IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*,
NEW MEXICO ASSOCIATION OF COUNTIES, *et al*,

Intervenors – Petitioners,

vs.

THE HONORABLE ALAN M. MALOTT,

District Judge – Respondent,

and

ROSE GRIEGO, *et al*,

Plaintiffs – Real Parties in Interest,

and

MAGGIE TOULOUSE OLIVER, *et al*,

Defendants – Real Parties in Interest.

SUPREME COURT OF NEW MEXICO
FILED

SEP – 5 2013

Docket Number: 34,306

VERIFIED PETITION FOR A WRIT OF SUPERINTENDING CONTROL

From the *Final Declaratory Judgment* issued in D–202–CV–2013 02757 on August 30, 2013 by The Hon. Alan M. Malott, Division XV, Second Judicial District Court, Bernalillo County, NM

Rule 12-305(F)(4) NMRA Notice: Petitioners request oral argument pursuant to Rule 12-214(B)(1) NMRA

Submitted by:

NEW MEXICO ASSOCIATION OF COUNTIES
AND THE INTERVENING COUNTY CLERKS

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE STATE OF NEW MEXICO, *ex rel.*,

NEW MEXICO ASSOCIATION OF COUNTIES,
as the collective and organizational representative
of New Mexico's thirty-three (33) Counties, AND

M. KEITH RIDDLE,
in his official capacity as Clerk of Catron County;

DAVE KUNKO,
in his official capacity as Clerk of Chaves County;

ELISA BRO,
in her official capacity as Clerk of Cibola County;

FREDA L. BACA,
in her official capacity as Clerk of Colfax County;

ROSALIE L. RILEY,
in her official capacity as Clerk of Curry County;

ROSALIE A. GONZALES-JOINER,
in her official capacity as Clerk of De Baca County;

LYNN J. ELLINS,
in his official capacity as Clerk of Doña Ana County;

DARLENE ROSPRIM,
in her official capacity as Clerk of Eddy County;

ROBERT ZAMARRIPA,
in his official capacity as Clerk of Grant County;

PATRICK Z. MARTINEZ,
in his official capacity as Clerk of Guadalupe County;

BARBARA L. SHAW,
in her official capacity as Clerk of Harding County;

MELISSA K. DE LA GARZA,
in her official capacity as Clerk of Hidalgo County;

PAT SNIPES CHAPPELLE,
in her official capacity as Clerk of Lea County;

RHONDA B. BURROWS,
in her official capacity as Clerk of Lincoln County;

SHARON STOVER,
in her official capacity as Clerk of Los Alamos County;
ANDREA RODRIGUEZ,
in her official capacity as Clerk of Luna County;
HARRIETT K. BECENTI,
in her official capacity as Clerk of McKinley County;
JOANNE PADILLA,
in her official capacity as Clerk of Mora County;
DENISE Y. GUERRA,
in her official capacity as Clerk of Otero County;
VERONICA OLGUIN MAREZ,
in her official capacity as Clerk of Quay County;
MOISES A. MORALES, JR.,
in his official capacity as Clerk of Rio Arriba County;
DONNA J. CARPENTER,
in her official capacity as Clerk of Roosevelt County;
DEBBIE A. HOLMES,
in her official capacity as Clerk of San Juan County;
MELANIE Y. RIVERA,
in her official capacity as Clerk of San Miguel County;
EILEEN MORENO GARBAGNI,
in her official capacity as Clerk of Sandoval County;
CONNIE GREER,
in her official capacity as Clerk of Sierra County;
REBECCA VEGA,
in her official capacity as Clerk of Socorro County;
ANNA MARTINEZ,
in her official capacity as Clerk of Taos County;
LINDA JARAMILLO,
in her official capacity as Clerk of Torrance County;
MARY LOU HARKINS,
in her official capacity as Clerk of Union County; AND
PEGGY CARABAJAL,
in her official capacity as Clerk of Valencia County,

Intervenors – Petitioners,

vs.

THE HONORABLE ALAN M. MALOTT,
District Court Judge, Division 15,
Second Judicial District Court,

District Judge – Respondent,

and

ROSE GRIEGO & KIMBERLY KIEL;
MIRIAM RAND & ONA LARA PORTER;
A.D. JOPLIN & GREG GOMEZ;
THERESE COUNCILOR & TANYA STRUBLE;
MONICA LEAMING & CECILIA TAULBEE; AND
JEN ROPER & ANGELIQUE NEUMAN,

Plaintiffs – Real Parties in Interest,

and

MAGGIE TOULOUSE OLIVER,
in her official capacity as Clerk of Bernalillo County; AND
GERALDINE SALAZAR,
in her official capacity as Clerk of Santa Fe County,

Defendants – Real Parties in Interest.[1]

VERIFIED PETITION FOR A
WRIT OF SUPERINTENDING CONTROL

[1] **NOTE:** The State of New Mexico is a Defendant in the Trial Court. However, because the *Final Declaratory Judgment* is not directed at the State of New Mexico and does not call upon the State to take or refrain from taking any action, the State of New Mexico is not listed as a Real Party in Interest.

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COME NOW, Petitioners–Intervenors, New Mexico Association of Counties (NMAC) and the above-named Intervenor Clerks, pursuant to Article VI, Sections 3 and 20 of the New Mexico Constitution and Rule 12-504 NMRA, who petition the Supreme Court for a Writ of Superintending Control from the *Final Declaratory Judgment* issued by Judge Alan M. Mallot in case number: D–202–CV–2013 02757 on August 30, 2013 (attached, Exhibit 1), and who in support thereof hereby **STATE:**

I. JURISDICTION

1. The Constitution provides that: "The supreme court shall have . . . superintending control over all inferior courts; it shall also have power to issue . . . writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same." N.M. Const. art. VI, § 3.

2. As observed with approval by this Court, "The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise." *State v. Roy*, 1936-NMSC-048, 40 N.M. 397.

II. PROCEDURAL HISTORY

3. New Mexico's marriage statutes – now compiled in NMSA 1978 at Chapter 40, Article 1 – were first passed by the Territorial Legislature beginning in 1860. *See* 1859-1860 N.M. Laws, p. 120.

4. Of the current NMSA 1978, Chapter 40, Article 1 – Marriage in General – fourteen (14) of the sixteen (16) sections were first adopted by the Territorial Legislature before statehood, the exceptions being Section 40-1-11 (Fees; Disposition), first passed in 1957 and Section 40-1-18 (Form of Application, License and Certificate), first passed in 1961.

5. None of the fourteen (14) substantive sections first passed by the Territorial Legislature between 1860 and 1909 contained any gender-specific references, using the word "couple" to refer to those solemnizing the contract of marriage. *Id.*

6. In 1934, this Court clarified that in New Mexico marriages are defined by statute, not the common law. *In re Gabaldon's Estate*, 1934-NMSC-053, 38 N.M. 392.

7. In 1961, the Legislature passed what is now NMSA 1978, Section 40-1-18 (1961), containing the form of application, license, and certificate of marriage. 1961 N.M. Laws, ch. 99, § 1.

8. Section 40-1-18, which has not been amended since it was adopted, contains the words "Bride" & "Groom" and "Male Applicant" & "Female Applicant" in the Application portion, as well as the words "Groom" & "Bride" in the Marriage Certificate portion of the statutory form. *Id.*

9. On November 7, 1972, by a vote of 155,633 (70.6%) for and 64,823 (29.4%) against, the people amended Article II, Section 18 of the New Mexico Constitution to include the words, "Equality of rights under law shall not be denied on account of the sex of any person."

10. In the morning of February 20, 2004, Sandoval County Clerk Victoria Dunlap, reading the lack of gender-specific language in the substantive portions of the marriage statutes, decided to begin issuing marriage licenses to otherwise qualified couples, regardless of gender.

11. In eight (8) hours, Ms. Dunlap issued sixty-six (66) licenses to same-sex couples, of which sixty-four (64) were returned and filed following a ceremony.

12. In the afternoon of February 20, 2004, then-Attorney General Patricia A. Madrid issued an *Advisory Letter* in which she stated that: "New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman." *See* Exhibit 2.

13. On March 23, 2004, the Thirteenth Judicial District Court issued a Temporary Restraining Order (TRO) which stated in part: "The Court hereby Orders County Clerk Victoria Dunlap: to immediately cease issuing marriage licenses to same-sex couples until this legality of this can be fully determined." *State of New Mexico, ex rel. Patricia A. Madrid and Sandoval Board of County Commissioners vs. Victoria Dunlap, Sandoval County Clerk*, D-1329-CV-2004 00292.

14. Due to the recusal of the assigned judge, on March 31, 2004 the Attorney General received from this Court an extension of the 10 day TRO, "until such time as the matter can be heard on the merits by the district court." *State ex rel. Madrid v. Dunlap*, No. 28,574. County Clerk Dunlap sought to have this Court extinguish the TRO, but that request was denied on July 8, 2004. *Dunlap v. Madrid & McDonald*, No. 28,730.

15. The Sandoval County TRO remained in effect until after the expiration of County Clerk Dunlap's term of office, at which point the case was dismissed without prejudice on January 3, 2005. *Dunlap*, D-1329-CV-2004 00292.

16. On March 21, 2013, the case from which this *Petition for a Writ of Superintending Control* originates was filed in the Second Judicial District Court. *Griego, et al, v. Oliver, et al*, D-202-CV-2013 02757.

17. On June 6, 2013, Attorney General King issued an analysis of same-sex marriage in New Mexico, in which he concluded that current law does not permit such marriages, but is subject to judicial attack under the 1972 amendment to the Human Rights Act. *See* Exhibit 3.

18. On June 6, 2013, a *Petition for a Writ of Mandamus* was filed in Santa Fe District Court, seeking to order Santa Fe County Clerk Geraldine Salazar to issue marriage licenses to same-sex couples in case number D-101-CV-2013 01525; that case was dismissed without prejudice on July 2, 2013.

19. On June 22, 2013 a *Verified Petition for a Writ of Mandamus* was filed before this Court by the Plaintiffs in the Santa Fe case in Docket No. 34,216, followed by a *Verified Petition for a Writ of Mandamus* filed in this Court on July 2, 2013 by the Plaintiffs in the Bernalillo County case in Docket No. 34,227. On August 15, 2013 both Petitions were "denied without prejudice to the parties to pursue litigation of issues in the lower court with a right to request expedited review." *Id.*

20. On August 21, 2013, the Doña Ana County Clerk, Lynn J. Ellins, having satisfied himself with the applicability of N.M. Const. art. II, § 18 to NMSA 1978, Chapter 40, Article 1, began issuing marriage licenses to same-sex couples. A *Petition for a Writ of Mandamus and Request for Immediate Stay*

was filed against County Clerk Ellins on August 29, 2013 in the Doña Ana District Court, case number D-307-CV-2013 02061.

21. On August 23, 2013, Judge Singleton signed an *Alternative Writ of Mandamus* directing the Santa Fe County Clerk to begin issuing marriage licenses to same-sex couples in case number D-101-CV-2013 02182.

22. On August 27, 2013, an *Alternative Writ of Mandamus* was issued in case number D-820-CV-2013 00295, directing Taos County Clerk Anna Martínez to begin issuing marriage licenses to same-sex couples.

23. On August 28, 2013, Peggy Carabajal, the Valencia County Clerk and Melanie Rivera, the San Miguel County Clerk, began issuing marriage licenses to same-sex couples, despite not having a court order directing them to do so.

24. Also on August 28, 2013, in case number D-132-CV-2013 00094, an *Alternative Writ of Mandamus* was issued directing Los Alamos County Clerk Sharon Stover to begin issuing marriage licenses to same-sex couples or to appear at a hearing on September 3, 2013. On September 3, 2013, County Clerk Stover was ordered to issue marriage licenses to same-sex couples.

25. On August 29, 2013, Judge Alan Malott approved Intervenor status for the New Mexico Association of Counties (NMAC) and for the thirty-one (31) County Clerks not already parties to cause number D-202-CV-2013 02757.

26. On August 29, 2013, case number D-1329-CV-2013 01715 was filed in the Thirteenth Judicial District Court seeking to compel Sandoval County Clerk Eileen Moreno Garbagni to issue marriage licenses to same-sex couples.

27. On September 3, 2013, Grant County Clerk Robert Zamarripa was served an *Alternative Writ of Mandamus* in case number D-608-CV-2013 00235.

28. Also on September 3, litigation was filed against both San Miguel County Clerk Melanie Rivera, D-412-CV-2013 00367, and Valencia County Clerk Peggy Carabajal, D-1314-CV-2013 01058, in the form of a *Petition for a Writ of Mandamus* against each Clerk.

29. Finally, on September 3, 2013, Judge Mallot, after finding an actual controversy exists between the parties, issued the *Final Declaratory Judgment* which is the subject of this *Verified Petition for a Writ of Superintending Control.*[2] The Defendant Clerks in the Bernalillo County case having announced their intention not to seek appellate review, Intervenors determined to seek immediate appellate review so that legal clarity may exist for County Clerks in executing their duties and for couples desiring to marry.

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[2] **NOTE:** There is a Scribner's error in the *Final Declaratory Judgment*: ¶3 of the Order should read "Bernalillo and Santa Fe Counties", not "Bernalillo and Sandoval Counties". A correction is in the process of being filed with the Trial Court. That error does not affect the arguments put forth in this case.

III. A WRIT OF SUPERINTENDING CONTROL IS NECESSARY IN THIS MATTER TO PREVENT EXCEPTIONAL HARDSHIP, COSTLY DELAYS AND UNUSUAL BURDENS OR EXPENSE

30. This Court has made clear that its "superintending control will not be invoked merely to perform the office of an appeal" *State Game Comm'n v. Tackett*, 1962-NMSC-154, ¶13, 71 N.M. 400, *see also State ex rel. Harvey v. Medler*, 1914-NMSC-055, 19 N.M. 252.

31. Traditionally, this Court has "limited its exercise of the power of superintending control to exceptional circumstances, such as cases in which 'the remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship[, or] costly delays and unusual burdens or expense.' " *State ex rel. Transcontinental Bus Serv., Inc. v. Carmody*, 1949-NMSC-047, ¶ 23, 53 N.M. 367, *as quoted with alterations in District Court of the Second Judicial Dist. v. McKenna*, 1994-NMSC-102, ¶ 4, 118 N.M. 402, *and quoted with approval in State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 8, 120 N.M. 619.

32. In *Schwartz*, the question presented to this Court was whether an administrative revocation of a driver's license following arrest for DWI precluded a criminal prosecution under double jeopardy. This Court resolved to hear the matter through Superintending Control because "[t]rial courts

throughout the state are in a position of uncertainty regarding how to proceed with DWI prosecutions, and some courts have chosen to follow Respondent's lead by dismissing such cases on double jeopardy grounds. In order to provide a prompt and final resolution to this troubling question we agreed to consider the petition for writ of superintending control." *Schwartz*, 1995-NMSC-069, ¶ 9.

33. To paraphrase the above quote from *Schwartz*: [County Clerks] throughout the state are in a position of uncertainty regarding how to proceed with [same-sex marriages], and some [County Clerks] have chosen to follow Respondent's lead by [issuing] such [marriage licenses with or without a court order]. In order to provide a prompt and final resolution to this troubling question [the Court should agree] to consider the petition for writ of superintending control.

34. In the case at bar, on the day this matter was filed with this Court, five (5) Counties (Santa Fe, Bernalillo, Taos, Los Alamos, and Grant) are issuing marriage licenses to same-sex couples pursuant to district court orders, three (3) Counties (Doña Ana, San Miguel, and Valencia) are issuing marriage licenses to same-sex couples without a court order, each of which is now facing litigation regarding its authority to issue same-sex marriage licenses without a court order. Another County (Sandoval) is pending litigation

regarding its obligation issue same-sex marriage licenses, and the remaining twenty-four (24) Counties are not issuing marriage licenses to same-sex couples and are not yet facing litigation (though that changes daily).

35. Further, in the two weeks prior to filing this matter with this Court, litigation has been filed against eight (8) Counties (Santa Fe, Taos, Los Alamos, Sandoval, Doña Ana, Grant, San Miguel, and Valencia), either seeking to allow or seeking to prohibit issuance of marriage licenses to same-sex couples. Eighteen (18) additional Counties have reported being contacted about denying same-sex couples or actually denying same-sex couples a marriage licenses, with varying suggestions or promises of further litigation.

36. Superintending Control is appropriate in this matter because remedy by appeal is wholly inadequate. All of the current litigation in eight (8) counties, as well as the potential litigation that has been promised and threatened, has a singular question of law in common, namely the responsibility of a County Clerk to issue or deny marriage licenses to same-sex couples.

37. Litigation in all thirty-three (33) Counties expends precious judicial resources. In addition, each County is then forced to use its resources advising the County Clerk as to the apparent current state of the law, as well as the apparent prevailing interpretation of the law, in addition to determining whether to contest the litigation when it comes. For Intervenor NMAC, who provides

multi-line insurance for the Counties, there is also the growing expense of repetitive litigation in each County spent defending what is, after all, a state issue. The issuance of a Writ of Superintending Control is necessary to avoid costly delays and unusual burdens and expense.

38. In addition to the above, in the fifteen (15) days prior to filing this *Verified Petition*, a total of 915 marriage licenses have been issued to same-sex couples around the state as follows: Doña Ana County: 202; Santa Fe County: 275; Bernalillo County: 401; Taos County: 18; San Miguel County: 6; and Valencia County: 13. Additional marriage licenses are being issued every day.

39. The couples receiving these marriage licenses need to know for a legal certainty if they are valid under New Mexico law. Presumed families are making life plans and presumed spouses are relying on anticipated benefits; i.e., couples with marriage licenses are relying upon the legal validity of those marriage licenses for community property decisions, hospital visitation, inheritance, and family decision-making. Superintending Control is appropriate to avoid irreparable, great, extraordinary, and exceptional hardship should this Court rule that same-sex marriage licenses are not authorized pursuant to existing New Mexico law.

IV. THE ANALYSES IN 2004 AND 2013 OF TWO ATTORNEYS GENERAL CONFLICT WITH THE *FINAL DECLARATORY JUDGMENT* AS TO THE ESSENTIAL QUESTION OF WHETHER NEW MEXICO LAW PERMITS SAME-SEX MARRIAGE.

40. On February 20, 2004, then-Attorney General Patricia A. Madrid issued an Opinion Letter regarding the legality of same-sex marriage in New Mexico. *See* Exhibit 2.

41. In that Opinion Letter, Attorney General Madrid stated that: "New Mexico Statutes, as they currently exist, contemplate that marriage will be between a man and a woman."

42. In addition to the form contained in NMSA 1978, Section 40-1-18 (1961), Attorney General Madrid pointed out that:

> The rights of married persons are set forth as applicable to a husband and a wife. See NMSA 1978, Sections 40-2-1 through 40-2-9. The property rights of married persons are expressed as existing between a husband and a wife. See NMSA 1978, Sections 40-3-1 through 40-3-17. The evidentiary privilege between spouses, as established by the New Mexico Supreme Court, is limited to communications that occur while the parties are husband and wife. See Rule 11-505 (B) NMRA. The generally accepted definition of "Husband" is a married man. Black's Law Dictionary, Sixth Edition. "Wife" is defined as a woman united to a man by marriage. Id. Thus, it appears that the

present policy of New Mexico is to limit marriage to a man and a woman.

Id.

43. On June 6, 2013, current-Attorney General Gary King came to a similar conclusion regarding the current state of New Mexico's marriage laws. *See* Exhibit 3.

44. In the section entitled *New Mexico Statutes Do Not Authorize Same-Sex Marriage*, Attorney General King posits:

> The question therefore is whether a statutory scheme that contains both gender-specific and gender-neutral references to the parties to a marriage authorizes same-sex marriage. New Mexico courts have not considered this question. However, state courts in New York, New Jersey, Massachusetts, and Minnesota have considered analogous statutory schemes and relying on basic tenets of statutory construction, concluded that a mix of gender-specific and gender-neutral terminology does not convey the right for same sex couples to marry. Those courts have uniformly held that a gender-neutral definition of marriage is not sufficient to make same-sex marriage legal when considered in light of (1) other core provisions governing marriage that employ gender-specific terms, and (2) the fact that when these marriage statutes were enacted (early 1900s and late 1800s), state lawmakers only contemplated marriages between opposite-sex couples.

Id.

45. Attorney General King observes that "[t]o read the definition in Section 40-1-1 separate and apart from the entire scheme is to disregard the directives of our Supreme Court that statutory schemes are to be interpreted in a comprehensive fashion. . . . Given the multiple gender-specific references in core components of the statutory scheme, the proper interpretation of the entire scheme is that the legislature intended to limit marriage to opposite-sex couples."

46. The *Final Declaratory Judgment* is in direct conflict with the analysis provided by the only two Attorneys General to interpret this issue. Although arguments could be made of the thought process of statutory drafting in the years immediately following the Civil War, the writings of these Attorneys General comes in the Twenty-First Century.

47. No statutes or constitutional provisions relied upon in the *Final Declaratory Judgment* have been altered as to this issue since these two Attorneys General analyzed the same question.

48. Thus Intervenor Clerks who are not issuing marriage licenses to same-sex couples and their Counties are caught between the clear and unambiguous analyses of two modern-day Attorneys General and a panoply of district court decisions in select areas of the state.

V. THE 1972 AMENDMENT TO N.M. CONST. ART. II, SEC. 18 PROTECTS DISCRIMINATION BASED ON SEX, NOT SEXUAL ORIENTATION.

49. The *Final Declaratory Judgment*, beginning at ¶ 9, relies upon the language of the 1972 amendment to N.M. Const. art. II, Sec. 18, which provides: "Equality of rights under the law shall not be denied on account of the sex of any person." *See* Exhibit 1.

50. This Court recently decided the case of *Elane Photography, LLC, v. Vanessa Willock*, 2013-NMSC-____, (No. 33,687, August 22, 2013), based on the New Mexico Human Rights Act (NMHRA), NMSA 1978, Sections 28-1-1 to -13 (1969, as amended through 2007).

51. The NMHRA, at Section 28-1-2(P) (2007), defines "sexual orientation" as one of the protected classes in the NMHRA that "means heterosexuality, homosexuality or bisexuality, whether actual or perceived;".

52. By contrast, the 1972 amendment to N.M. Const. art. II, Sec. 18 protects equality of rights based only on the sex of the person.

53. The *Final Declaratory Judgment* does not make a finding that equality of rights based on sex includes equality of rights based on sexual orientation, nor is there any appellate decision that extends equality of rights based on sex to equality of rights based on sexual orientation.

54. New Mexico law, as analyzed by Attorneys General Madrid and King, does not violate the 1972 amendment to NM Const. art. II, Sec. 18, in that no otherwise qualified man or woman is denied that ability to marry (so long as they marry an otherwise qualified person of the opposite sex). Marriage is not denied based on the sex of the person seeking to marry.

55. Intervenor Clerks who are not issuing marriage licenses to same-sex couples object to that part of the *Final Declaratory Judgment* which orders them to depart from the law as it is understood and which is rooted in an assumption that equality of rights based on sex extends to equality of rights based on sexual orientation, when there is no case law that establishes such extension and the *Final Declaratory Judgment* itself makes no finding of such extension.

VI. IF MARRIAGES BETWEEN SAME-SEX COUPLES ARE LEGALLY AUTHORIZED, COUNTY CLERKS NEED JUDICIAL DIRECTION REGARDING THE LANGUAGE ON THE FORMS CONTAINED IN STATUTE.

56. As has been discussed, *supra*, NMSA 1978, Section 40-1-18 (1961) contains statutory language in the forms that is gender-specific.

57. While some County Clerks have removed the gender-specific language, other County Clerks do not believe they have the inherent authority to make such

changes, acknowledging that NMSA 1978, Section 40-1-17 (2013) states that "the form of application, license and certificate shall be substantially as provided in Section 40-1-18 NMSA 1978,".

58. Should this Court find that the overall scheme either permits or requires County Clerks to issue marriage licenses to same-sex couples, implementation of such requires specific judicial direction regarding the statutory forms.

a. Regarding the Application portion, may or must a County Clerk omit the words "Male" and "Female" before the word "Applicant"?

b. Regarding the Certificate of Marriage portion, may or must a County Clerk substitute "Spouse" for "Groom" and for "Bride"?

c. Because issuance of marriage licenses to same-sex couples departs from the traditional understanding of marriage, on the Certificate of Marriage, may or must a County Clerk substitute the word "Marriage" for the statutory words "Holy Bonds of Matrimony"?

VII. CONCLUSION

59. The *Final Declaratory Judgment* and its reliance on N.M. Const. art II, §18 is a departure from every official interpretation of the statutes and constitution before it, including the action taken against then-Sandoval County Clerk Victoria Dunlap, as well as the analyses by the two Attorneys General.

60. No new statutes or constitutional provisions have passed since 2004 with regard to this issue, and no precedent exists to extend equality of rights based on sex to equality of rights based on sexual orientation.

61. Intervenor Clerks who are not issuing marriage licenses to same-sex couples require clarity of the law to proceed with their lawful obligations, and object to assumed constitutional interpretations for which there is no precedent.

62. Intervenor Clerks as a group cannot issue marriage licenses to same-sex couples with confidence of the legality of their actions without an opinion from this Court as to the responsibility and obligation of the County Clerk and the legal validity of the marriage licenses being issued, including direction or authority to change the statutory forms.

63. NMAC's responsibility as the collective and organizational representative of New Mexico's thirty-three (33) Counties compels it seek immediate clarification of a state law which is implemented only through the Counties.

64. This Court has previously determined that it "may exercise our power of superintending control 'even when there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment.' " *State ex rel. Townsend v. Court of Appeals*, 1967-NMSC-128, ¶ 10, 78 N.M. 71; *see also State Racing Comm'n v. McManus*, 1970-NMSC-134, ¶ 9, 82 N.M. 108 (holding that questions "of great public interest and

importance" may require the Supreme Court to use its power of superintending control).

65. That time is now.

VIII. PRAYER FOR RELIEF

Intervenors–Petitioners pray this Honorable Court

a. accept this matter and issue a *Writ of Superintending Control*,

b. issue a briefing schedule and schedule oral arguments,

c. quash the *Final Declaratory Judgment* if issuance of marriage licenses to same-sex couples is not permitted by law,

d. clarify the responsibilities and obligations of the County Clerk as it relates to issuance of marriage licenses to same-sex couples,

e. direct County Clerks regarding necessary or proper language for the statutory form or their authority to make changes to the statutory form, and

f. stay all pending litigation on this issue until a decision is rendered by the Court.

If this Court should determine not to issue a Writ of Superintending Control, in the alternative Intervenors–Petitioners pray this Court, pursuant to the August 15, 2013 order in Docket No. 34,227, the parties having pursued litigation of issues in the lower court, accept this *Verified Petition* as the first step in expedited review.

Respectfully Submitted,

NEW MEXICO ASSOCIATION OF COUNTIES, as the collective and organizational representative of New Mexico's thirty-three (33) Counties, AND

M. Keith Riddle, in his official capacity as Clerk of Catron County;

Dave Kunko, in his official capacity as Clerk of Chaves County;

Elisa Bro, in her official capacity as Clerk of Cibola County;

Freda L. Baca, in her official capacity as Clerk of Colfax County;

Rosalie L. Riley, in her official capacity as Clerk of Curry County;

Rosalie A. Gonzales-Joiner, in her official capacity as Clerk of De Baca County;

Lynn J. Ellins, in his official capacity as Clerk of Doña Ana County;

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Pat Snipes Chappelle, in her official capacity as Clerk of Lea County;

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Sharon Stover, in her official capacity as Clerk of Los Alamos County;

Andrea Rodríguez, in her official capacity as Clerk of Luna County;

Harriett K. Becenti, in her official capacity as Clerk of McKinley County;

Joanne Padilla, in her official capacity as Clerk of Mora County;

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Veronica Olguín Marez, in her official capacity as Clerk of Quay County;

Moises A. Morales, Jr., in his official capacity as Clerk of Rio Arriba County;

Donna J. Carpenter, in her official capacity as Clerk of Roosevelt County;

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Melanie Y. Rivera, in her official capacity as Clerk of San Miguel County;

Eileen Moreno Garbagni, in her official capacity as Clerk of Sandoval County;

Connie Greer, in her official capacity as Clerk of Sierra County;
Rebecca Vega, in her official capacity as Clerk of Socorro County;
Anna Martínez, in her official capacity as Clerk of Taos County;
Linda Jaramillo, in her official capacity as Clerk of Torrance County;
Mary Lou Harkins, in her official capacity as Clerk of Union County; AND
Peggy Carabajal, in her official capacity as Clerk of Valencia County

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STATEMENT OF RULE 12-504(H) NMRA COMPLIANCE

Pursuant to Rule 12-504(H) NMRA, this *Verified Petition for a Writ of Superintending Control* complies with the type-volume limitation in Rule 12-504(G)(3) NMRA: the body of the *Petition* is prepared using a proportionally-spaced type style or typeface (Times New Roman) and contains 3,985 words, obtained using the word count feature in Microsoft Word 2013.

DANIEL A. IVEY-SOTO

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Paul Gutiérrez, after being first duly sworn upon my oath, state that I am the Executive Director of the New Mexico Association of Counties, the collective and organizational representative of New Mexico thirty-three (33) Counties, and on behalf of the Intervenors – Petitioners in the above entitled cause of action, I have read and understand the foregoing *Verified Petition Writ of Superintending Control*, and the same is true and correct to the best of my knowledge, information, and belief.

Paul Gutierrez
PAUL GUTIERREZ

SUBSCRIBED AND SWORN to before me this 5th day of September, 2013, by Paul Gutiérrez.

Robin Martinez
NOTARY PUBLIC

MY COMMISSION EXPIRES:

8/20/16

CERTIFICATE OF SERVICE

We hereby certify that upon filing, a true, correct and endorsed copy of the foregoing will be served on Respondent and on all counsel of record.

STEVE KOPELMAN

DISTRICT JUDGE – RESPONDENT

The Honorable Alan M. Malott
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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NO: D 202 CV 2013 2757

ROSE GRIEGO & KIMBERLY KIEL, et al.,

Plaintiffs,

v.

MAGGIE TOULOUSE OLIVER, et al.,

Defendants

and

NEW MEXICO ASSOCIATION OF COUNTIES, et al.

Intervenors.

FINAL DECLARATORY JUDGMENT

THIS MATTER having come before the Court upon the Second Amended Complaint for Declaratory and Injunctive Relief; the Court having reviewed the entire file; the Court having convened a hearing in open Court on August 26, 2013; the Court having granted on August 29, 2013 the Unopposed Motion to Intervene of the New Mexico Association of Counties and the remaining thirty-one (31) Clerks of New Mexico's counties who were not already parties to this action, and the Court being sufficiently advised:

THE COURT FINDS:

1. There is jurisdiction over the parties and the subject matter.

2. The Court adopts the Plaintiffs' and Defendants' stipulated facts as set forth in open court.

3. The material issues of fact herein are not in dispute. Plaintiffs are same sex couples

who have shared lengthy committed relationships. Having made these deep personal and social commitments, they wish to enter into the state-sanctioned contract of marriage. Defendant Clerks and Intervenor Clerks are the individual County Clerks of New Mexico in their official capacities.

4. In order to enter into the state-sanctioned contract of marriage, any couple must obtain a Marriage License from a county clerk. Sec. 40-1-1, *et seq.*, NMSA. Defendants are charged with the clear and unambiguous duty to provide Marriage Licenses to qualified couples upon application. Sec. 40-1-10, NMSA. Plaintiffs, and those similarly situated throughout New Mexico, are otherwise qualified to obtain a marriage license and to enter into the contract of marriage [Section 40-1-1, 40-1-6, and 40-1-7, NMSA] and have either already been denied a Marriage License by a Defendant Clerk or who will, to a certainty, be denied a Marriage License by some of the Defendant Clerks or Intervenor Clerks on the basis of their same sex orientation.

5. An "actual controversy" exists between the parties. Section 44-6-1, *et seq.*, NMSA.

6. A specific prohibition of same sex marriage does not exist in Section 40-1-1 through 40-1-20, NMSA, although the statutory scheme does specifically prohibit marriage between minors without consent of their parents or court order, incestuous marriage, and marriage between those lacking contractual capacity.

7. Section 40-1-10, NMSA, establishes the necessity for a marriage license and states:

> Each *couple* desiring to marry pursuant to the laws of New Mexico shall first obtain a license from a county clerk of this state... (emphasis added)

but these statutes do not define or limit the definition of "couple" to a heterosexual pair of contractually capable people nor exclude those of same sex orientation from that term.

8. It is arguable that the use of both gender neutral and gender specific terms in our laws

on "Domestic Affairs," Section 40-1-1 through 40-15-4 NMSA supports the conclusion that New Mexico statutes do not allow same sex marriages; e.g., *Shields v. Madigan,* 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Lewis v. Harris,* 908 A.2d 196 (NJ 2006); *Goodridge v. Dept. of Pub. Health,* 798 N.E.2d 941 (Mass. 2003). And it is also arguable that our Territorial Legislature did not even consider same sex marriage when it established the statutory scheme in 1862. From this, some might argue that Defendants are prohibited from issuing Marriage Licenses to same sex couples or, at least, that there is no clear, non-discretionary duty to do so. See, *State of New Mexico's Response to Verified Petition for Writ of Mandamus 8/12/13 Supreme Court # 34227.*

9. It is, however, beyond argument that the People of the State of New Mexico considered, and spoke clearly to ensure "equality of rights under the law" in 1972 by adoption of *Article II, Section 18, Constitution of New Mexico.* Article II, Section 18 provides:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. *Equality of rights under the law shall not be denied on account of the sex of any person.* (emphasis added)

10. Accordingly, whether or not our statutory scheme in Section 40-1-1, *et seq.*, does, or does not, allow same sex marriage is of little consequence to the outcome of this litigation because the voice of New Mexicans in adopting Art. II, Section 18 in 1972 clearly prohibits such discrimination against same sex applicants and the Defendants' clear, non-discretionary duty to issue a license to "each couple" otherwise qualified stands clearly and inexorably through all the rhetoric.

11. Implying conditions of sexual orientation on one's right to enter civil contracts such as marriage is a violation of Article II, Section 18's mandate that "equality of rights shall not be denied on account of the sex of any person."

12. Implying conditions of sexual orientation on one's right to enter civil contracts such

as marriage is a violation of Article II, Sections 18's mandate that "no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."

13. Whether based in statute, or Constitutional protections, Defendants have a non-discretionary duty to issue a Marriage License to "each couple" otherwise qualified upon application for same and no valid excuse for not performing that duty has been asserted.

14. Gay and Lesbian citizens of New Mexico have endured a long history of discrimination. See, *Breen v. Carlsbad Municipal Schools,* 2005-NMSC-028. Denial of the right to marry continues this unfortunate, intolerable pattern and establishes irreparable injury on Plaintiffs' part. *Loving v. Virginia,* 388 U.S. 1 (1967). *U.S. v. Windsor,* (U.S. Supreme Court June 26 2013; see, www.supremecourt.gov/opinions/12pdf/12-307_6j37pdf.)

15. There is a substantial public interest in vindicating the rights of all citizens under the law and in preventing the ongoing violation of our constitutional rights. *Awad v. Ziriax,* 670 F.3d 1111 (10th Cir. 2012); *Herrera v. Santa Fe Public Schools,* 792 F. Supp.2d 11744 *(DC N.M. 2011).* There is no benefit to the parties or the public interest in having this matter progress through a lengthy path of litigation while basic constitutional rights are compromised or denied on a daily basis.

WHEREFORE, it is Ordered:

1. Section 40-1-1, *et seq.*, NMSA does not preclude nor prohibit issuance of a Marriage License to otherwise qualified couples on the basis of sexual orientation or the gender of its members.
2. To the extent Section 40-1-1, NMSA, may be read to prohibit issuance of a Marriage License to otherwise qualified same sex couples, those prohibitions are

unconstitutional and unenforceable under Article II, Section 18, Constitution of New Mexico.

3. The Writ of Mandamus and Permanent Injunction issued against the Clerks of Bernalillo and Sandoval Counties on August 26, 2013 remain in full force and effect. By stipulation of the parties, no Writ of Mandamus or Injunction is entered against the Intervenors.
4. This Declaratory Judgment constitutes a final judgment as to the claims between Plaintiffs and the New Mexico Association of Counties, and the individual County Clerks. There is no just reason for delay of an immediate review of this Declaratory Judgment as to those claims.
5. This Final Declaratory Judgment is stayed as to Intervenors pending appellate review.
6. The parties shall bear their own fees and costs.

Dated: 9/3/13

HON. ALAN M. MALOTT

Submitted by:

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February 20, 2004: Same Sex Marriages

Senator Timothy Z. Jennings
P.O. Box 1797
Roswell, New Mexico 88202

Dear Senator Jennings:

I have been asked to render a legal opinion on whether New Mexico law allows same sex marriages. In order to expedite a response, I decline to issue a formal opinion but offer this advisory letter instead. The job of the Attorney General, as a member of the executive branch of government, is to defend the laws of New Mexico irrespective of my personal views or opinions. It is the job of the legislature and the governor to enact laws that express the public policies of the State. It is the duty of the courts to rule on the constitutionality of such laws.

New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman. The New Mexico legislature has adopted a marriage application form that requires a male applicant and a female applicant. See NMSA 1978, Section 40-1-18. The rights of married persons are set forth as applicable to a husband and a wife. See NMSA 1978, Sections 40-2-1 through 40-2-9. The property rights of married persons are expressed as existing between a husband and a wife. See NMSA 1978, Sections 40-3-1 through 40-3-17. The evidentiary privilege between spouses, as established by the New Mexico Supreme Court, is limited to communications that occur while the parties are husband and wife. See Rule 11-505 (B) NMRA. The generally accepted definition of "Husband" is a married man. Black's Law Dictionary, Sixth Edition. "Wife" is defined as a woman united to a man by marriage. Id. Thus, it appears that the present policy of New Mexico is to limit marriage to a man and a woman.

New Mexico's marriage laws may be changed through the deliberative process employed by the peoples' representatives in the New Mexico legislature and approved by the governor. Moreover, the laws may be challenged in the courts as possibly being unconstitutional. See Lawrence et al. v. Texas, ___ U.S. ___, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). Until the laws are changed through the legislative process or declared unconstitutional by the judicial process, the statutes limit marriage in New Mexico to a man and a woman.

Thus, in my judgment, no county clerk should issue a marriage license to same sex couples because those licenses would be invalid under current law.

Your request was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although I am providing you my legal advice in the form of a letter instead of an Attorney General's Opinion, I believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Patricia A. Madrid
Attorney General

June 6, 2013

LEGALITY OF SAME-SEX MARRIAGE IN NEW MEXICO

Summary of Research
Sean Cunniff, Assistant Attorney General

A. New Mexico Statutes Do Not Authorize Same-Sex Marriage

The New Mexico statutes governing marriage, contained in Chapter 40, Article 1, include a multitude of provisions governing the marital union. In characterizing the marital parties, these statutes employ a mix of gender-neutral and gender-specific references.

On the one hand, Section 40-1-1 defines marriage in gender-neutral terms, declaring that "[m]arriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." See also State v. Lard, 86 N.M. 71, 74 (Ct. App. 1974)("[m]arriage" is a civil contract requiring a license"). Other sections in Article 1 employ gender-neutral terminology, namely, by using the terms "person" or "applicant" to describe the individual parties to a marriage, see NMSA 1978, §§ 40-1-5, -6, -8, -11, & 20, or the term "parties" or "couple" to refer to the marital couple. See NMSA 1978, §§ 40-1-9, -10, & -20.

On the other hand, Section 40-1-18 contains a model marriage license application form, which is to be employed "substantially" by county clerks. The form contains sections for a "male" and a "female" applicant. In Articles 2, 3, and 4 of Chapter 40, a number of references are made to "husband" and "wife," terms that are of a gender-specific character under the law. See Black's Law Dictionary, (9th ed. 2009) (defining "husband" as a "married man," defining "wife" as a "married woman."). For example, in Section 40-3-1, which governs property rights between spouses, it is stated, in relevant part, that the "property rights of husband and wife are governed by this chapter." Other provisions in these articles also characterize the parties to a marriage as "husband" and "wife." See, e.g., NMSA 1978, §§ 40-3-2, -3, -4 -8(B), -12 & -4-3.

The question therefore is whether a statutory scheme that contains both gender-specific and gender-neutral references to the parties to a marriage authorizes same-sex marriage. New Mexico courts have not considered this question. However, state courts in New York, New Jersey, Massachusetts, and Minnesota have considered analogous statutory schemes and relying on basic tenets of statutory construction, concluded that a mix of gender-specific and gender-neutral terminology does not convey the right for same sex couples to marry. Those courts have uniformly held that a gender-neutral definition of marriage is not sufficient to make same-sex marriage legal when considered in light of (1) other core provisions governing marriage that employ gender-specific terms, and (2) the fact that when these marriage statutes were enacted (early 1900s and late 1800s), state lawmakers only contemplated marriages between opposite-sex couples.

The two-prong logic employed by other states applies directly to the interpretation of New Mexico's marriage statutes. First, the definition of marriage set forth in Section 40-1-1 must be read in light of the entire statutory scheme. To read the definition in Section 40-1-1 separate and apart from the entire scheme is to disregard the directives of our Supreme Court that statutory

schemes are to be interpreted in a comprehensive fashion. See, e.g., State v. Smith, 2004-NMSC-32, ¶ 10, 136 N.M. 372, 376 ("A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter."). Given the multiple gender-specific references in core components of the statutory scheme, the proper interpretation of the entire scheme is that the legislature intended to limit marriage to opposite-sex couples.

Second, Section 40-1-1 was adopted during the 1862-1863 session of the Territorial Legislature. See 1862-1863 N.M. Laws at 64. This was the Civil War period, 50 years prior to New Mexico statehood. Given this historical context, the likelihood that the Territorial Legislature contemplated, much less authorized, same-sex unions is highly unlikely. Such an understanding is in keeping with the maxim of statutory construction that "[i]n performing our task of statutory interpretation...we also consider the history and background of the statute." State v. Rivera, 2004-NMSC-1, ¶ 14, 134 N.M. 769, 771.

Given the employment of gender-specific labels in New Mexico's marriage statutes, the historical context of the pre-statehood enactment of Section 40-1-1, and uniform spot-on out-of-state authority, we conclude that gay marriage is not currently authorized under New Mexico's statutory law.

B. The Statutory Prohibition on Same-Sex Marriage May Violate the Equal Protection Clause of the New Mexico Constitution

Although current state statutes limit marriage to couples of the opposite sex, we believe they are vulnerable to constitutional challenge. Both the New Mexico and U.S. Constitutions provide that no person shall be denied equal protection of the laws, see N.M. Const. art. II, § 18, U.S. Const. amend. XIV. The constitutional guarantee of equal protection "is essentially a direction that all persons similarly situated be treated alike." State v. Rotherham, 1996-NMSC-48, 122 N.M. 246, 254. Equal protection "concerns whether the legislature may afford a legal right to some individuals while denying it to others who are similarly situated." Cummings v. X-Ray Assocs. of N.M., P.C., 1996-NMSC-35, ¶ 22, 121 N.M. 821, 829.

Judicial review of an equal protection challenge generally involves three analytical steps. The threshold question is whether the legislature created a class of similarly situated individuals who are treated dissimilarly. Second, the court determines the appropriate level of scrutiny—strict, rational basis or intermediate—to apply to the challenged legislation. Third, the court applies the applicable level of scrutiny to the proffered rationale for the challenged policy. If it is determined that the challenged policy does not withstand the applicable level of scrutiny, the law is constitutionally invalid. See Breen v. Carlsbad Municipal Schools, 2005-NMSC-28, ¶¶ 10, 11, 33.

1. *Same-sex and opposite-sex couples seeking the right to marry are "similarly situated" for purposes of equal protection.*

A threshold question is whether same-sex couples seeking to marry are sufficiently similar to opposite-sex couples seeking to marry for the purposes of an equal protection analysis.

Generally, this predicate question has not served as an obstacle in litigation outside New Mexico by plaintiffs seeking recognition of same-sex marriage. For instance, courts in Connecticut, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 424 (Conn. 2008), Iowa, Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009), and California, In re Marriage Cases, 183 P.3d 384 (Cal. 2008) have employed strong language in rejecting assertions that same-sex couples possess different interests or characteristics than opposite-sex couples in seeking the right to marry. These courts have found same-sex couples similarly situated to opposite sex couples in every meaningful respect and need not be identical in every way. Like opposite-sex couples, same-sex couples seek to marry to ratify committed relationships, formalize familial ties, and raise children in a loving and supporting environment. Kerrigan, 957 A.2d at 424. As the California Supreme Court stated succinctly, "there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles...). In re Marriage Cases, 183 P.3d at 436. Applying the reasoning of these courts, and recognizing that same-sex couples in New Mexico share the same interests in pursuing the right to marry, we believe it is unlikely this threshold question will present an obstacle to an equal protection claim challenging the prohibition on same-sex marriage in New Mexico.

2. *New Mexico courts will likely apply the intermediate level of scrutiny to New Mexico's statutory classification prohibiting same-sex marriage.*

Depending on the rights or groups of people impacted by legislation, courts generally apply one of three levels of scrutiny when evaluating equal protection claims. Rational basis review is the least rigorous standard and applies to "general and social and economic legislation that does not effect a fundamental or important right or suspect or sensitive class." Breen, 2005-NMSC-28, ¶ 11. Strict scrutiny is most rigorous and applied only sparingly when legislation "affects the exercise of a fundamental right or a suspect classification, such as race, [alienage], or ancestry...." Id. ¶ 12. In between these two extremes, courts employ intermediate scrutiny to review legislation classifications "infringing important but not fundamental rights, and involving sensitive but not suspect classes." See Pinnell v. Board of County Comm'rs, 1999-NMCA-74, ¶ 27, 127 N.M. 452, 510. "[I]ntermediate scrutiny is more probing than rational basis but less so than strict scrutiny." Breen, 2005-NMSC-28, ¶ 13. There is a building universe of authority subjecting classifications targeting gays and lesbians for disparate treatment in marital rights to intermediate scrutiny. See, e.g., Varnum, 763 N.W.3d at 896 (applying intermediate scrutiny); Kerrigan, 957 A.2d 407 at 476-477 (same); Windsor v. United States, 699 F.3d at 185 (same). Accordingly, we consider whether gays and lesbians constitute "sensitive groups" under New Mexico law to determine whether New Mexico's statutory ban on same-sex marriage is subject to intermediate scrutiny.

In Breen, the New Mexico Supreme Court developed criteria for identifying sensitive groups for purposes of applying intermediate scrutiny. The court concluded that "intermediate scrutiny is justified if a discrete group has been subjected to a history of discrimination and political powerlessness based on a characteristic or characteristics that are relatively beyond the individuals' control such that the discrimination warrants a degree of protection from the majoritarian political process." 2005-NMSC-28, ¶ 21.

Applying the Breen criteria, it is largely uncontroverted that gays and lesbians have endured a long history of discrimination in New Mexico and the throughout the United States. Gay New Mexicans have historically been subjected to laws that resulted in discrimination against the group. Until 1975, consensual sexual intimacy between persons of the same sex in New Mexico was expressly prohibited and actively prosecuted under the state's anti-sodomy law. See NMSA 1953, § 40A-9-61(Vol. 6, 2d Repl.) (1963, repealed, Laws 1975, ch. 109 § 8). Recognizing this past discrimination, and the ongoing need to affirmatively protect the civil rights of gays and lesbians in the state, the New Mexico legislature has enacted some remedial legislation to protect gay New Mexicans. See, e.g. Human Rights Act, NMSA 1978, § ch. 28, art. 1 (1969, as amended through 2005) (amended in 2003 to bar discrimination based on sexual orientation or gender identity in matters of employment, housing and public accommodations).

Despite these legislative strides, the majoritarian political process has failed to yield the right for same-sex couples to marry, which is the "right sought" in an equal protection challenge to New Mexico's statutory scheme. Indeed, repeated, unsuccessful efforts to extend to same-sex couples the right to enter into civil unions make it clear that gays and lesbians suffer from "relative political weakness," making unlikely prompt legislative action to end discriminatory classifications that prohibit gay marriage.

In many respects, the judicial treatment of classifications targeting women and African-Americans for disparate treatment is a fitting analogue for classifications that target gays and lesbians. Like women and African-Americans, gays and lesbians have been subjected to a long period of state-sanctioned discrimination and have labored to gain traction politically. See Kerrigan, 957 A.2d at 440.

Applying the third factor in the Breen sensitive class analysis, the facts and law support the conclusion that sexual orientation is an integral aspect of one's identity and an immutable characteristic beyond a person's control. In many of the cases addressing the immutability of same-sex orientation in the equal protection context, the courts have assessed the extent to which sexual orientation is central to a person's identity. To wit, a multitude of courts have concluded that because same-sex identity is a central component of one's identity, it is an immutable characteristic. See, e.g., Kerrigan, 957 A.2d at 438 ("[b]ecause sexual orientation is such an essential component of personhood, even if there is some possibility of that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so"); In re Marriage Cases, 183 P.3d at 442 ("[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment") ; Varnum, 763 N.W.2d at 893 (same); Golinski, 824 F. Supp. 2d at 987 ("sexual orientation is ... immutable ... because it is so fundamental to one's identity"). As one court neatly summarized, "it would be abhorrent for government to penalize a person for refusing to change" a characteristic that is "so central to a person's identity." Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. Wash. 1989) (Norris, C.J., concurring).

For purposes of the sensitive class analysis under Breen, sexual orientation is a characteristic that is "beyond the ... control" of gay and lesbian New Mexicans. 2005-NMSC-28, ¶ 21. Moreover, based on the entirety of the preceding sensitive class analysis, a strong legal and factual basis

exists to conclude that each of the three prongs of the Breen sensitive class inquiry is satisfied. 2005-NMSC-28, ¶ 21. Accordingly, the facts and law support the conclusion that gays and lesbians constitute a sensitive class for purposes of equal protection analysis, and that laws discriminating against same-sex couples who want to marry should be subject to intermediate scrutiny.

3. *Applying intermediate scrutiny, there is a sound legal basis to conclude that New Mexico's prohibition on gay marriage is an invalid classification that violates New Mexico's equal protection clause.*

Although several rationales have been advanced in favor of statutory classifications excluding gays and lesbians from marriage, two appear to have emerged prominently: (1) preservation of traditional marriage and (2) protection of same-sex marriage as an engine of procreation. See, e.g., Kerrigan, 957 A.2d at 476-477; Varnum, 763 N.W.2d at 897-904; Conaway, 401 Md. at 317.

Notions that tradition or morality are adequate rationales to sustain prohibitions on same-sex marriage have generally not weathered constitutional review, even under rational basis examination. As a multitude of courts have maintained, the imprimatur of "tradition," without more, is merely an empty argument that serves to maintain a discriminatory classification for "its own sake." See, e.g., Romer, 517 U.S. 620, 635; Kerrigan, 957 A.2d at 478. The rationale to maintain a discriminatory classification must be "separate from the classification itself." Varnum, 763 N.W.2d at 898. Therefore, on its own, a desire to continue tradition by maintaining a discriminatory classification is a fallacious, circular argument that is unlikely to survive even rational basis review.

The argument that allowing same-sex marriage imperils optimal procreation by opposite-sex couples, is a slightly more viable legal argument, but still fails under intermediate scrutiny. While it is generally undisputed that encouraging procreation registers as both a legitimate and important governmental interest, it is less clear that this interest is rationally or substantially related to prohibiting gay marriage. When employing intermediate or heightened scrutiny, no court has found the necessary substantial relationship to uphold a classification precluding same-sex couples from marrying. See, e.g., Varnum, 763 N.W.2d at 899; In re Marriage Cases, 183 P.3d at 431-432. In Varnum, the court found that the responsible procreation rationale was "not substantially related to the asserted legislative purpose" because, among other things, "the statute is significantly under-inclusive with respect to the objective of increasing procreation because it does not include a variety of groups that do not procreate for reasons such as age, physical disability or choice." 763 N.W.2d at 902.

As discussed above, we believe it likely that a New Mexico court would apply intermediate scrutiny to this state's laws limiting marriage to opposite-sex couples. If so, based on the cases in other states that have applied intermediate scrutiny to similar laws in their states, there appears to be little possibility that New Mexico's laws precluding same-sex marriage would withstand an equal protection challenge.