

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

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

v.

No. D-202-CV-2013-02757

MAGGIE TOULOUSE OLIVER, in her  
official capacity as Clerk of Bernalillo County;  
GERALDINE SALAZAR, in her official capacity  
as Clerk of Santa Fe County; and  
the STATE OF NEW MEXICO,  
Defendants.

**PLAINTIFFS ROPER AND NEUMAN'S MOTION FOR TEMPORARY  
RESTRAINING ORDER OR, IN THE ALTERNATIVE, AN EXPEDITED HEARING  
FOR PRELIMINARY INJUNCTION**

PLAINTIFFS Jen Roper ("Jen") and Angelique Neuman ("Angelique"), through the undersigned counsel and pursuant to Rule 1-066 NMRA, respectfully request that this Court issue a temporary restraining order against the State of New Mexico and Geraldine Salazar ordering them to cease denying Plaintiffs a marriage license and all the attendant rights and responsibilities of marriage or set an expedited hearing for preliminary injunction requesting the same. As grounds for this motion, Plaintiffs state:

**BACKGROUND**

Jen, age 44, and Angelique, age 45, both New Mexico residents, have maintained an intimate and committed relationship of mutual protection and support for over two decades. *See* Affidavits of Jen Roper ("Roper Aff") and Angelique Neuman ("Neuman Aff") attached as Exhibits A and B, respectively. Jen and Angelique are mothers to three boys, ages fifteen,

sixteen, and eighteen. They adopted their sons twelve years ago from the state foster care system. Roper Aff at ¶ 11; Neuman Aff at ¶ 10.

Jen and Angelique have long desired to marry, in fact they have considered themselves engaged since early in their relationship, but they are unable to marry in New Mexico. Although a number of other states now recognize the freedom to marry for same-sex couples, Jen and Angelique waited to wed until their home state officially recognized and legally protected their family and commitment because they wanted more than a marriage on paper, and because they wanted to marry in front of family and friends in New Mexico. Neuman Aff at ¶19; []; Roper Aff at ¶ 19. Like most couples, Jen and Angelique believed that they had many good years ahead of them and expected the state eventually to acknowledge that their relationship and family are as important as any different-sex couple's. *Id.* at ¶ 17.

In December of 2012, however, Jen was diagnosed with the most aggressive form of brain cancer, Stage Four glioblastoma. Neuman Aff at ¶ 12; Roper Aff at ¶ 13. At that time, even with treatment, doctors gave her only an 18-month prognosis. A week later she had brain surgery and then a stroke a few days following. Roper Aff at *Id.* at ¶ ¶ 13, 15; Neuman Aff at ¶ ¶ 12, 15. The stroke resulted in right-side paralysis, memory loss, difficulty with recall, and vision impairment. Jen has stabilized for the time being, but her physical and mental capabilities will likely continue to deteriorate. Roper Aff at ¶ 15; Neuman Aff at 15. Due to her ongoing medical needs, Jen is currently undergoing in-patient treatment at an assisted living facility in Los Alamos and is unable to travel out of state to marry anywhere else.

Jen's illness has thrown the state's failure to permit the couple to marry in stark relief. Most importantly, Jen and Angelique seek official recognition of their love and commitment in the form of a legal marriage before Jen dies. In addition, Jen and Angelique seek the federal and state spousal protections afforded different-sex couples through marriage. For example,

although Jen and Angelique's sons receive Social Security disability benefits as a result of Jen's inability to work, Angelique cannot collect spousal benefits because they cannot legally marry. Also, New Mexico's death certificates have a space devoted to the marital status of the deceased. If Jen passes before the couple can wed, Jen's death certificate will not reflect the love and life she shared with Angelique. Neuman Aff at ¶ 33; Roper Aff at ¶ 31.

On August 14, 2013, Jen and Angelique appeared at the Santa Fe Clerk's office in order to try to obtain a marriage license. The couple was qualified to be married under the laws of the State of New Mexico in that they are over the age of eighteen, are not part of an existing marriage, and are not related to each other within the degrees of kinship set forth in NMSA 1978 § 40-1-7. They also had proper identification and were prepared to complete the application and pay the appropriate fee. An employee of the Santa Fe County Clerk, acting on behalf of and under the authority of the Santa Fe County Clerk, denied Jen and Angelique a marriage license because they are of the same sex or because of their sexual orientation.

It has become tragically clear that Jen may not survive the couple's twenty-year wait for New Mexico to acknowledge and honor their commitment. New Mexico's failure to recognize and protect their family has immediate and serious consequence for this couple. Before Jen dies or before her medical condition renders her unable to contract, Jen and Angelique want to get married and seek court order instructing the Santa Fe County clerk to stop denying the couple a license and the State of New Mexico to stop depriving the couple and their family the rights and benefits to which they are constitutionally entitled.

### **STANDARD OF REVIEW**

To obtain a temporary restraining order and/or a preliminary injunction, Plaintiffs must show that: (1) they will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any harm the injunction might cause the defendants; (3) issues of the

injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiffs will prevail on the merits. *See Labaldo v. Hymes*, 1993-NMCA-010, 314 N.M. 314, 318. Plaintiffs easily meet these four requirements and are therefore entitled to the requested injunctive relief.

**I. Plaintiffs Will Suffer Irreparable Injury Unless the Injunction Is Granted**

Defendants are denying Plaintiffs a fundamental right, and Plaintiffs will suffer irreparably if they continue to be denied the freedom to marry. *See Loving v. Virginia*, 388 U.S. 1 (1967). Jen may die before she and Angelique have occasion to exchange meaningful vows before their friends and family. She may die knowing that her relationship and her family are less important to the state than different-sex couples' relationships and their families. She may die before the state decides that her relationship is worthy of protection. And, if Jen dies before she is allowed to marry, her death certificate will not reflect the love and life she shared with Angelique. On the basis of those facts alone, it is difficult to overstate Plaintiffs' ongoing injury or its irreparable nature.

Further, apart from these profound affronts to Jen and Angelique's dignity, the couple is suffering significant uncertainty and financial consequence as a result of the denial of the rights and privileges of marriage at a time when they should not have to attend to such considerations. State law provides a safety net of automatic protections for spouses, covering innumerable, emergency scenarios in statute and in case law that married New Mexico couples have confronted over the course of the state's history. For example, as alleged in Plaintiffs' complaint:

Plaintiffs are denied the automatic right to make health care decisions for a spouse when the spouse cannot, including the right to withhold or withdraw life-sustaining procedures,



and Plaintiffs are denied the right afforded to spouses to have priority over all others to become the court-appointed guardian for a spouse who becomes mentally incompetent.<sup>1</sup>

Plaintiffs are denied protections afforded married couples upon the death of a spouse, such as intestacy rights permitting the surviving spouse to inherit automatically from the deceased spouse's estate; the ability of the surviving spouse to benefit from the deceased's estate even if there is a will; and the right of the surviving spouse to family and personal property allowances.<sup>2</sup>

Plaintiffs are denied the automatic right to make burial decisions and other decisions concerning the disposition and handling of remains of deceased spouses.<sup>3</sup>

Although the couple has taken what steps they can through wills and health care directives to ensure that Angelique will be able to carry out Jen's wishes in medical treatment and ultimately, death, both worry these documents cannot cover every emergency circumstance, and that Angelique and the couple's sons could be left vulnerable. Neuman Aff at ¶¶ 26-31; Roper Aff at ¶¶ 25-31. In preferencing spouses, and thereafter other relatives, the law creates significant uncertainty that the couple's decisions—covering some of the most meaningful life and death matters—will be respected in the same way that it does for couples who are able to marry.

Following the United States Supreme Court's decision in *Windsor*, Jen and Angelique are also now being denied protections under federal law.<sup>4</sup> These include, but are not limited to, the

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<sup>1</sup> See, e.g., NMSA § 24-7A-5 (spouse may make health care decisions, including the right to withhold or withdraw life-sustaining procedures, if patient has not designated a surrogate or the surrogate cannot be located); NMSA § 45-5-301 (spouse of incapacitated person may appoint guardian); NMSA § 45-5-311 (spouse of incapacitated person has priority to be appointed guardian).

<sup>2</sup> See, e.g., NMSA § 45-2-102 (surviving spouse inherits percentage of intestate estate property even if there are children); NMSA § 45-2-807 (surviving spouse entitled to one half of community property as well joint tenancy property even if there is a will); (NMSA § 45-2-402, 403 (surviving spouse entitled to family and personal property allowances that take priority over all other claims in intestate estate).

<sup>3</sup> See, e.g., NMSA § 24-12A-2 (spouse of a deceased person has priority in disposition of the deceased person's remains, absent designation); NMSA § 24-6B-9 (spouse of deceased person has authority to make anatomical gift of decedent's body or parts).

<sup>4</sup> In *Windsor*, the Supreme Court held that it is unconstitutional for the federal government to grant benefits to different-sex couples and deny those benefits to same-sex married couples. *United States v. Windsor*, 570 U.S. \_\_\_\_ (June 26, 2013), slip op. (available at [http://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf)). Those rights and benefits touch on nearly every aspect of married and family life and include: interests of property, finances, retirement, childcare, access to healthcare and healthcare decisions. *Windsor*, slip op. at 20. Failure to recognize

spousal payments that Angelique would have been eligible to receive both during Jen's disability and after her death had New Mexico allowed the couple to marry.<sup>5</sup>

Finally, if Jen passes before the couple can wed, Jen's death certificate will not reflect her relationship with Angelique as Jen could not claim marital status and Angelique's name could not be listed under "surviving spouse." State of New Mexico, Certificate of Death, New Mexico Vital Records and Health Statistics, sample attached hereto as Exhibit C . Indeed, a federal court in Ohio recently issued a temporary restraining order requiring the State of Ohio to respect the marriage of a same-sex couple who face similarly serious health circumstances to Jen and Angelique on the grounds that they would not be designated as married on the death certificate. *See Obergefell v. Kasich*, 1:13-CV-501, 2013 WL 3814262, at \*7 (S.D. Ohio July 22, 2013) ("Finally, the uncertainty around this issue during Mr. Arthur's final illness is the cause of extreme emotional hardship to the couple. Dying with an incorrect death certificate that prohibits Mr. Arthur from being buried with dignity constitutes irreparable harm. Furthermore, Mr. Arthur's harm is irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away.").

If Plaintiffs were allowed to marry today, both they and their families would enjoy the comfort of knowing that their relationship was protected by the state, and they would be able to celebrate their love and commitment to one another through the status the whole world recognizes—marriage. Moreover, they could immediately access the critical protections

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same-sex marriages "raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex families" and prevents same-sex couples from accessing "the Bankruptcy Code's special protections for domestic-support obligations." *Windsor*, slip op. at 23-24. Furthermore, for same-sex couples, Social Security benefits are "denie[d] or reduce[d] . . . upon the loss of a spouse and parent." *Windsor*, slip op. at 24.

<sup>5</sup> See 20 CFR 404.330 (wife's benefit while spouse is receiving social security disability benefits); 20 CFR 404.335 (widow's benefit after death of spouse who was on social security disability benefits); 20 CFR 404.390-91 (widow's lump sum social security benefit after death of spouse).

provided by marriage under state and federal law. Plaintiffs will lose any chance of vindicating their rights if they are forced to wait out even relatively expedient litigation: Plaintiffs do not have years; they may not have months.

## **II. The Threatened Injury Outweighs Any Harm to Defendants**

The threatened injury to Plaintiffs significantly outweighs any conceivable harm that the requested injunctive relief might cause defendant. Again, Jen may die before the state allows her to celebrate an officially recognized union with the person she has long loved and shared her life with, in front the children they raised together, their family and their friends. She may die before Angelique and their children are guaranteed the legal and financial protections the government provides to married couples. Plaintiffs' threatened injury is therefore immense, whereas any possible harm to the Defendants would be minimal.

First, the requested injunctive relief would merely change the scope of a statutory duty already imposed on Defendant Salazar. Instead of turning Jen and Angelique away and denying their license, she would accept their fee, grant the license, and record the license after the ceremony was completed. Complying with an existing statutory duty is not a harm, let alone a harm that could outweigh the significant injury threatened to Plaintiffs. It may also be the case that the application for marriage would need to be reprinted. When the reprinting of some documents is held up to Plaintiffs' harm, however, it pales.

Second, the state and its departments are also well suited to accommodate such a change. The privileges and responsibilities of marriage are well defined within its statutes and regulations, and well understood by the courts. This Court's order would simply require that following their marriage in conformance with the license issued by Defendant Salazar, Jen and Angelique's marriage be treated the same as marriages entered into by different-sex couples for all purposes in New Mexico. The ease of this transition is evidenced by the now thirteen states,

plus the District of Columbia, which allow same-sex couples to marry and which have not experienced any substantial transition-related burdens as a result.<sup>6</sup>

Third, Plaintiffs are seeking a temporary restraining order or preliminary injunction solely on behalf of themselves and in light of their unique, dire circumstances. Requiring the issuance of one marriage license for a uniquely-situated same-sex couple prior to the courts definitively deciding the constitutionality of the exclusion of same-sex couples from marriage in New Mexico, will not burden defendants. In fact, since 2004, there have been sixty-four married same-sex couples in New Mexico, and there has not been any resulting harm.<sup>7</sup>

In short, there is no real harm to Defendants resulting from granting Jen and Angelique the relief they seek, but they stand to lose a great deal if the Court does not grant the relief. See *Obergefell*, 1:13-CV-501, 2013 WL 3814262, at \*7 (“there is absolutely no evidence that the State of Ohio or its citizens will be harmed by the issuance of an order temporarily restraining the enforcement of these provisions against the Plaintiffs in this case. No one beyond Plaintiffs themselves will be affected by such a limited order at all. Without an injunction, however, the harm to Plaintiffs is severe.”).

### **III. An Injunction Would Not Be Adverse to the Public Interest**

Plaintiffs’ rights to equal treatment and due process under the law, as guaranteed by the New Mexico Constitution, have been and continue to be violated by Defendants’ refusal to issue them a marriage license and confer on them all of the attendant privileges and responsibilities of marriage. The public has an interest in ensuring that the fundamental rights our government

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<sup>6</sup> See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert granted 133 S.Ct. 786, 184 L.Ed.2d 526 (U.S. 2012) and vacated and remanded sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (U.S. 2013); Conn. Gen. Stat. Ann. § 46b-20 (West); Del. Code Ann. tit. 13, § 101 (West); D.C. Code § 46-401; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); Me. Rev. Stat. tit. 19-A, § 650-A; Md. Code Ann., Fam. Law § 2-201 (West); Minn. Stat. § 517.01; N.H. Rev. Stat. Ann. § 457:1-a; N.Y. Dom. Rel. Law Ann. § 10-a (McKinney); R.I. Gen. Laws Ann. § 15-1-1 (West); Vt. Stat. Ann. tit. 15, § 8 (West); Wash. Rev. Code Ann. § 26.04.010 (West).

<sup>7</sup> The Sandoval County Clerk granted sixty-four New Mexican couples marriage licenses in 2004 before Attorney General Madrid ordered the clerk to cease.

affords citizens are granted in a non-discriminatory manner. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383, 99 S.Ct. 2898, 2907 (1979)); *see also* *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012) (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“[W]e agree with . . . the Sixth Circuit that ‘it is always in the public interest to prevent the violation of a party’s constitutional rights.’”); *Herrera v. Santa Fe Public Schools*, 792 F.Supp.2d 1174, 1199 (D. N.M. 2011) (“A temporary restraining order would not be adverse to the public interest, because it would protect against an alleged violation of [an individual’s] constitutional right.”).

In addition to the public’s interest in preventing the violation of Plaintiffs’ constitutional rights, the public should also be interested in the health—financial and otherwise—and protection of all New Mexican families. As described above, the privileges and responsibilities of marriage provide a crucial safety net when couples and families need them most. The public has an interest in preserving and protecting couples and their families in circumstances like Jen and Angelique’s.

#### **IV. Plaintiffs Have a Substantial Likelihood of Prevailing on the Merits.**

As discussed in greater detail in Plaintiffs’ memorandum in support of this motion, Defendant’s denial to Plaintiffs of the rights and privileges of marriage clearly violates the constitutional mandate that all persons similarly situated be treated equally, the New Mexico constitutional prohibition against discrimination on the basis of gender, and New Mexicans’ right to due process of law. In fact, Defendants State of New Mexico and Bernalillo County Clerk Maggie Toulouse Oliver agree with Plaintiffs that denying same-sex couples the right to marry will likely not withstand challenge. *See* experts of State of New Mexico’s Resp. to Verified

Petition for Writ of Mandamus at 17, *Griego v. Oliver*, No. 34,227 (N.M. Aug. 12, 2013), attached hereto as Exhibit D. Defendants simply cannot state an interest, rational or otherwise, in denying Plaintiffs the freedom to marry; and therefore, Plaintiffs have a substantial likelihood of success on the merits.

**REQUEST FOR RELIEF**

Plaintiffs Jen Roper and Angelique Neuman respectfully request that this Court issue a temporary restraining order against the State of New Mexico and Geraldine Salazar ordering them immediately to cease denying Plaintiffs a marriage license and all the attendant rights and responsibilities of marriage. In the alternative, Plaintiffs Jen Roper and Angelique Neuman respectfully request that this Court set an expedited hearing for preliminary injunction, seeking the same relief.

Respectfully submitted,

SUTIN, THAYER & BROWNE  
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## DECLARATION OF JEN ROPER

I, Jen Roper, pursuant to Rule 1-011 NMRA, declare, under the penalty of perjury under the laws of the State of New Mexico, that the following is true and correct:

1. My name is Jen Roper, and I am a plaintiff in the above action. I have read the complaint filed in this action, and I can verify that all the facts contained therein are true. I submit this declaration in support of our request for a temporary restraining order or, in the alternative, a preliminary injunction.
2. I am a forty-four year old New Mexico resident. I live in Santa Fe, but have recently been residing in an assisted living facility in Los Alamos due to illness.
3. I was born in Denver, Colorado but moved to New Mexico at the age of 7. New Mexico is my home.

### Angelique's and My Relationship and Our Family

4. I first met Angelique Neuman ("Angelique") twenty-one years ago, in 1991, when we were both materials engineering students at the New Mexico Institute of Mining and Technology in Socorro.
5. Soon after we first met at a materials engineering gathering, we quickly became friends.
6. After spending more and more time together, our friendship developed into a romantic relationship. I introduced Angelique to my father within a month of dating because I was serious about her as a partner.
7. Angelique lent me her mother's engagement ring, which I wore and loved. When talking about the ring one day, the topic of marriage came up. We still cannot agree on who proposed first, but since that conversation, we have considered ourselves engaged.





8. Angelique and I have been in a strong, committed relationship ever since, and we have always wanted to get married.
9. When Angelique finished school, we moved to Los Alamos so she could take a full-time job working for Los Alamos National Labs (“LANL”). I worked full time, then part-time at LANL.
10. Several years ago, I left LANL and began working for the pueblo of Pojoaque. Most recently, I worked for the Pueblo of Pojoaque Boys and Girls Club.
11. Twelve years ago, we jointly adopted three young brothers from Children, Youth & Families Department (“CYFD”) custody. The boys are now fifteen, sixteen, and eighteen. They live with us in Santa Fe, New Mexico.
12. Angelique and I have dedicated ourselves to building a safe and nurturing environment for our three sons. Our eldest enlisted in the U.S. Army after graduating from high school. He is now in basic training.

### **My Health and Prognosis**

13. On December 19, 2012, I was diagnosed with Stage Four glioblastoma, the most aggressive form of brain cancer. I quickly went into surgery and doctors partially removed the tumor on December 24, 2012.
14. At that time, I was given an 18-month prognosis.
15. Soon after the surgery, I suffered a stroke resulting in right-side paralysis, memory loss, difficulty with recall, and vision impairment. Those issues have stabilized, but the doctors tell me my physical and mental capacities will continue to deteriorate.
16. This illness has forced me to move into an assisted living facility in Los Alamos to receive in-patient treatment and therapy. Angelique is here as often as she can be. I see

our children often as well. Throughout the challenges these last few months, we have made every effort to maintain our strong family.

17. My condition has made my desire to marry Angelique far more urgent. I may not live much longer, and I cannot wait until the state gets around to finally acknowledging the importance of my relationship. Even if we wanted to go and get married in another state, my inability to travel prevents us from doing so.

**Angelique's and My Desire to be Married in New Mexico and Our Attempt to Obtain a Marriage License**

18. New Mexico is our home. It is where I met Angelique, where we have chosen to live, raise our children, and build our lives together.
19. Travelling to a state that has legalized marriage for same-sex couples just so we could get married was never, and will never, be right for us. Our marriage would not be the same if our state did not issue or recognize it. We want to get and be married in New Mexico.
20. After being together for more than two decades, getting married would provide the respect, dignity, and recognition our relationship deserves. It is incredibly important to us and to our family.
21. On August 14, 2013, Angelique and I went to the Santa Fe County Clerk's office to try to obtain a marriage license.
22. We arrived at the Clerk's office with personal identification (drivers' licenses), and we were ready to complete the application and to pay the appropriate fee. In addition to being over the age of eighteen, I am not part of existing marriage and I am not related by blood in any way to Angelique.
23. We spoke briefly with an employee of the Clerk's office who is responsible for issuing marriage licenses, and we explained that we wanted to apply for a marriage license.

24. The employee said that she could not issue us a marriage license because we are a same-sex couple.

**Angelique and I Are Harmed by Not Being Able To Marry**

25. Angelique and I, because we are not married, are unable to access protections that spouses are provided automatically.
26. It is my understanding that state law automatically provides spouses with numerous important rights and responsibilities, including the right to make health care decisions for a spouse when the spouse cannot, including the right to withhold or withdraw life-sustaining procedures; priority over all others to become the court-appointed guardian for a spouse who becomes mentally incompetent; the right to make burial decisions and other decisions concerning the disposition and handling of remains of deceased spouses; and rights involving inheritance, if a spouse dies without a will.
27. Even before I knew I was sick, Angelique and I tried to protect our relationship and our family by entering into documents, like wills. I long ago gave Angelique my health care power of attorney, which has fortunately allowed her to make medical decisions for me in this time of crisis. I also designated Angelique as the beneficiary in my will and under my retirement plans.
28. I still worry, though, that I will not be able to ensure that Angelique makes decisions for me if I become incapacitated or after I die. Because our relationship is not officially recognized, Angelique's authority over my health and our finances could be challenged. Before I die, I very much want to make sure that I do everything I can to protect Angelique and ensure her ability to make decisions for our family.

29. I receive Social Security disability benefits, which also go to our sons as my children. Angelique, however, cannot receive certain benefits normally afforded to spouses of those on Social Security disability. In addition, Angelique will not be eligible for a social security death benefit upon my passing.
30. Getting married means much more than access to legal and financial protections. Angelique and I want to have our relationship sanctioned by the state and treated as equal, not just for our own benefit, but for our sons as well. We want them to know the strength of commitment through legal marriage. While our sons, our family, and our friends recognize and support our loving relationship, it is critical to have the government and society officially recognize our commitment.
31. If I die before Angelique and I can wed, my death certificate will be blank in the information box for "Surviving Spouse." There will therefore be no official record of the life and love Angelique and I shared.
- \*\*\*\*\*
32. I have not been given much time to live. If this process takes much time to finish, I may not be here long enough to marry Angelique. I am currently able to make important decisions for myself. If my condition continues to worsen, however, I could become incapable of entering into a marriage. Nothing would mean more to us and to our sons than to celebrate our love and commitment through legal marriage in our home, New Mexico.
33. Given my limited time, I ask the court to act quickly so that we may enjoy the respect, dignity, and recognition our relationship deserves.

Dated:

8/21/13

Jen Roper

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Jen Roper

**DECLARATION OF ANGELIQUE NEUMAN**

I, Angelique Neuman, pursuant to Rule 1-011, declare, under the penalty of perjury under the laws of the State of New Mexico, that the following is true and correct:

1. My name is Angelique Neuman, and I am a plaintiff in the above action. I have read the complaint filed in this action, and I can verify that all the facts are true. I submit this declaration in support of our request for a temporary restraining order or, in the alternative, preliminary injunction.
2. I am a forty-five year old resident of Santa Fe County, New Mexico, currently working as an engineer at Los Alamos National Laboratories (“LANL”).
3. I was born in Curaçao, an island in the Carribean Sea off of the coast of Venezuela. I moved to New Mexico in 1991, and I have lived here since. I now consider New Mexico my home.

**Jen’s and My Relationship and Our Family**

4. I first met Jen Roper (“Jen”) in 1991 when we were both materials engineering students at the New Mexico Institute of Mining and Technology in Socorro.
5. Soon after we met at a materials engineering gathering, we quickly became friends.
6. After spending more and more time together, our friendship developed into a romantic relationship. Not more than a month after we began dating, Jen introduced me to her father. Our relationship was quickly becoming more serious.
7. Early in our relationship, I lent Jen my mother’s engagement ring. One day, while talking about the ring, the topic of marriage came up. We still cannot quite agree on who proposed first, but since that conversation, we have considered ourselves engaged.



8. Jen and I have been in a committed and loving relationship ever since, and we have always wanted to get married.
9. After I finished school, we moved to Los Alamos and I began a full-time job working as an engineer at LANL. Jen worked full time, then part-time at LANL. Then she worked for about four years at the Pojoaque Pueblo Boys and Girls Club.
10. Twelve years ago we expanded our family and jointly adopted three young brothers from Children, Youth & Families Department (“CYFD”) custody. The boys are now ages fifteen, sixteen, and eighteen. They live with us in Santa Fe, New Mexico.
11. Jen and I have dedicated ourselves to building a safe and nurturing environment for our children, and we are incredibly proud of each of them. Our eldest son recently graduated from high school and enlisted in the U.S. Army to serve our country.

#### **Jen’s Health and Prognosis**

12. On December 19, 2012, Jen was diagnosed with Stage Four glioblastoma, the most aggressive form of brain cancer. Doctors partially removed her tumor on December 24, 2012.
13. Even with treatment, Jen was given only an 18-month prognosis.
14. I knew right away that our lives had changed forever, and that my time with the love of my life would be cut short.
15. Following the surgery, Jen suffered a stroke resulting in right-side paralysis, memory loss, difficulty with recall, and vision impairment. Jen has since stabilized, but her physical and mental capacities will continue to deteriorate.
16. Because of her medical needs, Jen is currently receiving in-patient treatment at an assisted living facility in Los Alamos. I spend as much time as possible, often several

hours a day, caring for and spending time with Jen. Our children visit often as well, and we have strived to maintain our strong family amidst these difficult challenges.

17. Jen's illness has created a real urgency to become married. Jen's prognosis is poor, so we likely do not have much time to get married. Jen's condition also inhibits travel. Even if we wanted to do so, we could not travel to another state to get married.

**Jen's and My Desire to be Married in New Mexico and Our Attempt to Obtain a Marriage License**

18. New Mexico is our home. It is where Jen and I found one another and where we have chosen to raise our children and build our life and family together.
19. Travelling to a state that has legalized marriage for same-sex couples just in order to get married was never right for us. Our marriage would mean less to us if our state did not issue or recognize it. We want to get and be married in New Mexico.
20. After more than two decades together, getting married would afford us the respect, dignity, and recognition our relationship deserves. It is incredibly important to us and our family.
21. On August 14, 2013, Jen and I went to the Santa Fe County Clerk's office to try to obtain a marriage license.
22. We arrived at the Clerk's office with personal identification (drivers' licenses), and we were ready to complete the application and to pay the appropriate fee. In addition to being over the age of eighteen, I am not part of existing marriage and I am not related by blood in any way to Jen.
23. We spoke briefly with an employee of the Clerk's office who is responsible for issuing marriage licenses, and we explained that we wanted to apply for a marriage license.



24. The employee said that she could not issue us a marriage license because we are a same-sex couple.
25. Even though I expected to be denied a license, I still found myself disappointed. Part of me hoped that when they saw how urgent our situation was, they would give us a license.

**Jen and I Are Harmed by Being Denied the Ability to Marry**

26. By not being able to marry, Jen and I are losing out on protections spouses are automatically provided.
27. It is my understanding that state law automatically provides spouses with numerous important rights and responsibilities, including the right to make health care decisions for a spouse when the spouse cannot, including the right to withhold or withdraw life-sustaining procedures; priority over all others to become the court-appointed guardian for a spouse who becomes mentally incompetent; the right to make burial decisions and other decisions concerning the disposition and handling of remains of deceased spouses; and rights involving inheritance, if a spouse dies without a will.
28. Jen and I have attempted to enter into various agreements to try to ensure my ability to be treated like Jen's spouse. Jen has given me a health care power of attorney, which allows me to make medical decisions on her behalf, and she has designated me as the beneficiary in her will and for the purposes of her retirement plans.
29. Despite having taken these precautions, I feel uncertain that Jen's and my wishes will always be respected when it most matters. I worry that a healthcare provider or court could decide that because I am not Jen's spouse, I do not have the authority to act out her wishes and to protect our commitment to each other and our family.

30. Under federal law, Jen and our sons receive “child” benefits as part of Jen being on Social Security Disability because she can no longer work. It is my understanding that if I had been able to marry Jen, I would as a spouse also be entitled to “wife” benefits both during Jen’s disability and after her death, as long as our youngest son is under the age of 16. It is my understanding that Social Security also provides \$255 to a spouse when the other spouse dies, and that I would be eligible for this benefit were I to marry Jen.
31. The money I could save on the Social Security death benefit I would receive if Jen dies may seem small standing alone, but they would go a long way to help our financially strained family in this time of great need.
32. The legal and financial harms Jen and I experience by not being able to get married are real, but getting married means much, much more to us than access to legal and financial protections. We want the state and our community to recognize our relationship as equal to those of different-sex couples, not just for us but for our sons. We want them to know the strength of our commitment through legal marriage. And while our sons, our family, and our friends recognize our love and long-standing relationship, to have the government and society recognize our commitment is ineffable.
33. If Jen dies before we can wed, her death certificate will not list me as surviving spouse, and there will be no official record of the love and life we shared.

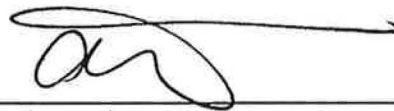
\*\*\*\*\*

34. Jen and I do not have much time. Jen has a short prognosis, and, given her deteriorating mental capacities, she may become incapable of entering into a valid marriage. I love Jen deeply and cannot fathom how I would live without her. For now, nothing would mean

more to us and our sons than to celebrate our love and commitment through legal marriage in our state, New Mexico.

35. Given our limited time, I ask the court to act quickly so that our family may enjoy the respect, dignity, and recognition or relationship deserves.

Dated: 8/21/13

A handwritten signature in black ink, appearing to be 'AN', written over a horizontal line.

Angelique Neuman

**STATE OF NEW MEXICO  
CERTIFICATE OF DEATH**

New Mexico Vital Records and Health Statistics  
State of New Mexico  
United States of America

This document is not authentic unless reproduced on safety paper displaying the Raised Seal of New Mexico

The back of this document contains an artificial watermark • Hold at angle to view.

DECEDENT'S LEGAL NAME [REDACTED]		IF FEMALE, MAIDEN NAME [REDACTED]	
DATE OF DEATH [REDACTED]	TIME OF DEATH [REDACTED] AM <input type="checkbox"/> PM <input checked="" type="checkbox"/>	SEX [REDACTED]	SOCIAL SECURITY NUMBER [REDACTED]
MARITAL STATUS [REDACTED]	SURVIVING SPOUSE - If wife, maiden name [REDACTED]		
DATE OF BIRTH [REDACTED]	BIRTH PLACE [REDACTED]	SERVED IN U.S. ARMED FORCES [REDACTED]	
DECEDENT'S RACE [REDACTED]	TRIBE [REDACTED]	HISPANIC [REDACTED]	
DECEDENT'S RESIDENCE COUNTY [REDACTED]		DECEDENT'S RESIDENCE STATE [REDACTED]	
MOTHER'S FULL MAIDEN NAME [REDACTED]		FATHER'S FULL NAME [REDACTED]	
METHOD OF DISPOSITION <input type="checkbox"/> Burial <input type="checkbox"/> Donation <input type="checkbox"/> Removal from State <input type="checkbox"/> Cremation <input type="checkbox"/> Entombment <input type="checkbox"/> Other (Specify): [REDACTED]		DISPOSITION LOCATION [REDACTED]	
FUNERAL SERVICE FACILITY [REDACTED]		COUNTY OF DEATH [REDACTED]	
PLACE OF DEATH [REDACTED]	TYPE OF PLACE [REDACTED]	NAME OF PERSON CERTIFYING CAUSE OF DEATH [REDACTED]	
MANNER OF DEATH <input checked="" type="checkbox"/> Natural <input type="checkbox"/> Accident <input type="checkbox"/> Homicide <input type="checkbox"/> Suicide <input type="checkbox"/> Undetermined <input type="checkbox"/> Pending Investigation			
CAUSE OF DEATH			
PART I. Events such as diseases, injuries, or complications that directly caused the death.			
a.	[REDACTED]		
b.	[REDACTED]		
c.	[REDACTED]		
d.	[REDACTED]		
PART II. Other significant conditions contributing to death.			
[REDACTED]			



File Number: [REDACTED]  
 File Date: [REDACTED] 2010  
 Order Number: [REDACTED]

*Mary Anne Escudero*, State Registrar



**CERTIFIED COPY OF VITAL RECORD**  
 This is a true and exact reproduction of all or part of the document officially registered and filed with the New Mexico Vital Records and Health Statistics, Public Health Division, Department of Health.

DATE ISSUED \_\_\_\_\_



**WARNING: IT IS ILLEGAL TO ALTER, COPY OR COUNTERFEIT THIS CERTIFICATE.  
 ADVERTENCIA: ES ILEGAL ATERAR, COPIAR O FALSIFICAR ESTE CERTIFICADO.**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**NO. 34,227**

**ROSE GRIEGO, KIMBERLY KIEL,  
MIRIAM RAND, ONA LARA PORTER,  
A.D. JOPLIN, GREG GOMEZ, THERESE  
COUNCILOR, TANYA STRUBLE, SARAH  
ADAMS, CHRISTINE HAYWARD, ANDREW  
GANS and RONNIE CHAVEZ,**

Petitioners,

v.

**MAGGIE TOULOUSE OLIVER, in her  
official capacity as Clerk of Bernalillo County,  
and STATE OF NEW MEXICO,**

Respondents.

SUPREME COURT OF NEW MEXICO  
FILED

AUG 12 2013



**STATE OF NEW MEXICO'S RESPONSE TO  
VERIFIED PETITION FOR WRIT OF MANDAMUS**

New Mexico's guarantee of equal protection to its citizens demands that same sex couples be permitted to enjoy the benefits of marriage in the same way and to the same extent as other New Mexico citizens. In the face of that guarantee, New Mexico's statutes governing marriage prohibit the issuance of a marriage license – and thereby the benefits of marriage itself – to same sex couples. Nonetheless, the Court should carefully consider whether mandamus is the appropriate vehicle for providing the relief Petitioners seek.



## ARGUMENT AND AUTHORITY

There is no doubt that Article II, § 18 of the New Mexico Constitution requires the State to treat equally any of its citizens seeking legal recognition of their marriage, and that any statutory scheme interfering with that guarantee of equality is flatly unconstitutional. Moreover, there is little doubt that the New Mexico statutes governing the legal institution of marriage do not permit the issuance of a marriage license to a same sex couple. There is, however, substantial doubt as to whether the issues raised in the Petition are properly resolved by exercise of this Court's mandamus power. This Response analyzes each of these propositions in order, concluding that (1) it is unconstitutional to deny same-sex couples the benefits of legal marriage; (2) that New Mexico's statutes do, in fact, prohibit such marriages, and (3) that mandamus is not the appropriate vehicle for making these legal determinations.

### **I. DENYING THE INSTITUTION OF MARRIAGE TO SAME SEX COUPLES VIOLATES THE NEW MEXICO CONSTITUTION.**

Because of authority from other courts favoring equal protection analysis, *see, e.g., United States v. Windsor*, 570 U.S. \_\_\_, \*20 (June 26, 2013); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), this Response analyzes New Mexico's prohibition of same-sex

marriage only under Article II, § 18 of the New Mexico Constitution. As fleshed out in detail below, the prohibition is unconstitutional.

Under both the New Mexico and U.S. Constitutions, no person shall be denied “equal protection of the laws[,]” *see* N.M. CONST. art. II, sec. 18, U.S. CONST. amend. XIV, “which is essentially a direction that all persons similarly situated be treated alike.” *State v. Rotherham*, 1996-NMSC-48, 122 N.M. 246, 254, 923 P.2d 1131, 1139 (citation omitted).

This Court has interpreted the Equal Protection Clause of the New Mexico Constitution to afford greater rights than its federal counterpart. In *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413, this Court expressed that it would “interpret the New Mexico Constitution’s Equal Protection Clause independently when appropriate,” concluding that our state constitution “affords rights and protections independent of the United States Constitution.” (internal quotation marks omitted); *accord Rodriguez v. Scotts Landscaping*, 2008-NMCA-46, ¶ 9, 143 N.M. 726, 181 P.3d 718 (acknowledging the approach articulated in *Breen*); *Chapman v. Luna*, 102 N.M. 768, 769-70, 701 P.2d 367, 368-69 (1985) (stating that the New Mexico and U.S. Constitutions “constitute independent rights and protections”); *but see Valdez v. Wal-Mart Stores*, 1998-NMCA-30, ¶ 6, 124 N.M. 655, 657 (“[w]e have interpreted the Equal

Protection Clauses of the United States and New Mexico Constitutions as providing the same protections”) (internal quotation marks omitted). As will be discussed in more depth below, the *Breen* Court acted on this approach by applying a sensitive class (*i.e.*, heightened scrutiny) designation to the mentally disabled, 2005-NMSC-28, ¶ 14, a departure from a U.S. Supreme Court decision declining to assign heightened scrutiny to people with mental disabilities. *See City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985).

Review of an equal protection challenge involves three analytical steps. *See Breen*, 2005-NMSC-28, ¶¶ 10, 11, 33. First, the “threshold question in analyzing all equal protection claims is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly.” *Id.*, ¶ 10. Assuming the threshold barrier is surmounted, the court must next “determine what level of scrutiny should apply to the challenged legislation.” *Id.*, ¶ 11. Finally, the court must apply the applicable level of scrutiny to the State’s proffered rationale for the challenged policy.

**A. Because Gay and Lesbian New Mexicans Seeking the Right to Marry Share Many of the Same Characteristics as Opposite-Sex Couples, the two Groups are “Similarly Situated” for Purposes of an Equal Protection Analysis.**

At issue in the instant matter is the legislation codified in Chapter 40 of the New Mexico statutes which functions to preclude same-sex couples from



marrying, as is fleshed out in Section II below. *See* NMSA 1978, §§ 40-1-1 to -4-20. Thus, the question for purposes of this analysis is whether same-sex couples seeking to marry are similarly situated to opposite-sex couples doing the same thing.

In other jurisdictions considering this precise question, it has been widely held that same-sex couples are similarly situated to opposite-sex couples. In Connecticut, for instance, the state Supreme Court concluded that same-sex couples wishing to marry are similarly situated to opposite-sex couples because same-sex couples “can meet the same statutory eligibility requirements,” share the “same interest in a committed and loving relationship,” and share the “same interest in having a family and raising their children in a loving and supporting environment.” *Kerrigan*, 957 A.2d at 424. Likewise, the Iowa Supreme Court, while emphasizing that “no two...groups of people are the same in every way,” noted that the “plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples.” *Varnum*, 763 N.W.2d at 883. Finally, the California Supreme Court concluded that a contention challenging the similarly-situated status of same-sex couples “clearly lack[ed] merit,” because “[b]oth groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords

the same rights and privileges and imposes the same obligations and responsibilities.” *In re Marriage Cases*, 183 P.3d 384, 436 (Cal. 2008).

This reasoning is persuasive and accords with the protections Article II, § 18 provides to New Mexico citizens. There is little question that same-sex couples are similarly situated to opposite-sex couples with respect to the right to marry.

**B. For Purposes of the New Mexico Constitution, Gays and Lesbians Are a Sensitive Class and New Mexico’s Prohibition of Same-Sex Marriage is Therefore Subject to Intermediate Scrutiny.**

Because of the building universe of authority subjecting to intermediate scrutiny classifications targeting gays and lesbians for disparate treatment in marital rights (and the relative dearth of authority in support of applying strict scrutiny), the Attorney General submits that intermediate scrutiny is appropriate in this case. *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 169, 185 (2nd Cir. 2012), *aff’d* 570 U.S. \_\_\_ (2013).

New Mexico courts employ intermediate scrutiny to review legislative 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, 982 P.2d 503 (citation omitted). The burden rests with the party supporting the legislation, who must establish that “the state action

is substantially related to an important government interest.” *Breen*, 2005-NMSC-28, ¶ 13.

In *Breen*, this Court set forth a New Mexico-specific approach to identifying the presence of a sensitive class for purposes of intermediate scrutiny. “[I]ntermediate 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.” *Breen*, 2005-NMSC-28, ¶ 21. Subsequent court decisions have broken out these criteria into discreet elements, namely: (1) a long history of societal discrimination against the group, (2) systematic denial of the group from the political process, and (3) discrimination against the group for reasons beyond its members’ control. *See Scotts Landscaping*, 2008-NMCA-46, ¶ 16.

**i. Gays and Lesbians Have Endured a Long History of Discrimination in New Mexico and Throughout the United States.**

As with the mentally disabled, found by both the *Breen* and *Cleburne* Courts to be targets of historical discrimination, gay New Mexicans have historically been subjected to laws that resulted in discrimination against them. In fact, 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). On multiple occasions, the courts of New Mexico flatly rejected arguments that consensual same-sex sexual relations constituted constitutionally protected conduct. *See, e.g., Washington v. Rodriguez*, 82 N.M. 428, 431, 483 P.2d 309, 312 (Ct. App. 1971); *State v. Sanchez*, 85 N.M. 368, 371, 512 P.2d 696, 699 (Ct. App. 1973). New Mexico is hardly exceptional in waiting until 1975 to repeal an anti-sodomy law. To wit, "until the Supreme Court's [2003] decision in *Lawrence v. Texas*, it was not unconstitutional under the Fourteenth Amendment for a state to enact legislation making it a crime for two consenting adults of the same sex to engage in sexual conduct in the privacy of their home." *Conaway v. Deane*, 932 A.2d 571, 610 (Md. 2007).

Perhaps in recognition of this past discrimination, the New Mexico legislature has promulgated remedial legislation to protect gay New Mexicans. *See Varnum*, 763 N.W.2d at 890 ("statutory enactments [protecting gays and lesbians against discrimination] demonstrate a legislative recognition of the need to remedy historical sexual-orientation-based discrimination"). Among those protections, most prominent is the bar on discrimination against gays and lesbians in matters of employment, housing, and public accommodations. *See* NMSA 1978,

§ 28-1-7. However, these anti-discrimination measures were not passed until 2003, after multiple failures to enact the protections in 1991, 1993, 1997, 1999, and 2001. See Brad Sears, New Mexico – Sexual Orientation and Gender Identity Law and Documentation of Discrimination 7 (The Williams Institute 2009), available at <http://www.escholarship.org/uc/item/63k8x206>.

The remedial legislation adopted to protect lesbians and gays illustrates the ongoing discrimination against them. As the Supreme Court noted in *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973), with respect to women by reference to the 1964 Civil Rights Act and ERA, and the *Breen* court noted with respect to the mentally disabled by reference to laws enacted to “ensure better living standards” for the mentally disabled, 2005-NMSC-28, ¶¶ 25, 27, the legislature’s enactment of Section 28-1-7 “show[s] the continuing need that mentally disabled persons have for protection from societal discrimination.” *Id.* As such, there is a largely uncontroverted basis on which to conclude that gays and lesbians in New Mexico have suffered a long history of societal discrimination adequate to warrant a sensitive class designation.

orientation as “purely behavioral.” *See Pedersen*, 881 F. Supp. 2d at 324-325. The Supreme Court has since expressly “rejected the artificial distinction [set forth in *Bowers*] between status and conduct in the context of sexual orientation.” *Pedersen*, 881 F. Supp. 2d at 324-325. As a consequence, the “precedential underpinnings of those cases declining to recognize homosexuality as an immutable characteristic have been significantly eroded.” *Id.* at 325.

The facts and law thus support the conclusion that gays and lesbians constitute a sensitive class for purposes of equal protection analysis under the New Mexico constitution. Intermediate scrutiny is thus appropriate.

**C. Applying Intermediate Scrutiny Reveals that New Mexico’s Prohibition on Gay Marriage is an Invalid Classification that Violates Article II, § 18.**

Applying intermediate scrutiny to the rationale supporting the prohibition on same-sex marriage demonstrates its unconstitutionality. Due to the nature of mandamus proceedings, no rationales are advanced here to defend New Mexico’s statutory prohibition on same-sex marriage. It is nonetheless possible to glean some generic understanding of how such an analysis would proceed based upon rationales advanced in similar adjudications elsewhere.

Two such rationales appear to have emerged prominently: (1) that same-sex marriage undermines procreation by undermining the institution of marriage;

*Varnum*, 763 N.W.2d at 899, 901-02; *Abercrombie*, 884 F. Supp. 2d at 1106; and (2) that same-sex marriage undermines morality and tradition. *Pedersen*, 881 F. Supp. 2d at 341-42.

Notions that tradition or morality are adequate rationales to sustain prohibitions on same-sex marriage have generally not weathered constitutional review. As a multitude of courts have maintained, the imprimatur of “tradition,” without more, is an empty argument that serves to maintain a discriminatory classification for “its own sake.” *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996); *Kerrigan*, 957 A.2d at 478. Equal protection plainly prohibits status-based classifications absent the presence of at least a legitimate government interest that bears at least a rational relationship to the challenged classification. *See Romer*, 517 U.S. at 365. That rationale 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 cannot survive constitutional scrutiny. *See Romer*, 517 U.S. at 635; *Varnum*, 763 N.W.2d at 898. Arguments based on “morality” are vulnerable to similar attacks. As the *Lawrence v. Texas* court made clear, without any additional asserted state interest, “[m]oral disapproval of [homosexuals] ... is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” 539 U.S. 558,

582. Thus, without supplemental rationales, tradition or morality-based arguments do not constitute an adequate basis to maintain a discriminatory classification.

The argument that allowing same-sex marriage imperils optimal procreation by opposite-sex couples likewise fails. Under this formulation, “responsible” or “optimal” procreation occurs when the mother and the father raise their offspring within the confines of a marriage. *Abercrombie*, 884 F. Supp. 2d at 1112-13; *Varnum*, 763 N.W.2d at 899.

While it is generally undisputed that encouraging procreation registers as both a legitimate and important governmental interest, *see, e.g., Conaway*, 932 A.2d at 630, it is less clear that this interest is substantially related to prohibiting gay marriage. When employing heightened scrutiny, no court has found the necessary substantial relationship to uphold a classification discriminating against gays and lesbians. *See, e.g., Varnum*, 763 N.W.2d at 899; *In re Marriage Cases*, 183 P.3d at 431-32. In *Varnum*, for instance, 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.