic partnerships and other similar same-sex relationships have not been recognized in Nebraska. Consequently, Section 29 does not specify affected persons, and it cannot constitute a bill of attainder for that reason.

In addition, Section 29 also does not impose punishment on Plaintiffs or their members. The test for whether a provision is punitive is well established:

To rise to the level of “punishment” under the Bill of Attainder Clause, harm must fall within the traditional meaning of legislative punishment, fail to further a nonpunitive purpose, or be based on a congressional intent to punish.

Id. Section 29’s purpose and effect of preventing the redefinition of marriage clearly does not fall within the traditional meaning of legislative punishment, and it has a clear nonpunitive purpose of retaining the traditional meaning of marriage as being between a man and a woman. Indeed, Section 29 does not punish or prohibit any conduct, past or future. It simply prevents Plaintiffs or anyone else from redefining marriage in Nebraska without all voters having the opportunity to participate in the political process. It is frivolous to suggest that a voter initiative that preserves the right of all Nebraska voters to participate in any effort to redefine marriage was enacted for the purpose of punishing those who want to change the meaning of marriage.

Plaintiffs’ bill of attainder claim merits no more consideration than that given by the Eighth Circuit Court of Appeals to the claim in *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), that the

military's "Don't Ask, Don't Tell" policy is a bill of attainder. In its conclusion, without any other discussion, the Court noted: "We have considered Richenberg's bill of attainder claim and conclude it is without merit." *Id.* at 264. Plaintiffs' bill of attainder claim has less merit than the claim in *Richenberg*. In *Richenberg*, the military's "Don't Ask, Don't Tell" policy had inflicted an actual harm on Richenberg; Section 29 inflicts no cognizable harm on Plaintiffs. A constitutional provision protecting the meaning of marriage is no more a bill of attainder than is a statute prohibiting common law marriage.

CONCLUSION

Plaintiffs lack standing in this case, there is no justiciable case or controversy, and Section 29 clearly is not a bill of attainder. For these reasons, this Court lacks jurisdiction over the subject matter of this case, and Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Thus, this case should be dismissed.

DATED this 30th day of June, 2003.

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MICHAEL O. JOHANNNS, in his official
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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2003, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Matt McNair, Robert F. Bartle, David S. Buckle, Fred B. Chase, Tamara Lange, and Amy Miller, and I hereby certify that I have mailed by United State Mail the document to the following non CM/ECF participant:

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