IN THE NEW MEXICO SUPREME COURT

NO. 34,306

ROSE GRIEGO, et al.,
Plaintiffs-Real Parties in Interest,
v.
MAGGIE TOULOUSE OLIVER, et al.,
Defendants-Real Parties in Interest,
AND
STATE OF NEW MEXICO, ex rel.,
NEW MEXICO ASSOCIATION OF COUNTIES, et al.,
Intervenors-Petitioners,
v.
HON. ALAN M. MALOTT,
Respondent.

BRIEF OF AMICI CURIAE NEW MEXICO LEGISLATORS[1] IN SUPPORT OF INTERVENORS-PETITIONERS

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[1] Amici Curiae New Mexico Legislators are Senators Cliff Pirtle, Carroll Leavell, William Sharer, Steve Neville, Craig Brandt, Ron Griggs, Stuart Ingle and Lee Cotter; Representatives James Strickler, Nora Espinoza, Bob Wooley, Jason Harper, Larry Larranaga, Yvette Herrell, Don Bratton, Dennis Roch, James P. White, David Gallegos, Paul Bandy and Cathrynn Brown; Former Representatives Vernon Kerr and Speaker C. Gene Samberson; and Former Senator Paul Becht.

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ARGUMENT

I. New Mexico's Marriage Statutes Permit Marriage Only between One Man and One Woman.

The intent of the Legislature, a comprehensive reading of all the statutes addressing marriage, this Court's treatment of marriage, the consensus of past and present New Mexico Attorneys General, and an unbroken line of precedent from other jurisdictions all confirm that the marriage statutes in this State permit marriage only between one man and one woman.

"When construing statutes, [this Court's] guiding principle is to determine and give effect to legislative intent." *N.M. Indus. Energy Consumers v. PRC*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. "A statute must be interpreted as the Legislature understood it at the time it was enacted." *Montoya v. City of Albuquerque*, 1970-NMSC-132, 82 N.M. 90, 94, 476 P.2d 60, 64. The Territorial Legislature, during its 1862-1863 session, enacted NMSA 1978, Section 40-1-1 (1862-63), which states 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." The universally accepted legal (as well as social) understanding of "marriage" in the middle of the Nineteenth Century was a domestic relationship between one man and one woman. *See, e.g.*, John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States* 105 (1868) (defining marriage as a contract "by which a man and woman reciprocally

engage to live with each other"); Joel Prentiss Bishop, *Commentaries on the Law of Marriage & Divorce* § 225 (1st ed. 1852) ("It has always . . . been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex"). Nothing suggests that the Legislature that enacted Section 40-1-1 intended any other definition of marriage.

Other New Mexico statutes addressing marriage corroborate that marriage in this State is the union of a man and a woman. A statute "must be considered . . . in reference to statutes dealing with the same general subject matter." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (2003) (quotation marks omitted). For example, NMSA 1978, Section 40-1-18 (1961), which prescribes a model application for a marriage license, contains a section for a "Male Applicant" and a "Female Applicant." And NMSA 1978, Section 40-1-7 (2013), which prohibits incestuous marriages, specifically employs opposite-sex terminology—forbidding marriages "between brothers and sisters," "uncles and nieces," and "aunts and nephews."

New Mexico law, moreover, describes the rights and responsibilities of married couples by reference to the "husband" and "wife." *See* Paul Benjamin Linton, *Same-Sex Marriage and the New Mexico Equal Rights Amendment*, 20 Geo. Mason U. C.R. L.J. 209, 212 n.16-17 (2010) [hereinafter "Linton, *N.M. ERA*"] (cataloguing the relevant statutes). One statute, for example, provides that

the "[h]usband and wife contract toward each other obligations of mutual respect, fidelity and support." NMSA 1978, § 40-2-1 (1907). State property statutes are replete with comparable provisions. *See, e.g.*, NMSA 1978, § 40-3-2 (1907) ("Husband and wife may hold property as joint tenants, tenants in common or as community property"); NMSA 1978, § 40-3-3 (1907) ("Neither husband nor wife has any interest in the property of the other").

This Court and current and former New Mexico Attorneys General agree that marriage under the laws of this State is the union of a man and a woman. This Court has recognized that "'[m]arriage is a civil contract between three parties—the husband, the wife, and the State.'" *Merrill v. Davis*, 1983-NMSC-070, 100 N.M. 552, 554, 673 P.2d 1285, 1287 (quoting *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979)). And current and former Attorneys General have acknowledged that "the legislature intended to limit marriage to opposite-sex couples." Verified Petition Ex. 3 at 2; *accord* Verified Petition Ex. 2 at 1.

That New Mexico law understands marriage as an opposite-sex union is reinforced by the uniform conclusion of high courts in other States with marriage statutes similar to those enacted here. *See, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) (concluding that "New York's statutory law clearly limits marriage to opposite-sex couples" because "that was the universal understanding when [the statutes] were adopted in 1909"); *Lewis v. Harris*, 908 A.2d 196, 208 (N.J. 2006)

(concluding that New Jersey's "marriage statutes, which were first enacted in 1912, limit marriage to heterosexual couples" as evidenced by "the use of gender-specific language in the text of various statutes" (citations omitted)); *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971) (concluding that Minnesota's statutes "do[] not authorize marriage between persons of the same sex" because "[i]t is unrealistic to think that the original draftsmen of [the] marriage statutes, which date from territorial days, would have used the term in [that] sense"); *see generally* Linton, *N.M. ERA*, 20 Geo. Mason U. C.R. L.J. at 213 n.21 (citing at least eight additional decisions reaching the same conclusion). This Court should follow this persuasive judicial precedent.

II. New Mexico's Marriage Statutes Comport with the State's Equal Protection Clause.

New Mexico's marriage statutes, like all legislatively enacted measures in this State, are presumed constitutional; challengers face a great burden in seeking to judicially overturn them.

> It is well settled that there is a presumption of the validity and regularity of legislative enactments. This Court must uphold such statutes unless it is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting the challenged legislation. This Court has repeatedly refused to inquire into the wisdom, the policy or the justness of an act of the Legislature.

Espanola Hous. Auth. v. Atencio, 1977-NMSC-074, 90 N.M. 787, 788, 568 P.2d 1233, 1234 (citation omitted); *accord Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250.

This presumption of constitutionality and deference to the Legislature is particularly strong where, as here, "social . . . legislation is challenged on equal protection grounds[.]" *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 14, 125 N.M. 721, 965 P.2d 305 (*Trujillo III*); *see also Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050 ("Ordinarily [this Court] defer[s] to the Legislature's judgment in enacting social . . . legislation"). Deciding whether to fundamentally redefine marriage—society's most basic institution—is a social question of the highest order. For as the United States Supreme Court has stated, marriage between a man and a woman is "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). It is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the race," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Significant judicial deference is thus warranted when considering a fundamental change to a bedrock social institution.

A. The Couples Treated Differently by New Mexico's Marriage Statutes Are Not Similarly Situated When Viewed in Light of the Government's Overriding Purpose for Marriage.

The New Mexico Equal Protection Clause "is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Wagner*, 2005-NMSC-016, ¶ 21. "As a threshold matter," then, this Court "must decide whether the legislation at issue results in dissimilar treatment of similarly-situated individuals." *Madrid*, 1996-NMSC-064, ¶ 35. Analysis of this "similarly situated" requirement considers the similarity of the groups in light of "the purpose of the [challenged] law." *See New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 40, 126 N.M. 788, 975 P.2d 841 (1998) [hereinafter *NARAL*] (quotation marks omitted).

Under these principles, Plaintiffs' equal-protection claim fails at the outset because the classification drawn by the marriage laws—opposite-sex couples versus all other relationships (including same-sex couples)—does not result in dissimilar treatment of relationships that are similarly situated for the overriding purpose of the marriage laws.

The precise classification at issue here is based on an obvious biological difference between same-sex couples and opposite-sex couples: that sexual relationships between opposite-sex couples have the natural capacity to create children, but sexual relationships between same-sex couples do not. This

distinction goes to the heart of the government's purpose for recognizing and regulating marriage. The record of human history leaves no doubt that the institution of marriage owes its existence to the undeniable biological reality that opposite-sex unions—and only such unions—can naturally produce children. Marriage is thus "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction* to 1 A History of the Family: Distant Worlds, Ancient Worlds 5 (Andre Burguiere et al. eds., 1996); *see also* Bertrand Russell, *Marriage & Morals* 77 (Liveright Paperbound Edition, 1970) ("But for children, there would be no need of any institution concerned with sex.").

That biological foundation—the unique procreative potential of sexual relationships between men and women—implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of the human race; thus the responsible creation, nurture, and socialization of the next generation is a vital—indeed existential—social good. On the other hand, irresponsible procreation and childrearing—the all-too-frequent result of casual or transient sexual relationships between men and women—commonly results in hardships, costs, and other ills for children, parents, and society.

Therefore, as eminent scholars from various disciplines have recognized, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique

procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, the government seeks to increase the likelihood that children will be born and raised in a stable and enduring family unit that includes both the mother and the father who brought them into this world.[2]

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[2] *See, e.g.*, William Blackstone, 1 *Commentaries* *410 (describing the relationship of "husband and wife" as "directing man to continue and multiply his species" and "prescribing the manner in which that natural impulse must be confined and regulated," and describing the relationship of "parent and child" as "consequential to that of marriage, being its principal end and design"); John Locke, *Second Treatise of Civil Government* §79 (1690) ("For the end of conjunction between male and female, being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones"); Montesquieu, 2 *The Spirit of Laws* 96 (1st American from the 5th London ed., 1802) ("The natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to fulfill this obligation."); Bronislaw Malinowski, *Sex, Culture, and Myth* 11 (1962) ("[T]he institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents"); *The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985) ("[T]he social system [of marriage and the family] powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring."); G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); James Q. Wilson, *The Marriage Problem* 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); Sherif Girgis, Ryan T. Anderson & Robert P. George, *What is Marriage?* 38 (2012) [hereinafter "Girgis, *What is Marriage?*"] ("[T]he only way to account for the remarkable fact that almost all cultures have regulated male-female sexual relationships" is that "[t]hese relationships alone produce new human beings.").

Amici refer to this governmental purpose for marriage as "responsible procreation and childrearing."

When viewed in light of this governmental purpose for marriage—to minimize the potential harms and channel to constructive ends the natural procreative capacity of certain sexual relationships—it is readily apparent that opposite-sex couples and same-sex couples are not similarly situated here.

Amici do not deny that marriage serves additional purposes, or that many couples marry for love, commitment, subjective fulfillment, and a variety of other personal reasons. But it is incontrovertible that one governmental purpose of marriage is responsible procreation and childrearing; indeed, no other purpose can explain why marriage is "fundamental to [our] very existence and survival," *Zablocki*, 434 U.S. at 384, or why it has existed in virtually every society throughout history. Because of this governmental purpose, Plaintiffs cannot prevail on their equal-protection challenge.

For although same-sex couples (like other relationships not recognized as marriages) may be similarly situated to opposite-sex couples with respect to love, commitment, and other such purposes, they are not so situated with respect to the government's purpose of promoting responsible procreation and childrearing. Focusing on a few characteristics (love and commitment) shared by two groups, while ignoring the overriding governmental purpose for the challenged laws

(responsible procreation and childrearing), "is insufficient" to establish that the two classes "are similarly situated." *See Madrid*, 1996-NMSC-064, ¶ 35. Stated differently, "a common characteristic shared by beneficiaries and nonbeneficiaries alike[] is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Johnson v. Robison*, 415 U.S. 361, 378 (1974). Consequently, the State's marriage statutes do not violate New Mexico's Equal Protection Clause.

B. The Couples Treated Differently by New Mexico's Marriage Statutes Are Not a Suspect or Sensitive Class.

Although equal-protection analysis typically "defer[s] to the Legislature's judgment in enacting social . . . legislation," *Wagner*, 2005-NMSC-016, ¶ 12, the creation of suspect and sensitive classes removes important social issues from the democratic process. Accordingly, the judiciary, out of "respect for the separation of powers," should be "very reluctant" to establish new suspect or sensitive classes. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); *accord Richardson v. Carnegie Library Rest., Inc.*, 1988-NMSC-084, 107 N.M. 688, 697, 763 P.2d 1153, 1162 ("[C]ourts should be hesitant to overturn a statute other than on fundamental rights grounds because the separation of powers doctrine mandates deference to a legislative determination of reasonableness."), *overruled on other grounds by Trujillo III*, 1998-NMSC-031.

The class at issue here, same-sex couples, does not qualify as "sensitive" (and thus, by extension, does not qualify as "suspect"). While this Court is not bound by federal precedent discussing suspect or quasi-suspect classes, that case law is "informative." *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413. Every federal circuit that has considered whether sexual orientation is a suspect or quasi-suspect classification (save one) has held that it is not.[3] Many state high courts have reached similar conclusions when interpreting their own constitutions. *See, e.g.*, *Conaway v. Deane*, 932 A.2d 571, 606-16 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 974-76 (Wash. 2006) (plurality); *Hernandez*, 855 N.E.2d at 11 (declining to apply heightened scrutiny when "review[ing] legislation governing marriage and family relationships").

This Court's sensitive-class analysis should reach the same conclusion. The touchstone of this Court's analysis is whether "a discrete group . . . warrants a degree of protection from the majoritarian political process." *Breen*, 2005-NMSC-

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[3] *See Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *but see Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013).

028, ¶ 21. Yet as demonstrated below, that simply cannot be said of same-sex couples who seek to redefine marriage to include their relationships.

Unlike women or persons with mental disabilities—groups that this Court has previously classified as sensitive, *see id.* ¶ 29—same-sex couples possess political power that vastly exceeds their small percentage of the population. Women account for approximately half of the population, and so do people who experience "a diagnosable mental illness in their lifetimes[.]" Robin S. Rosenberg, *Abnormal Is the New Normal*, Slate (Apr. 12, 2013), http://www.slate.com/articles/health_and_science/medical_examiner/2013/04/diagnostic_and_statistical_manual_fifth_edition_why_will_half_the_u_s_population.html. Yet "their political voice[s] [have been] disproportionately small compared to their numbers." *See Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1011 (D. Nev. 2012) (discussing women as a class).

In contrast, individuals who identify as gay—even though they comprise less than 4% of the population, *see* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgendered?*, The Williams Institute (Apr. 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf—have achieved a disproportionate level of political power and success, particularly on the issue of marriage. For example:

- The Democratic Party has included redefining marriage in its official party platform. *See* Platform Standing Comm., 2012 Democratic Nat'l Convention Comm., *Moving America Forward* 17, 18 (2012), *available at* http://www.democrats.org/democratic-national-platform.
- The President and his administration support same-sex marriage. *See* Josh Earnest, *President Obama Supports Same-Sex Marriage*, The White House Blog (May 10, 2012, 7:31 PM), http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage.
- During the last five years, legislatures in seven United States jurisdictions—New Hampshire, Vermont, New York, the District of Columbia, Minnesota, Delaware, and Rhode Island—have voted to redefine marriage. *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, National Conference of State Legislatures (July 26, 2013), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.
- Last year, the citizens in three States—Maine, Maryland, and Washington—decided to redefine marriage through a direct vote of the people. *See* Richard Socarides, *Obama and Gay Marriage: One Year Later*, The New Yorker (May 6, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/05/obama-and-gay-marriage-one-year-later.html.

- Plaintiffs themselves have highlighted many New Mexico statutes, rules, and executive orders benefiting persons in same-sex relationships. *See* Pls.' Second Am. Compl. for Declaratory and Injunctive Relief ¶ 63.[4]

As a result, or perhaps because, of this tremendous political influence, some polls show that by 2011, the proportion of Americans supporting same-sex marriage increased from 27% to 53% in a span of only 16 years. *See* Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup.com (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gaymarriage.aspx.

While a "group need not be completely politically powerless" to attain sensitive-class status, heightened scrutiny applies only so long as the group is "limited in its political power or ability to advocate within the political system." *Breen*, 2005-NMSC-028, ¶ 18. But as explained above, no material political limitations impede the group at issue in its quest to redefine marriage. That same-sex couples have not succeeded in "alter[ing] the law [they are] challenging" does not mean that they have limited political power or ability to advocate. *See Sevcik*, 911 F. Supp. 2d at 1009. If that were sufficient, every member of a minority group that has experienced past discrimination would automatically be entitled to

[4] For an extensive discussion of the political victories of—and public, financial, media, and religious support for—individuals who identify as gay, see Amicus Curiae Brief of Concerned Women for America, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 417729.

heightened scrutiny, which, in turn, would transfer the power to decide heated political debates from the Legislature to the judiciary. *See id.*

In short, citizens advocating to redefine marriage are among the most influential groups in modern politics; they have attained more legislative victories, political power, and popular favor in less time than virtually any other group in American history. Characterizing this group as in need of "a degree of protection from the majoritarian political process," which this Court must do to conclude that the class qualifies as "sensitive," would be at odds with reality. *See Breen*, 2005-NMSC-028, ¶ 21. This Court should thus conclude that the class implicated here is not "sensitive" for purposes of New Mexico equal-protection jurisprudence.

C. New Mexico's Marriage Statutes Do Not Withhold from Plaintiffs a Fundamental or Important State Constitutional Right.

"A fundamental right is that which the Constitution explicitly or implicitly guarantees." *Howell v. Heim*, 1994-NMSC-103, 118 N.M. 500, 505-06, 882 P.2d 541, 546-47. Evaluating whether a purported right ranks as fundamental "requires a 'careful description' of the asserted fundamental liberty interest." *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶ 18, 145 N.M. 500, 201 P.3d 169 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). A court will find that the carefully described right qualifies as fundamental only if it is, "objectively, deeply rooted in this Nation's [or this State's] history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice

would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (quotation marks and citations omitted).

A purported right to marry a person of the same sex is not a fundamental constitutional right. The United States Supreme Court implicitly recognized last term that marrying a person of the same sex is not deeply rooted in our history and tradition, stating that "marriage between a man and a woman no doubt ha[s] been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689; *accord Hernandez*, 855 N.E.2d at 8 ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived . . . that there could be marriages only between participants of different sex."). There is thus "no long history" of a right to marry a person of the same sex, and "the mere novelty of such a claim is reason enough to doubt" that the purported right qualifies as fundamental. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (quotation marks and alterations omitted).

Nor does the supposed right to marry a person of the same sex rank as an important constitutional right. No state constitutional provision guarantees any such right to New Mexicans. Consequently, it would be improvident for this Court to conclude that the State Constitution protects this alleged right and to apply heightened scrutiny on that basis.

The judiciary should exercise caution when asked to divine fundamental and important constitutional rights not expressly provided in the Constitution's text because "extending constitutional protection to an asserted right or liberty interest, . . . to a great extent, place[s] the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. Courts "must therefore exercise the utmost care whenever . . . asked to break new ground in this field, lest the [Constitution] be subtly transformed into the policy preferences" of judges. *Id.* (quotation marks and citations omitted).

D. New Mexico's Marriage Statutes Are Rationally Related to Legitimate Governmental Purposes.

"Rational basis review applies to general social . . . legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class." *Breen*, 2005-NMSC-028, ¶ 11. "Under this test, the burden is on the opponent of the legislation to prove that the law lacks a reasonable relationship to a legitimate governmental purpose." *Marrujo v. New Mexico State Highway Transp. Dep't*, 1994-NMSC-116, 118 N.M. 753, 758, 887 P.2d 747, 752. "The opponent's burden is difficult because they must demonstrate that the challenged legislation is clearly arbitrary and unreasonable, not just that it is possibly so." *Id.* (quotation marks omitted). "Only when a statutory classification is so devoid of rational support or serves no valid governmental interest, so that it amounts to mere

caprice, will it be struck down under the rational basis test." *Thompson v. McKinley Cnty.*, 1991-NMSC-076, 112 N.M. 425, 430, 816 P.2d 494, 499.

"Underlying [the rational-basis] standard is the traditional deference accorded by courts to the legislature's sense of the general good." *Marrujo*, 118 N.M. at 758, 887 P.2d at 752 (quotation marks omitted). "[This Court] will not second guess the legislature, but rather will uphold the statute if any state of facts reasonably can be conceived that will sustain the challenged classification." *Thompson*, 112 N.M. at 430, 816 P.2d at 499 (quotation marks omitted). "[W]hen employing the rational-basis test, courts will not consider controversies surrounding the academic examination of legislative policy." *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 40, 121 N.M. 821, 918 P.2d 1321. Nor will a court strike down a statute simply because it "disagrees" with the Legislature "on where to draw the line." *See Wagner*, 2005-NMSC-016, ¶ 28.

Marriage, as discussed in Section (II)(A) above, is inextricably linked to the undeniable biological fact that opposite-sex couples, and only such couples, are capable of naturally creating life through their sexual relationships and, therefore, are capable of furthering, or threatening, the government's interest in responsible procreation and childrearing. Same-sex couples, in contrast, are not capable of furthering, or threatening, this governmental interest to the same degree as opposite-sex couples. This biological distinction alone establishes that the marriage

statutes satisfy equal-protection analysis because courts uphold statutory classifications when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson*, 415 U.S. at 383; *see also Cleburne*, 473 U.S. at 448 (observing that the government may make special provision for a group if its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not"); *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) ("[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation.").

"[A] host of judicial decisions" thus have held that "laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867; *see, e.g.*, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1112-14 (D. Haw. 2012); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. Ct. App. 2010) ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage."); *Hernandez*, 855 N.E.2d at 7-8 ("[A]n important function of marriage is to create more stability and permanence in the

relationships that cause children to be born"); *Conaway*, 932 A.2d at 630-34; *Andersen*, 138 P.3d at 982-85; *Morrison v. Sadler*, 821 N.E.2d 15, 23-31 (Ind. Ct. App. 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 461-64 (Ariz. Ct. App. 2003); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

So long as "an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry"—a showing that has been established above—the State "is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest." *Jackson*, 884 F. Supp. 2d at 1106-07; *see also Andersen*, 138 P.3d at 984-85; *Morrison*, 821 N.E.2d at 23, 29; *Standhardt*, 77 P.3d at 463.

Nevertheless, it is rational to believe that declining to redefine marriage does in fact further legitimate state interests. New Mexicans might reasonably fear that officially changing the public and legal meaning of marriage from a gendered to a genderless institution would create adverse consequences over time to the institution of marriage and the interests it has always served. Indeed, a large group of prominent scholars from all relevant academic fields have expressed "deep[] concerns about the institutional consequences of same-sex marriage for marriage itself." Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008). As they have explained:

> Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.

Id. at 18-19.

By redefining marriage, the law would teach that marriage is "essentially an emotional union" without any inherent connection "to procreation and family life." Girgis, *What is Marriage?* at 7. "If marriage is understood as an essentially emotional union, then marital norms, especially permanence and exclusivity, will make less sense," *id.* at 67, thereby decreasing the societal expectations for people to live by those norms. In short, it is reasonable to worry that officially changing the public meaning of marriage to a genderless institution will send a message that the desires of adults, as opposed to the needs of children (or any other social good that transcends the marriage partners), are the paramount concern of marriage and may weaken the social norms encouraging parents, especially fathers, to make the sacrifices necessary to marry, remain married, and play an active role in raising their children. *Cf. Lewis*, 908 A.2d at 222 (altering "the shared societal meaning of marriage" as "the union of a man and a woman" "would render a profound change in the public consciousness of a social institution of ancient origin").

Even some supporters of redefining marriage, such as Professor Andrew Cherlin of Johns Hopkins University, identify same-sex marriage as "the most

recent development in the deinstitutionalization of marriage," which he defines as the "weakening of the social norms that define people's behavior in . . . marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Family 848, 848, 850 (2004) [hereinafter "Cherlin, *Marriage*"]. This weakening of social norms entails shifting the focus of marriage from serving vital societal needs to facilitating the personal fulfillment of individuals. *See id.* at 853; *see also* Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26 (2004) (expressing concern that "acceptance of the arguments made by some advocates of same-sex marriage would" result in a "definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple").

Cherlin predicts that if the deinstitutionalization of marriage continues, "the proportion of people who ever marry could fall further," and, "because of high levels of nonmarital childbearing, cohabitation, and divorce, people will spend a smaller proportion of their adult lives in intact marriages than in the past." Cherlin, *Marriage*, 66 J. Marriage & Family at 858. The process of deinstitutionalization could even culminate, Cherlin writes, in "the fading away of marriage," to the point that it becomes "just one of many kinds of interpersonal romantic relationships." *Id.* Reasonable New Mexicans who share these concerns about the

effects of redefining marriage may rationally decline to change the fundamental definition of this vital social institution.

III. New Mexico's Marriage Statutes Comport with the State's Equal Rights Amendment.

When construing a state constitutional provision, "[t]he most important consideration" for this Court is to "interpret the constitution in a way that reflects the drafters' intent." *State v. Lynch,* 2003-NMSC-020, ¶ 24, 134 N.M. 139, 74 P.3d 73. This Court "has no power by construction to enlarge the scope of constitutional provisions beyond their intent." *Bd. of Educ. v. Robinson*, 1953-NMSC-055, 57 N.M. 445, 450, 259 P.2d 1028, 1032.

The legislators who approved the Equal Rights Amendment (ERA), and the voters who ratified it, intended that the amendment would "eradicate unequal treatment in the law between men and women." Linton, *N.M. ERA*, 20 Geo. Mason U. C.R. L.J. at 214, 222-30 (exploring the ERA's history in detail). Yet they did not intend that the ERA would force New Mexicans to redefine marriage to include same-sex couples. Indeed, "Senator Tibo Chavez, the principal Senate sponsor of the amendment, . . . scoff[ed] at the suggestion that the amendment would affect laws restricting marriage to opposite-sex couples." *Id.* at 224 (citing *Women's Equal Rights Resolution Clears Final Legislative Hurdle*, Albuquerque J. (Feb. 16, 1972) at A5). Aside from this one public statement, "there was no editorial or public comment on whether the [ERA] would require recognition of same-sex

marriage. The absence of such commentary strongly suggests that no one . . . thought it would have that effect." *Id.* at 230. Reinforcing this understanding of the ERA's purpose and effect, when the Legislature "repealed [and] amended" many laws "in direct response to the passage of the Equal Rights Amendment in 1972," *NARAL*, 1999-NMSC-005, ¶ 35, it did not redefine marriage in New Mexico to include same-sex couples.

This Court's case law confirms that the marriage statutes do not violate the ERA. A prerequisite for any ERA violation is that the government must treat one sex more favorably than the other. *See id.* ¶ 2 (finding an ERA violation because the challenged rule did "not apply the same standard of medical necessity to both men and women" and thereby "treat[ed] men and women differently"); *id.* ¶ 27 (similar); *id.* ¶ 47 (concluding that the challenged rule was "presumptively unconstitutional" because it "employ[ed] a gender-based classification that operate[d] to the disadvantage of women"); *see also City of Albuquerque v. Sachs*, 2004-NMCA-065, ¶¶ 15-16, 135 N.M. 578, 92 P.3d 24 (concluding that a city ordinance "prohibiting public exposure of the female breast but not the male breast d[id] not operate to the disadvantage of women" and thus that the ordinance "d[id] not treat men and women differently in violation of the New Mexico Equal Rights Amendment"). That prerequisite is not satisfied here because the marriage statutes treat men and women equally: both may marry someone of the opposite-sex; and

neither may marry someone of the same sex. The marriage statutes thus do not violate the ERA.

This conclusion conforms to the weight of precedent throughout the country analyzing same-sex marriage claims under a sex-discrimination theory. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008); *Conaway*, 932 A.2d at 585-602 (rejecting a claim under Maryland's Equal Rights Amendment); *Hernandez*, 855 N.E.2d at 10-11; *Andersen*, 138 P.3d at 988-90 (rejecting a claim under Washington's Equal Rights Amendment); *see generally* Linton, *N.M. ERA*, 20 Geo. Mason U. C.R. L.J. at 214-18 (citing more than a dozen state and federal decisions rejecting this sex-discrimination theory).

IV. New Mexico's Marriage Statutes Comport with the State's Due Process Clause.

"[A]nalysis under the equal protection clause . . . is identical to that used under the due process clause[]." *Marrujo*, 118 N.M. at 760, 887 P.2d at 754. Thus, for all the reasons explained under the equal-protection analysis above, the marriage statutes do not violate the Due Process Clause of the State Constitution.

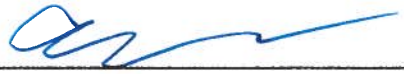
CONCLUSION

For the foregoing reasons, Amici respectfully requests that this Court quash the Final Declaratory Judgment issued by the District Court, declare that New Mexico statutes permit marriage only between one man and one woman, declare that the New Mexico Constitution does not require the State to redefine marriage to

include same-sex couples, and clarify that County Clerks do not have authority to issue marriage licenses in a manner not permitted by the State's marriage statutes.

Dated: September 19, 2013.

Respectfully submitted,



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Expires on 02/28/2015

My commission expires: 2/28/2015