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,

v. **No. 34,306**

THE HONORARBLE ALAN M. MALOTT,

Respondent,

and

ROSE GRIEGO AND KIM KIEL, et al.,

Plaintiffs-Real Parties in Interest

and

MAGGIE TOULOUSE OLIVER, et al.,

Defendants-Real Parties in Interest

PLAINTIFFS-REAL PARTIES IN INTEREST RESPONSE TO PETITION FOR WRIT OF SUPERINTENDING CONTROL

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Under the Constitution of New Mexico, Plaintiffs, six same-sex couples in loving and long-term relationships, have the same right to marry as all other New Mexicans. This case presents the Court with opportunity to confirm that principle, and bring us closer to fulfilling our Constitution's commitment to equality and due process of law. Plaintiffs submit that both law and justice argue for a speedy, definitive determination of this case.

BACKGROUND

Plaintiffs filed an action for declaratory and injunctive relief against the clerks of Bernalillo and Santa Fe Counties and the State of New Mexico, requiring the clerks to issue them marriage licenses and requiring the State to treat their marriages equally to the marriages of opposite-sex couples. On August 26, 2013, Plaintiffs appeared before the district court on a motion for a temporary restraining order. At the hearing, all parties stipulated to all the facts set forth in Plaintiffs' Second Amended Complaint ("Complaint"). (Trans., August 26, 2013, at 7:13-22, Exhibit A.)

The district court entered a Declaratory Judgment, Permanent Injunction and Peremptory Writ of Mandamus requiring defendant clerks to immediately begin issuing marriage licenses to same sex couples. On September 3, 2013, the district court entered a Final Declaratory Judgment, adding as Intervenors the other

thirty-one county clerks in New Mexico, and the New Mexico Association of Counties.[1] They are now Petitioners before this Court.

In the Final Declaratory Judgment, the court found that it had jurisdiction over the parties and the subject matter and that there was an actual controversy between the parties. (Judgment, ¶¶ 1, 5.) The court also adopted the facts stipulated to by the parties. (*Id.*, ¶ 2.)

The court concluded that New Mexico marriage statutes contain no "specific prohibition" on marriage for same-sex couples. (*Id.*, ¶¶ 6-8.) But the court found that the statutory question was "of little consequence to the outcome of this litigation" because the New Mexico Constitution's guarantees of equal protection, equal rights, and due process plainly forbid excluding Plaintiffs from marriage. (*Id.*, ¶¶ 9-12.)

The court further declared that its Judgment applied to Petitioners. (*Id.* at ¶ 4.) The district court stayed its Judgment as to Petitioners pending appellate review. (*Id.* at ¶ 5.) Indeed, this stay was a condition of Petitioners' intervention, and, with limited exceptions, they collectively refuse to issue marriage licenses to

[1] The Final Declaratory Judgment mistakenly names the Sandoval County Clerk rather than the Santa Fe County Clerk as the party enjoined; this error will be corrected.

same-sex couples until the issue is definitively resolved by this Court. (Petition, ¶¶ 61-62.)

Other district courts have also recently issued writs against the clerks of Grant, Los Alamos, and Taos Counties, and pursuant to those writs those clerks are now issuing marriage licenses to same sex couples.[2] A writ petition and complaint against the Sandoval County clerk have also been stayed, pending the outcome of this proceeding.[3] Members of the legislature have brought three lawsuits to stop county clerks from issuing marriage licenses to same-sex couples. These lawsuits challenge the validity of marriage licenses already issued to same-sex couples.[4] Many of these legislators have appeared as *amici curiae* in this proceeding.

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[2] *Stark, et al. v. Martinez,* No. D-820-CV-2013-00295 *(*Taos County); *Newton, et al. v. Stover*, No. D-132-CV-2013-00094 (Los Alamos County); *Katz, et al. v. Zamarripa*, No. D-608-CV-2013-00235 (Grant County)

[3] *Gering v. Garbagni*, D-1329-CV-2013-01715 (Sandoval County).

[4] *Sharer, et al. v. Ellins*, No. D-307-CV-2013-02061 (Dona Ana County); *Sharer, et al. v. Rivera*, No. D-412-CV-2013-00367 (San Miguel County); *Sharer, et al. v. Carabajal*, No. D-1314-CV-2013-01058 (Valencia County).

ARGUMENT

I. THIS COURT SHOULD ISSUE ITS WRIT OF SUPERINTENDING CONTROL AND MAKE A DEFINITIVE, CONSTITUTIONAL RESOLUTION OF THE ISSUES

Plaintiffs agree with Petitioners that the Court should issue a writ of superintending control and definitively resolve on constitutional grounds the legal questions surrounding marriage for same-sex couples in New Mexico. Petitioners have described the serious issues created for them by the multiple lawsuits and the lack of a definitive decision from the Court on these issues. Yet the burden on Plaintiffs, and other same-sex New Mexico couples, in terms of the uncertainty around their marriages and their ability to marry, is of even greater significance and further warrants exercise by the Court of its extraordinary power "to control the course of ordinary litigation in inferior courts." *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 421.

A. This Case Presents Exceptional Circumstances and Issues of Great Public Importance Warranting Use of the Power of Superintending Control.

The Court has generally limited its exercise of the power of superintending control to exceptional circumstances or to matters of great public importance. *District Court v. McKenna*, 1994-NMSC-102, 118 N.M. 402. Both are plainly present here. The issues presented in the Petition are of equal or greater importance to the issues presented in cases in which the Court issued a writ of

superintending control, and upon which Petitioners rely. For example, in *McKenna*, the Second Judicial District Court petitioned for a Writ of Superintending Control "asking generally for guidance and assistance" in handling a petition for a grand jury to investigate one or more of the court's judges. *Id.*, ¶ 1. The Court issued the Writ, finding the matter of sufficient "great public importance" to justify the exercise of its seemingly "boundless" superintending authority. *Id.,* ¶ 4.

The Court has held that "we may exercise our power of superintending control even when there is a remedy by appeal, where it is deemed in the public interest to settle the question involved at the earliest moment." *State ex rel Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 8, 120 N.M. 619. The *Schwartz* Court found it appropriate to use superintending control to decide whether a license revocation and a prosecution for DWI constituted double jeopardy. *Schwartz* relied on the holding in *State Racing Comm'n v. McManus*, 1970-NMSC-134, ¶ 9, 82 N.M. 108, 110, that questions of "great public interest and importance" may require the Court to use its power of superintending control. In *McManus*, the question was whether a jockey had to exhaust administrative remedies in front of the State Racing Commission before seeking judicial relief. Surely the right of same-sex couples to get married in New Mexico, and to have their marriages recognized by the State, is of equal or greater public importance than those matters.

The fundamental nature and great importance of marriage is manifest. Marriage has long been deemed a fundamental right. *See Loving v. Virginia*, 388 U.S. 1 (1967). It is profoundly important to the well-being and happiness of individuals, families and society. Like decisions about whether and when to have children, an individual's decision about whether and who to marry involves fundamental aspects of autonomy and dignity. The denial to same-sex couples of marriage's benefits and the dignity and respect of being treated as equal persons with regard to marriage is a grave injustice. The daily harm experienced by lesbian, gay and bisexual New Mexicans who cannot access marriage or whose marriages are not being recognized runs from "the mundane to the profound." *See United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2694 (2013). Marital status impacts everything from property, finances, retirement, child care, healthcare decisions, and access to healthcare. (*See* Compl., ¶¶ 54-58 (describing the many protections, benefits and responsibilities conferred on couples who are recognized as married under state and federal law).)[5]

[5] The Internal Revenue Service has announced that it will treat as married for federal income taxes couples married in states that permit same-sex marriage. Rev. Rul. 2013-17. As of September 23, 2013, New Mexico is not on the Social Security Administrations list of states recognizing same-sex marriages. *See* SSA Program Operations Manual Systems, Windsor Same-Sex Marriage Claims, https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM; *see also* "IRS Guidance Answers Same-Sex Marriage Tax Questions in Wake of

Since the Final Declaratory Judgment was entered several Plaintiff couples, like over a thousand other New Mexican same-sex couples, have married. The remaining Plaintiffs intend to marry. In living their married lives, or contemplating entering into marriage, Plaintiffs have a profound interest in having the same certainty that different-sex couples have when they marry: that as married couples they are (or will be) fully vested with all the rights and responsibilities attendant on marriage, and that the State will treat their marriages accordingly. Plaintiffs should not have to wait for an appeal of the decision below for certainty about access to, and recognition of, a status that plays such a unique and central social, legal and economic role in New Mexico's society.

Moreover, there is an immediate and urgent public need for resolution of the issue presented here, even greater than in *McKenna* or *Schwartz*. What was merely threatened in *Schwartz*—an important law being inconsistently applied—is a reality here: (1) some county clerks are issuing marriage licenses to same-sex couples, some are refusing; (2) some district courts have issued writs ordering county clerks to issue marriage licenses to same-sex couples; (3) one court has stayed such a request pending the ruling on this Petition; and, (4) the pending suits

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Supreme Court's DOMA Ruling" *at*
http://www.lgbtbar.org/assets/Thomson_Reuters_Special_Report_DOMA_IRS.pdf

against the clerks of Dona Ana, Valencia and San Miguel counties contend that New Mexico law prohibits same-sex marriage.

So the reality is a patchwork of inconsistent practices in which same-sex couples' constitutional rights are respected in some counties and not in others. This inconsistency is unjust, unfair to all concerned, and within the power of the Court to remedy.

B. The Court Can and Should Address the Constitutional Questions Presented in This Proceeding.

Although several district courts, including the court below, have concluded that New Mexico's marriage statutes allow same-sex couples to marry, statutory interpretation alone cannot conclusively resolve existing uncertainty surrounding marriage for same-sex couples in New Mexico. Plaintiffs seek vindication not only of their constitutional right to marry, but their entitlement to all the essential protections and responsibilities attendant on marriage. Yet the State has taken the position that the statutes governing many of the protections and benefits of marriage explicitly exclude same-sex couples. (*See* State Resp. to Ver. Pet. for Writ of Mandamus, filed August 12, 2013, at 17-19.)

The procedural posture of this case makes a definitive, constitutional resolution of the issues by superintending control particularly appropriate. All the county clerks, and the State, are parties to the action below, and subject to its Final

Declaratory Judgment.[6] Thus, only in this action, now, can all the issues be heard and decided expeditiously so that there is a final, uniform statewide rule vindicating Plaintiffs' constitutional rights.

Excluding same-sex couples from marriage violates both the federal and state constitutions. In *Windsor*, 133 S. Ct. at 2693-96, the Supreme Court held that laws that discriminate against married same-sex couples violate federal due process and equal protection because of their "interference with the equal dignity of same-sex marriages." This, and other federal court holdings, lead to the conclusion that the Fourteenth Amendment to the federal Constitution requires states to permit same-sex couples to marry. *See Windsor v. United States,* 699 F.3d 169 (2d Cir. 2012)*, Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)*, Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987-90 (N.D. Cal. 2012). But Plaintiffs brought this case under the New Mexico Constitution because the questions presented here have not yet been conclusively decided by the federal courts. This Court has emphasized that our Constitution provides greater protection against discrimination than the federal constitution. *See*, *e.g.*, *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 15, 138 N.M. 331. Heightened state constitutional protection is warranted here, both because marriage is primarily

[6] The Dona Ana County Clerk has moved to withdraw from the Petition and appear as an *amicus*, but is a party to the action below, and subject to its judgment.

a state law issue, and because New Mexico has a distinctive history of recognizing that discrimination based on sexual orientation is invidious. NMSA 1978, § 28-1-7 *et seq.;* NMSA 1978, § 31-18B-3; *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283; *see also State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 783 (heightened protection under the state constitution is justified based on "structural differences between state and federal law, or distinctive state characteristics"). The Court should conclude that prohibiting Plaintiffs from marrying violates rights guaranteed by the New Mexico Constitution.

II. PROHIBITING PLAINTIFFS FROM MARRYING VIOLATES DUE PROCESS OF LAW BY DENYING THEM A FUNDAMENTAL RIGHT

Barring same-sex couples from marriage violates New Mexico's due process guarantee by depriving them the fundamental right to marry. N.M. Const. art. II, § 18. In determining whether a right is fundamental under our Constitution, New Mexico courts generally consider: (1) whether the United States Supreme Court has recognized the right as fundamental; (2) the degree to which the class of persons seeking to assert the right is similar or dissimilar to those asserting similar interests in cases recognizing fundamental rights; and (3) the degree of abridgment of the right. *See State v. Druktenis*, 2004-NMCA-032, ¶¶ 89-96, 135 N.M. 223. Plaintiffs prevail under all these factors.

First, the United States Supreme Court has repeatedly held that the freedom to marry is a fundamental right deeply rooted in privacy, liberty, and freedom of intimate association. *See*, *e.g.*, *Loving*, 388 U.S. at 12; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("the decision to marry is a fundamental right"); *see also Wachocki v. Bernalillo County Sheriff's Dep't*, 2010-NMCA-021, ¶ 36, 147 N.M. 720 (recognizing that marriage is a fundamental right under the federal constitution), *aff'd*, 2011–NMSC–039, 150 N.M. 650.

Second, partners in same-sex relationships have the same stake as others in the underlying autonomy, privacy, and associational interests protected by the fundamental freedom to marry. Without deciding whether a state must permit same-sex couples to marry, the United States Supreme Court has held that individuals in same-sex relationships have the same liberty and privacy interests in their intimate relationships as heterosexual people. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003); *cf. Windsor*, 133 S. Ct. at 2693-96. As New Mexico law already recognizes, same-sex couples are just as capable as others of entering committed relationships, raising children, and forming stable families that contribute both to their own welfare and that of society. *Chatterjee*, 2012-NMSC-

019, *In re Rebecca M.*, 2008-NMCA-033, 143 N.M. 554; *Barnae v. Barnae,* 1997-NMCA-077, 123 N.M. 583; NMSA 1978 § 32A-5-11.

Third, excluding same-sex couples from marriage infringes on their rights to privacy, autonomy, and liberty. Without access to marriage, same-sex couples in New Mexico cannot enter into an officially recognized and protected family relationship, leaving them with no way to assume full responsibility for one another and no meaningful protection against being treated as legal strangers by third parties and the State. (*See* Compl., ¶ 57.)

In sum, same-sex couples in New Mexico have the same fundamental right to marry as others, and any law excluding them from that right violates due process, unless Petitioners can show that it is necessary to achieve a compelling state interest. *See ACLU of N.M. v. City of Albuquerque*, 2006–NMCA–078, ¶ 19, 139 N.M. 761 (holding that heightened scrutiny applies when a law violates a fundamental right). As argued below, there is no basis, compelling, rational or otherwise, for treating same-sex couples differently than different-sex couples. Petitioners and the State have so stipulated.[7] (*See* Exhibit A; Compl., ¶¶ 67, 74, 79, 85 and Judgment ¶ 2.)

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[7] *Amici* state legislators depict the relief sought in this case as recognition of a "new" right to "same-sex marriage." (Leg. Br. at pp. 16-17.) The United States Supreme Court has recognized, however, that the scope of a fundamental right is defined by the underlying interests it protects, not by the personal characteristics of

III. PROHIBITING PLAINTIFFS FROM MARRYING DENIES THEM CONSTITUTIONALY GUARANTEED RIGHTS ON THE BASIS OF SEX AND SEXUAL ORIENTATION

Prohibiting lesbian, gay and bisexual New Mexicans from marrying their partners prevents them from marrying the person they love solely because of their sex or sexual orientation. Neither form of discrimination is permissible under our Constitution.

A. Prohibiting Plaintiffs From Marrying Is Unconstitutional Discrimination on the Basis of Sex.

"New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination . . ." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 36, 126 N.M. 788 ("*NARAL")*. It has no counterpart in the federal Constitution and provides greater protection than the New Mexico Constitution's general requirement of equal protection. *See id.,* ¶ 30. "New Mexico's state constitution requires the State to provide a compelling justification for using such [gender-based] classifications to the disadvantage of the persons they classify."

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the people who seek to exercise it. Thus, the right at stake here is not "same-sex marriage" any more than *Loving* concerned the right to "interracial marriage;" or *Turner*, the right to "inmate marriage." Similarly, historical patterns of discrimination cannot be used to justify excluding certain groups from otherwise generally applicable rights. *See In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008), ("Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.") (internal citations and quotation marks omitted).

Id., ¶ 43 (emphasis added). The exclusion of same-sex couples from marriage discriminates on the basis of sex and cannot withstand this review. (Judgment, ¶ 11.)

Limiting the right to marry on the basis of the sex of one's partner is discrimination on the basis of sex. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d at 996; *cf. Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). *Perry* explained that sex and sexual orientation "are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." 704 F. Supp. 2d at 996. Here, to the extent the New Mexico marriage statutes prohibit same-sex couples from marrying or permit the State to refuse to recognize their marriages, the statutes target gay, lesbian and bisexual people "in a manner specific to their sexual orientation and, because of their relationship to one another . . . specifically due to sex." *Id.* Each Plaintiff in this proceeding wishes to marry or is married to a person of the same sex. Prohibiting same-sex couples from marrying or denying them recognition of their marriages, deprives each Plaintiff of the many benefits associated with marriage based solely on his or her sex.

The *NARAL* Court held that the State needed a "compelling" justification for discriminating between people on the basis of sex. 1999-NMSC-005, ¶ 30. Because Petitioners and the State have no rational reason for treating Plaintiffs

differently from other couples wishing to marry, much less a compelling justification, excluding them from marriage violates the Equal Rights Amendment.

B. Prohibiting Plaintiffs From Marrying Is Unconstitutional Discrimination on the Basis of Sexual Orientation.

"Equal protection, both federal and state, guarantees that the government will treat individuals similarly situated in an equal manner." *Breen,* 2005-NMSC-028, ¶ 7. Here, Plaintiffs are similarly situated to different-sex couples in every relevant respect, and their exclusion from marriage constitutes unconstitutional discrimination based on their sexual orientation.[8]

In deciding whether two groups of people are similarly situated, New Mexico courts have looked "beyond the classification to the purpose of the law." *NARAL*, 1999-NMSC-005, ¶ 40. Like different-sex couples who wish to marry or are married, Plaintiffs are long-term, committed couples, many of whom have children together, who seek the recognition and protection the State's marriage laws provide. *See*, *e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 882-84 (Iowa 2009) ("for purposes of Iowa's marriage laws, which are designed to bring a sense of

[8] *Amici curiae* state legislators argue that same-sex couples are not similarly situated to different-sex couples because same-sex couples and different-sex couples do not share the "common characteristic" of "the natural capacity to create children." (*See* Leg. Br. at 6, 10.) But for the same reasons that the different procreative abilities of same-sex couples as compared to certain different-sex couples does not constitute a rational basis for excluding same-sex couples from marriage, so it does not mean that same-sex couples and different-sex couples are not similarly situated for the purposes of marriage. *See* Section IV below.

order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation."); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 423-24 (Conn. 2008); *In re Marriage Cases*, 183 P.3d at 435 n.54.

Plaintiffs are fully qualified to marry under New Mexico law. (Judgment, ¶ 3.) When a county clerk refuses to issue a marriage license to a fully qualified couple simply because they are of the same sex, that clerk is treating similarly situated people differently based solely on their sexual orientation.

The Court should recognize this as discrimination against a suspect class and subject it to strict scrutiny. *See*, *e.g.*, *Breen*, 2005-NMSC-028, ¶ 12. "A suspect class has been defined as a discrete group saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *State v. Rotherham*, 1996-NMSC-048, ¶ 20, 122 N.M. 246 (internal cites and quotations omitted). Lesbian, gay and bisexual people are such a discrete group, and are entitled to the most searching scrutiny of any discrimination against them.

It has been stipulated to by the parties that gay, lesbian and bisexual New Mexicans have long suffered societal discrimination. (Compl. ¶¶ 49-52.) Until 1975, New Mexico criminalized consensual sexual intimacy between persons of

the same sex. Numerous convictions were upheld by state courts, which repeatedly rejected the argument that the statute violated constitutional rights by subjecting defendants to punishment solely for private, consensual intimate conduct. *See State v. Elliott*, 1976-NMSC-030, 89 N.M. 305. By criminalizing the most intimate aspects of lesbian, gay and bisexual people's lives, the State marked them as outcasts and invited public and private discrimination against them. New Mexico had no laws protecting lesbian, gay, and bisexual people against discrimination until 2003. Even with such protections, lesbian, gay, and bisexual New Mexicans continue to face discrimination in employment, public accommodation, and elsewhere. *See* Williams Institute, *New Mexico—Sexual Orientation and Gender Identity Law and Documentation of Discrimination* (Sept. 2009).

Second, the discrimination gay, lesbian, and bisexual people face is predicated on a factor – sexual orientation – that has no bearing on an individual's ability to contribute to society. *See Windsor*, 699 F.3d at 182-83 ("The aversion homosexuals experience has nothing to do with aptitude or performance."). These factors–(1) a history of discrimination based on (2) an irrelevant personal characteristic–are the key elements behind holdings that discrimination against a particular class should be treated as suspect. They are readily satisfied here. *See id.* at 181.

Additionally, lesbian, gay, and bisexual New Mexicans are "limited in [their] political power or ability to advocate within the political system," and their "effective advocacy is seriously hindered by the need to overcome this already deep-rooted prejudice against their integration in society." *Breen*, 2005-NMSC-028, ¶¶ 18, 21. Although *Amici* state legislators claim that recent political successes demonstrate that gay, lesbian, and bisexual New Mexicans do not need heightened protection from the majoritarian process (Leg. Br. at pp.12-15), the assessment of "political powerlessness" is relative. The law does not require that a group be completely unable to secure beneficial legislation, only that it is "seriously hindered" in doing so by the effects of societal prejudice. *Breen*, 2005-NMSC-028, ¶¶ 18, 21. As many courts have found, in combating discrimination, lesbian, gay and bisexual people "are still significantly encumbered." *Windsor,* 699 F.3d at 184; *see also Kerrigan,* 957 A.2d at 461 (holding that "the relatively modest political influence that gay persons possess is insufficient to rectify the invidious discrimination to which they have been subjected for so long"); *Varnum,* 763 N.W.2d at 893-95; *Golinski*, 824 F. Supp. 2d at 987-90; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 326-34 (D. Conn. 2012).

Like racial minorities and women, lesbian, gay, and bisexual people remain "vastly underrepresented in this Nation's [and this state's] decision making councils" and despite recent advances, they still "face pervasive, although at times

more subtle, discrimination . . . in the political arena." *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973). No openly gay, lesbian, or bisexual person has ever been elected to statewide executive office. Nor have lesbian, gay, and bisexual people in New Mexico been able to secure legislation providing legal recognition to their relationships. Bills to establish domestic partnerships for same-sex couples were defeated five times in recent years.[9] Lesbian, gay, and bisexual people's modest recent gains have not overcome the continuing systemic effects of prejudice and under-representation in government. *See Breen*, 2005-NMSC-028, ¶ 20.

Because lesbian, gay and bisexual people are in a suspect class, the Court should apply strict scrutiny to discrimination based on sexual orientation. At the very least, however, if sexual orientation is not a suspect class, it is a sensitive class that should be afforded intermediate scrutiny. This Court has held that intermediate scrutiny applies where "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 majoritarian political process."

[9] Gay, lesbian, and bisexual people also remain politically disadvantaged nationally. Ballot initiatives in no fewer than three-fifths of the states have sought to eliminate same-sex couples' right to marry; most have passed. Likewise, almost four decades after the first federal sexual orientation antidiscrimination legislation was introduced, no such federal legislation has been enacted.

Breen, 2005-NMSC-028, ¶ 21, *see also Windsor*, 699 F.3d at 185 (recognizing sexual orientation as a "quasi-suspect" classification and applying intermediate scrutiny).

Intermediate scrutiny requires Petitioners to show an "important" reason for the discriminatory practice. *Breen,* 2005-NMSC-028, ¶ 30. Petitioners, and the State below, have not and cannot make any such showing. Indeed, they have stipulated that the opposite is true. The reason is obvious: there simply is no important governmental objective served by refusing to issue marriage licenses to same-sex couples on the same basis as different-sex couples or in failing to recognize the marriages of same-sex couples as fully equal to those of different-sex couples.

IV. PROHIBITING PLAINTIFFS FROM MARRYING FAILS ANY LEVEL OF CONSTITUTIONAL SCRUTINY

As argued above, the exclusion of same-sex couples from marriage cannot survive heightened scrutiny because the State cannot demonstrate that the prohibition is necessary to "further a compelling state interest" or even that the prohibition is "substantially related to an important government interest." *Breen*, 2005-NMSC-028, ¶¶ 12-13. But the exclusion fails even the lowest level of constitutional scrutiny because it is not "supported by a firm legal rationale or evidence in the record." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137

N.M. 734. This is reflected in the stipulation below, and the district court's acceptance and endorsement of that stipulation in the Final Declaratory Judgment.

Amici legislators, however, argue that excluding same-sex couples from marriage furthers the state interest in promoting responsible procreation. (Leg. Br. at p.18.) They say the purpose of marriage is to regulate sexual relationships between men and women so that children born to such unions have stable families. (*Id.* at pp.7-9.) But prohibiting same-sex couples from marrying does not rationally further this interest. The choices of different-sex couples regarding procreation and marriage are not rationally affected by whether same-sex couples are permitted to marry. *See Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012) ("there is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly"); *Varnum*, 763 N.W.2d at 901-902 ("While heterosexual marriage does lead to procreation, the argument by the County fails to address the real issue in our required analysis of the objective: whether the exclusion of gay and lesbian individuals from the institution of civil marriage will result in more procreation? If procreation is the true objective, then the proffered classification must work to achieve that objective.")

Moreover, same-sex couples also have children—through assisted reproduction or adoption—and the government has just as strong an interest in

encouraging that such procreation and child-rearing takes place in the stable context of marriage. *See Varnum*, 763 N.W.2d at 902 ("Conceptually, the promotion of marriage of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation.").[10]

The legislators' brief also suggests that children are best off when raised by a mother and father who are both biologically related to them, and thus, worse off if their parents are same-sex couples. (Leg. Br. at p.8.) Even if there were any basis for this view—and there is not[11]—prohibiting same-sex couples from marrying does not rationally advance the goal of getting more children reared in dual-gendered biological parent families. It does not prevent same-sex couples

[10] In any event, marriage in New Mexico has not been limited based on an ability to procreate; it has been limited based on the sex of the partners regardless of their procreative abilities. *See*, *e.g.*, *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (encouraging procreation is not a justification for the denial of marriage to same-sex couples since "the sterile and the elderly are allowed to marry").

[11] New Mexico law rejects any preference for different-sex couples as parents over same-sex couples. See NMSA 1978 § 32A-5-11 (lesbian, gay and bisexual individuals can adopt children, including the children of their partner); *In re Jacinta M.*, 1988-NMCA-100, ¶ 12, 107 N.M. 769 (state cannot refuse to let a family member take custody of a child from foster care because of the sexual orientation of the family member); *Chatterjee*, 2012-NMSC-019 (an individual may seek a declaration that she is the legal parent of a child she has been raising together with a same-sex partner, based on her having held out the child as her own, even if she has not adopted the child).

from having children, and it does not prevent different-sex couples from procreating outside of family units or forming families where one or both parents are not biologically related to the child. And it is simply irrational to think that it encourages gay, lesbian or bi-sexual people to form intimate relationships with people of the opposite sex and have children with them. As described in the Complaint, excluding same-sex couples from marriage serves only to harm the children of same-sex couples. (Complaint, ¶¶ 54-58); *See also Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 964 (Mass. 2003) ("Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.").

In sum, under any level of constitutional scrutiny, the exclusion of Plaintiffs from marriage in New Mexico, and any denial of equal treatment of their marriages, violates their constitutional rights.

V. PROHIBITING PLAINTIFFS FROM MARRYING CAUSES THEM AND THEIR CHILDREN SIGNIFICANT HARM

The violation of Plaintiffs' constitutional rights has serious consequences for them and their families. Same-sex couples in New Mexico suffer the indignity of living under a state law that "instructs all [government] officials, and indeed all

persons with whom same-sex couples interact, including their own children, that their [relationships are] less worthy than the [relationships] of others." *Windsor*, 133 S.Ct. at 2675. Each day Petitioners deny same-sex couples access to marriage, these couples are deprived of countless legal benefits and protections under state and federal law.

For example, couples who are unable to marry are prevented under federal law from obtaining government healthcare benefits, accessing bankruptcy law protections for domestic-support obligations, filing joint tax returns, being buried together in veterans' cemeteries, and accessing certain protections under the federal penal code. *Id.* at 2694. As a matter of state law, couples' inability to marry prevents joint tax filings, increases the cost and decreases the availability of health care coverage, denies access to many pension and retirement benefits, prevents couples from obtaining community property protections that apply in separation or divorce, eliminates important inheritance rights and protections, and denies couples the right to make health care decisions for each other without the need to obtain special legal documents.[12]

[12] *See e.g.*, NMSA 1978, § 7-2-2(F); §§ 10-7C-4, 10-11-14.5, 10-11A-7, 10-12B-14, 10-12C-13; §§ 20-4-11, 20-4-12, 20-4-14; § 21-21F-3; §§ 24-7A-5, 24-12-4, 24-12A-2; § 29-4A-2; §§ 40-3-1 to -17; §§ 45-2-101 to -103, 45-2-301, 45-2-807; § 59A-22-34.

Denying New Mexican same-sex couples the right to marry or refusing to recognize their marriages also causes serious, immediate and irreparable harm to the those couples and their children. The *Windsor* Court highlighted that the government's differential treatment of same-sex couples "humiliates tens of thousands of children *now* being raised by same-sex couples." *Id.* (emphasis added). Each child in New Mexico has one childhood, and those formative years cannot be regained once they have passed. These children have a right to know that they and their families are as valued by New Mexico as every other family.

The harm to same-sex couples and their children caused by this discrimination is irreparable, and warrants prompt review and remedy by this Court. Indeed, if this Court's consideration of these critical constitutional questions is delayed for months or years, it is certain that many New Mexican couples will lose forever the opportunity to marry due to death or disability occurring during the pendency of the litigation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Issue its Writ of Superintending Control taking jurisdiction of this cause.
2. Order the following in its Writ of Superintending Control:

A. That the Final Declaratory Judgment entered by the district court is affirmed in all respects including, without limitation, its conclusion that any prohibition or limitation on the right of persons to marry on account of gender or sexual orientation violates Article II, §18 of the Constitution of New Mexico and is therefore void and of no effect.

B. That the county clerks of New Mexico are permanently enjoined and required to issue marriage licenses without regard for the gender or sexual orientation of the applicants for such licenses.

C. That this cause is remanded to the district court for consideration and adoption of a modification to the forms for a marriage license application and certificate found at NMSA 1978, § 40-10-18. The revision shall be solely and exclusively to remove gender or sexual orientation based references in those forms so that the forms comport with constitutional requirements set out in this Court's Writ. The Petitioners and all Real-Parties-in-Interest shall have thirty days to submit proposed revised forms to the district court. The district court, once satisfied that the proposed revisions comport with this

Court's ruling and in no other way alters the operation of the statute, shall enter its order modifying the Final Declaratory Judgment previously entered to include the requirement that all county clerks use the modified forms hereafter.

D. That the State of New Mexico recognize as fully valid, and on equal terms with all other marriages entered into under the laws of this state, the marriages of same-sex couples entered into pursuant to licenses issued to same-sex couples by any of the New Mexico county clerks before or during the pendency of this lawsuit.

3. Order such further relief as the Court deems proper and the law allows.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH RULE 12-504(G)

Pursuant to Rule 12-504(H) NMRA, this Response to Petition for Writ of Superintending Control complies with the type-volume limitation set forth in Rule 12-504(G)(3) NMRA. The Response was prepared using a proportionally-spaced type style or typeface (Times New Roman), and the body of the Response, as defined in Subparagraph (1) of Paragraph G of this rule, contains 5,963 words. This word-count is obtained using the word-count feature of Microsoft Office Word 2007, latest update on 1/11/13.

CERTIFICATE OF SERVICE

We hereby certify that on September 23, 2013, we emailed and mailed a copy of this Response to:

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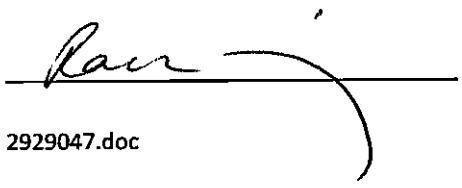

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. D-202-CV-2013-02757

ROSE GRIEGO and KIMBERLY KIEL, et al.,

Plaintiffs,

vs.

ORIGINAL

MAGGIE TOULOUSE OLIVER, et al.,

Defendants.

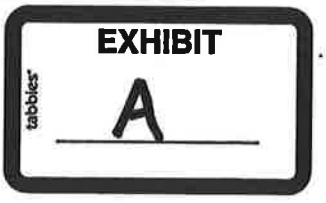
TRANSCRIPT OF PROCEEDINGS

On the 26th day of August 2013, at approximately 3:17 p.m., this matter came on for hearing on a MOTION HEARING, before the HONORABLE ALAN MALOTT, Division XV, Judge of the Second Judicial District, State of New Mexico.

The Plaintiffs, THERESE COUNCILOR, GREG GOMEZ, ROSE GRIEGO, A.D. JOPLIN, KIMBERLY KIEL, MONICA LEAMING, ANGELIQUE NEUMAN, ONA LARA PORTER, MIRIAM RAND, JEN ROPER, TANYA STRUBLE, and CECILIA TAULBEE, appeared by Counsels of Record, MAUREEN A. SANDERS and J. KATE GIRARD, 102 Granite Avenue, Northwest, Albuquerque, New Mexico 87102; LAURA SCHAUER IVES, Post Office Box 566, Albuquerque, New Mexico, 87103-0566; PETER KIERST and LYNN MOSTOLLER, Post Office Box 1945, Albuquerque, New Mexico 87103-1945.

Plaintiffs who appeared in person: Therese Councilor, Tanya Struble, Kimberly Kiel, Rose Griego, Angelique Neuman, One Porter, and Miriam Rand.

MARIE L. ENCINIAS, CCR, BAS
Official Court Reporter



MR. AUH: No, Your Honor.

THE COURT: -- as the basic facts?

MR. FUQUA: No, Your Honor.

THE COURT: So there's no dispute as to those basic facts.

Counsel indicated they may have some additional facts to stipulate to.

Ms. Ives, do you have those?

MS. IVES: Yes, Your Honor.

THE COURT: Would you like to read them into the record?

MS. IVES: Yes. Thank you, Your Honor.

The parties have agreed to stipulate to all the facts set forth in Plaintiffs' complaint. Those facts include the historical discrimination, political powerlessness. In addition to those facts, the parties have also agreed that marriage is a fundamental right, that sexual orientation is an integral part of a person's identity that has no impact on the person's ability to contribute to society and is not readily subject to change. And we have also agreed that the plaintiffs are similarly situated to different-sex couples with respect to marriage laws.

THE COURT: All right. Thank you.

MS. IVES: Thank you.

THE COURT: Anyone have any question or dispute as

to those purported stipulated facts?

Mr. Fuqua?

MR. FUQUA: No, Your Honor.

THE COURT: Mr. Schuler or Mr. Auh?

MR. AUH: Just to point out that it's the facts outlined in the Second Amended Complaint which are --

THE COURT: Right. All right. To be clear, it is the Second Amended Complaint, which was filed 8/16/2013.

Counsel, any problem with that?

MR. ROSS: No. That's fine.

THE COURT: All right. Let me just write this down.

All right. Are there -- Ms. Sanders, I'll start with you. Are there any other facts or any other evidence, documents, testimony, or otherwise that Plaintiffs would want to put on this afternoon?

MS. SANDERS: No, Your Honor.

THE COURT: All right. Mr. Auh --

MR. AUH: No, Your Honor.

THE COURT: -- anyone for County? All right.

Mr. Ross, anybody for Santa Fe County?

MR. ROSS: No, Judge.

THE COURT: Mr. Fuqua, anybody you want to put on?

MR. FUQUA: No, Your Honor.

THE COURT: All right. Then, what I'm going to do