

FILED
 U.S. DISTRICT COURT
 2003 APR 30 AM 8:54
 GARY D. MCFARLAND
 CLERK

IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF NEBRASKA

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; ACLU NEBRASKA, a non-profit)
 organization incorporated under the laws of)
 Nebraska,)

Plaintiffs,)

-v-)

ATTORNEY GENERAL JON C. BRUNING, in)
 his official capacity; GOVERNOR MICHAEL O.)
 JOHANNNS, in his official capacity,)

Defendants.)

COMPLAINT

Case No. 4:03 CV 3155

INTRODUCTION

1. Plaintiffs are Nebraska organizations that advocate for equality under the law as part of their missions and that have lesbian, gay and bisexual members. Plaintiffs seek to have Article I, Section 29 of the Nebraska Constitution (Section 29) declared unlawful as a denial of equal protection and a bill of attainder.
2. Section 29 prohibits government recognition of the “uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship,” thereby barring 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. Section 29 applies at all levels of state and municipal government, imposing a special disability on people in same-sex relationships whether they seek protection for their relationships from government employers, administrative agencies, cities, towns, or the state legislature.

3. Section 29 prevents same-sex couples from securing protection against a wide array of injuries that domestic partnership laws and policies are designed to address, including being prevented from visiting a same-sex partner in the hospital, making care decisions when a same-sex partner is incapacitated, taking bereavement leave when a same-sex partner dies, or making funeral arrangements for a same-sex partner after death.
4. In this lawsuit, plaintiffs do not ask for marriage, civil unions or domestic partnerships. Instead, they seek nothing more - and nothing less - than a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection. This lawsuit is about equal access, not guaranteed success, in the political arena.

JURISDICTION AND VENUE

5. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation under color of state law of rights secured by the United States Constitution.
6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction to grant the declaratory relief requested is provided by 28 U.S.C. § 2201.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because the defendants reside within the district and a substantial part of the events giving rise to plaintiffs' claims occurred in this district.

PARTIES

8. Plaintiff CITIZENS FOR EQUAL PROTECTION, INC. (CFEP) is a non-profit membership organization incorporated under the laws of Nebraska in 1993. CFEP's mission is to eliminate discrimination based on sexual orientation through legislation and education. CFEP is a grassroots lesbian, gay, bisexual and transgender civil rights organization. CFEP has lesbian, gay and bisexual members, including members who are lesbian, gay or bisexual public employees.
9. Plaintiff NEBRASKA ADVOCATES FOR JUSTICE AND EQUALITY (NAJE) is a non-profit membership organization incorporated under the laws of Nebraska. NAJE incorporated three years ago in response to the anti-gay campaign in support of Section 29, and its mission is to 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. NAJE's primary activity is lobbying against legislation that discriminates based on sexual orientation or gender identity and in favor of legislation that protects the civil and political rights of lesbian, gay, bisexual and transgender Nebraskans. NAJE has lesbian, gay and bisexual members, including members who are lesbian, gay or bisexual public employees.
10. Plaintiff ACLU NEBRASKA is a non-profit membership organization incorporated under the laws of Nebraska. ACLU NEBRASKA is committed to the protection of civil

liberties of all persons, including rights secured by the Constitutions of the United States and the State of Nebraska. ACLU NEBRASKA works to protect and promote civil liberties throughout the State of Nebraska. ACLU Nebraska has worked to advance the civil liberties of gay, lesbian and bisexual Nebraskans by lobbying in support of bills that seek to extend legal protections to lesbian, gay and bisexual people and against legislative efforts to discriminate on the basis of sexual orientation. ACLU NEBRASKA has lesbian, gay and bisexual members, including members who are lesbian, gay or bisexual public employees.

11. Defendant JON C. BRUNING is sued in his official capacity as Attorney General of the State of Nebraska. The Attorney General is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint. The Attorney General is the chief law enforcement officer of the State, and is charged with enforcing the laws of the State of Nebraska and with issuing opinions as to the constitutionality of proposed laws and acts of the State.

12. Defendant MICHAEL O. JOHANNIS is sued in his official capacity as Governor of the State of Nebraska. The Governor is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint. The Governor is responsible for the civil administration of the laws of the State.

STATEMENT OF FACTS

13. Initiative 416, which was signed into law by Governor Johannis on December 7, 2000, amended the Nebraska Constitution's Bill of Rights, adding the following provision as Article I, Section 29:

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.

14. The constitutional barrier created by Section 29 is the only one of its kind in the nation. No other state constitutionally prohibits state and local government officials from recognizing same-sex relationships in any way, including as domestic partnerships.
15. Section 29 classifies people based on sexual orientation. It singles out lesbian, gay and bisexual people by referring to a unique characteristic they share – participation in same-sex relationships – and then uses that shared characteristic to deny them equal footing in the political arena. While different-sex couples may seek and obtain legislation and government employment policies that protect their domestic partnerships, same-sex couples are prevented from doing so.
16. The very purpose of Section 29 is to make it more difficult for lesbian, gay and bisexual people than for all others to seek aid from the government, to make them unequal to everyone else. Unlike other Nebraskans, who may seek relief at any level of government when they want to protect their relationships, same-sex couples are constitutionally barred from using ordinary political channels to obtain legal protection for their relationships.
17. Section 29 makes it futile to ask government officials for even the most basic protections for people united in same-sex relationships, including the right and the responsibility to provide for one another's basic living expenses, to make health care decisions for a partner who is incapacitated, to visit a partner in the hospital and to make funeral arrangements when a partner dies. Other Nebraskans face no such constitutional barrier and may seek legal

protection for their relationships – including different-sex domestic partnerships – without constraint.

18. The futility of seeking protection for people in same-sex relationships through ordinary political channels is underscored by the fate of a recent bill in the Nebraska legislature. The bill proposed to allow both same-sex and different-sex couples to protect their families at the end of life by authorizing domestic partners to make decisions about funeral arrangements and organ donation. In response to the bill, the Attorney General issued an opinion on March 10, 2003 stating that the proposed law would be unconstitutional under Section 29 because it “would create new rights which spring from recognition of a domestic partnership; a partnership which could comprise same sex couples.” A copy of the proposed legislation reviewed by the Attorney General is incorporated by reference and attached as Exhibit A. A copy of the Attorney General’s opinion on the proposed legislation is incorporated by reference and attached as Exhibit B.
19. Section 29 also denies lesbian, gay and bisexual state and local government employees a level playing field when they try to advocate directly with their employers for bereavement leave when a same-sex partner dies, family and medical leave when a same-sex partner is seriously ill or injured, health insurance for a same-sex partner, or any other form of protection that requires recognition of a same-sex relationship. Other public employees in Nebraska face no such constitutional barrier and already have such protections for their relationships or may seek them without constraint.
20. Recognition of domestic partnerships is widespread throughout the nation in both the public and private sectors. Over 150 local governments and agencies offer health benefits to

same-sex domestic partners of employees, and eleven state governments offer them, including Iowa. Over 50 states and municipalities offer domestic partner registries, including Iowa City, Iowa and St. Louis, Missouri. In the private sector, more than 5,000 companies, and nearly 40% of Fortune 500 companies, recognize the domestic partnerships of same-sex couples.

21. Guyla Mills, who led the petition drive to place Initiative 416 on the ballot and chaired the Defense of Marriage Amendment Committee in support of Section 29, publicly explained the purpose of Section 29 on numerous occasions prior to its passage. Mills stated that Section 29 was intended to prevent “the havoc that would result by putting ‘homosexual marriage’ on the public policy freeway . . . venturing down a path where children are taught in schools that homosexual and heterosexual marriage are equal . . . where adoption into homosexual homes is normalized.” Mills explained that the second sentence of Section 29 was necessary “to send a message to society about homosexuality . . . that homosexuality and heterosexuality are not morally equivalent.” Mills stated that Section 29 was based on the prevailing morals of society and explained the importance of sending a strong message about homosexuality, “that homosexuality is a sin and should not be sanctioned even by ‘quasi-marriage’ unions such as domestic partnerships and civil unions.” Mills also stated that her organization chose to petition to amend the constitution rather than to amend state statutes to ensure that their work would not be undermined in future elections.

22. Plaintiffs each have members who are lesbian, gay or bisexual Nebraskans in committed same-sex relationships and members who plan to be in committed same-sex relationships in the future. Plaintiffs’ members include the following same-sex couples:

- a. Dave Gilsdorf and his partner Robb Crouch are in their early thirties. They have been in a committed, loving relationship for over six years. Dave grew up in North Platte, Nebraska and works in Lincoln as a software developer with a private company. Robb was raised mainly in Des Moines, Iowa and is an assistant director of communications at a non-profit foundation. Dave and Robb are both close to their extended family members. Last year, they hosted Thanksgiving for their extended family at their new home. Dave and Robb care and provide for one another and have made a commitment to each other that they will continue to do so, but Section 29 denies them equal footing in their efforts to obtain domestic partnership legislation that would allow them to take on the legal rights and obligations to care for one another and to make important health care and funeral decisions with and for one another when one of them is incapacitated or dies. In addition, Robb's employer participates in a state university insurance pool, and Section 29 prevents Robb and Dave from advocating on equal footing for a policy that would allow Robb to provide health insurance for Dave should uncertain economic times and job loss mean that their family needs that safety net; for a policy that would allow Robb to take family and medical leave to care for Dave if he is injured or becomes seriously ill; or for a policy that would allow Robb to take bereavement leave to attend Dave's funeral. Dave and Robb are members of CFEP, NAJE and ACLU NEBRASKA.
- b. Judy Gibson is 62 and her partner Barbara DiBernard is 53. They have been in a committed, loving relationship for over 14 years. Judy is a therapist and has lived in Lincoln since 1969. Barbara has been an English professor at the University of Nebraska-Lincoln since 1978. Barbara and Judy became seriously involved in 1988 and

built a wheelchair-accessible house together in the early 1990s as part of their plan to deal with Judy's degenerative illness. Building the house together represented their commitment that they would care for one another for the rest of their lives. Judy and Barbara care and provide for one another and have made a commitment to one another that they will continue to do so, but Section 29 denies them equal footing in their efforts to obtain domestic partnership legislation that will allow them to take on the legal rights and obligations to care for one another, to make health care and funeral decisions with and for one another when one of them becomes seriously ill or dies, and to pay third parties for debts incurred by the other for basic living expenses. In addition, Section 29 denies Judy and Barbara equal footing in their efforts to obtain state university policies that protect their relationship. For example, under Section 29, the university is not permitted to establish a policy allowing Barbara to take time off from work to take Judy to her regular medical and wheelchair maintenance appointments. Judy and Barbara are also concerned about planning for health insurance as they approach retirement. Judy is not eligible for health insurance through Barbara's state university employer, and Section 29 prevents them from advocating on equal footing for a new university policy that would allow Judy to participate in Barbara's health plan when they are ready to retire. This is particularly important because Barbara's health insurance policy provides far better coverage than Judy can obtain through her current employer or on the private insurance market. Judy and Barbara are members of CFEP, NAJE and ACLU NEBRASKA.

- c. Nancy Brink and her partner Maria Perez will hold a commitment ceremony this summer at the North Side Christian Church in Omaha, where Nancy has been the minister for 15 years. Nancy was born in Louisiana, the daughter of a minister, and moved to Omaha 15 years ago after attending seminary in Tennessee and serving other congregations. Maria was born in Puerto Rico, taught science in public school for 15 years and now teaches Spanish to college students. Nancy and Maria met at the national meeting for their denomination, the Christian Church (Disciples of Christ), and Maria now lives with Nancy and her seven-year-old daughter. Nancy shares the responsibilities of caring for her daughter with her former partner of 14 years, and Maria has become another parent to Nancy's daughter. Shortly before Nancy and Maria first met, Nancy underwent two surgical procedures, and her experience in the hospital made her realize that she cannot be sure that Maria will be permitted to make important medical decisions for her if anything happens in the future, or even that Maria will be permitted to visit her in the hospital during family visiting hours. Nancy and Maria care and provide for one another and for Nancy's daughter and have made a commitment to one another that they will continue to do so, but Section 29 prevents them from advocating on equal footing for legislation that will authorize them to take on the rights and responsibilities to care for one another and to make important health care and funeral decisions with and for one another when one of them becomes seriously ill or dies. Nancy and Maria are members of CFEP and NAJE.
- d. Jim Kieffer and his partner Gary Lopez are in their early forties and live in Omaha. They have been in a committed, loving relationship for over ten years and exchanged vows in a

commitment ceremony in November 1993. Jim is a development consultant for a healthcare company and Gary is a manager for a railroad. Jim and Gary are both active in their church, and they spend much of their free time gardening at home and caring for a close friend who is disabled. Jim and Gary care and provide for one another and have made a commitment to one another that they will continue to do so, but Section 29 prevents them from advocating on equal footing for legislation that would allow them to take on the legal rights and obligations to care for one another and to make important health care and funeral decisions with and for one another when one of them becomes incapacitated or dies. Jim and Gary are members of CFEP and NAJE.

- e. Donna Colley and Margaux Towne-Colley have been in a committed, loving relationship for over six years and are the proud moms of their 18-month-old son. Donna is a partner at a large law firm in Omaha, and Margaux is a full-time stay-at-home mom. Donna and Margaux always wanted to have children, and they started their family soon after their civil union ceremony. Donna and Margaux fully understand the added responsibilities that come with raising a child, including the need to plan for the possibility that one of them will become incapacitated or die unexpectedly or even that their relationship will not last for the rest of their lives. Like other families, Donna and Margaux want to honor their personal responsibilities to their family and want to take on the legal obligation to follow through with the financial, physical and emotional commitments they assumed when they decided to enter into a committed relationship and to have a child. Donna and Margaux care and provide for one another and for their son and they have made a commitment to one another that they will continue to do so, but Section 29 denies them

equal footing in their efforts to obtain legislation that would allow them to take on the legal rights and obligations to care for one another and to make important health care and funeral decisions with and for one another if one of them becomes incapacitated or dies and that would obligate both Donna and Margaux to pay third parties for debts incurred by either partner for basic living expenses. Donna and Margaux's concerns about financial responsibility to one another and to their son are of particular concern because of their decision that it was important for Margaux to be a full-time stay-at-home mom without an income or the means to obtain health-care insurance. Section 29 prevents Donna and Margaux from using ordinary political channels to seek any form of government protection for their family. Donna and Margaux are members of CFEP and NAJE.

23. But 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. For example, plaintiffs and their members would advocate for state and local domestic partnership legislation and associated protections for people in same-sex relationships, including enactment of their draft bill proposing a "Financial Responsibility and Protection for Domestic Partners Act," which would make domestic partners responsible for each others' basic living expenses and would automatically authorize a registered domestic partner to visit a partner in the hospital, to make health care decisions for an incapacitated partner, and to make decisions regarding organ donation and funeral arrangements when a partner passes

away. A copy of Plaintiffs' draft bill proposing a "Financial Responsibility and Protection for Domestic Partners Act" is incorporated by reference and attached as Exhibit C.

24. But for the barrier created by Section 29, plaintiffs and their members, including those identified in this Complaint, would advocate with public employers for the adoption of policies to protect people in committed same-sex relationships. For example, plaintiffs and their members would advocate for domestic partnership policies authorizing employees to take family and medical leave to care for a same-sex partner and to take bereavement leave to attend a same sex partner's funeral on the same terms that such leave is available to care for and to grieve the loss of other employees' immediate family members.
25. While the foregoing paragraphs detail some of the legal protections plaintiffs and their members wish to seek in the political arena and from government employers, in this lawsuit plaintiffs seek nothing more than an equal opportunity to try to convince governmental employers to adopt policies – and elected representatives to enact legislation – that would allow people in same-sex relationships to take on the rights and responsibilities that all other Nebraskans in committed relationships already have or may seek without constraint.

FIRST CLAIM FOR RELIEF
(Equal Protection)

26. Plaintiffs repeat and reallege paragraphs 1 through 25 as if set forth in full.
27. Section 29 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
28. Section 29 is a literal violation of equal protection. It imposes a special, broad and undifferentiated disability on lesbian, gay and bisexual people, disqualifying same-sex

couples when they seek protection for their committed relationships through the ordinary political process or from government employers while allowing others to enjoy or to seek such protection without constraint.

29. Section 29's unequal treatment of people in same-sex relationships is sweeping, barring any governmental recognition of the uniting of two persons of the same sex, including in a domestic partnership, a civil union, or any other same-sex relationship.
30. Section 29 singles out one group of people for unequal treatment without sufficient justification and for the very purpose of making them unequal to everyone else.

SECOND CLAIM FOR RELIEF
(Bill of Attainder)

31. Plaintiffs repeat and reallege paragraphs 1 through 30 as if set forth in full.
32. Section 29 is a bill of attainder in violation of Article I, section 10 of the United States Constitution.
33. Section 29 legislatively punishes same-sex couples, including plaintiffs' members, based on sexual orientation and without the protections of a judicial trial. Section 29 specifically designates lesbian, gay and bisexual people by referring to a unique characteristic of the group – participation in same-sex relationships.
34. Section 29 disqualifies lesbian, gay and bisexual people from using ordinary political channels to protect their same-sex relationships; disenfranchises them by barring their elected representatives from advancing any city, state or local policies or legislation that requires recognition of same-sex relationships; and excludes them from an important part of political

life by making it futile for them to participate in the democratic process in Nebraska in their efforts to obtain protection for same-sex relationships.

35. Section 29 deprives people in same-sex relationships of an essential component of citizenship and damages their social, cultural and political existence.
36. Section 29 inflicts its deprivations on lesbian, gay and bisexual people in order to keep them from bringing about what proponents of Section 29 considered to be unacceptable: recognition by state or local government of the uniting of two persons of the same sex whether in the form of a domestic partnership, a civil union, a marriage, or any other similar same-sex relationship.
37. Section 29 was intended to punish lesbian, gay and bisexual people.
38. The punishment imposed by Section 29 is unconditional and furthers no non-punitive purpose.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

1. Declaring that Article I, Section 29 of the Nebraska Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
 2. Declaring that Article I, Section 29 of the Nebraska Constitution is a bill of attainder in violation of Article I, section 10 of the United States Constitution;
 3. Striking down and permanently enjoining enforcement of Article I, Section 29 of the Nebraska Constitution;
 4. Awarding Plaintiffs reasonable attorneys' fees and costs under 42 U.S.C. § 1988;
- and

5. Granting such other and further relief as the Court deems just and proper.

Dated this 30 day of April, 2003.

Robert F. Bartle

Robert F. Bartle # 15010
Bartle & Geier
1141 H Street
Lincoln, NE 68501-3104
(402) 476-2847
(402) 476-2853 (fax)

David S. Buckel
Lambda Legal Defense & Education Fund
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585 ext. 212
(212) 809-0055 (fax)

Amy Miller # 21050
ACLU Nebraska
941 O St., Ste. 760
Lincoln, NE 68508
(402) 476-8091
(402) 476-8135 (fax)

Brian Chase
Lambda Legal Defense & Education Fund
3500 Oak Lawn Ave.
Dallas, TX 75219
(214) 219-8585
(214) 219-4455 (fax)

Tamara Lange
James D. Esseks
ACLU Foundation
Lesbian & Gay Rights Project
125 Broad St., 18th Fl.
New York, NY 10004
(212) 549-2627
(212) 549-2650 (fax)

PLACE OF TRIAL

*Plaintiffs request trial in
Lincoln, Nebraska*

Robert F. Bartle
4-30-03