IN THE SURPEME COURT OF THE STATE OF NEW MEXICO

No. 34,306

ROSE GRIEGO and KIMBERLY KIEL,
MIRIAM RAND and ONA LARA PORTER,
A.D. JOPLIN and GREG GOMEZ,
THERESE COUNCILOR and TANYA STRUBLE,
MONICAL LEAMING and CECELIA TAUBLEE, and
JEN ROPER and ANGELIQUE NEWMAN,

Plaintiffs-Real Parties in Interest,

v.

MAGGIE TOLOUSE OLIVER,
in her official capacity as Clerk of Bernalillo County, and
GERALDINE SALAZAR,
in her official capacity as Clerk of Santa Fe County,

Defendants-Real Parties in Interest,

and

STATE OF NEW MEXICO, ex rel.,
NEW MEXICO ASSOCIATION OF COUNTIES,
as the collective and organizational representative of
New Mexico's thirty-three Counties, and
M. KIETH RIDDLE,
in his official capacity as Clerk of Catron County,
DAVE KUNKO,
in his official capacity as Clerk of Chaves County,
ELISA BRO,
in her official capacity as Clerk of Cibola County,
FREDA L. BACA,
in her official capacity as Clerk of Colfax County,
ROSALIE L. RILEY,
in her official capacity as Clerk of Curry County,

ROSALIE A. GONZALES-JOINER,
in her official capacity as Clerk of De Baca County,
LYNN M. ELLINS,
in his official capacity as Clerk of Doña Ana County,
DARLENE ROSPRIM,
in her official capacity as Clerk of Eddy County,
ROBERT ZAMARRIPA,
in his official capacity as Clerk of Grant County,
PARTICK Z. MARTINEZ,
in his official capacity as Clerk of Guadalupe County,
BARBARA L. SHAW,
in her official capacity as Clerk of Harding County,
MELISSA K. DE LA GARZA,
in her official capacity as Clerk of Hidalgo County,
PAT SNIPES CHAPPELLE,
in her official capacity as Clerk of Lea County,
RHONDA B. BURROWS,
in her official capacity as Clerk of Lincoln County,
SHARON STOVER,
in her official capacity as Clerk of Los Alamos County,
ANDREA RODRIGUEZ,
in her official capacity as Clerk of Luna County,
HARRIETT K. BECENTI,
in her official capacity as Clerk of McKinley County,
JOANNE PADILLA,
in her official capacity as Clerk of Mora County,
DENISE Y. GUERRA,
in her official capacity as Clerk of Otero County,
VERONICA OLGUIN MAREZ,
in her official capacity as Clerk of Quay County,
MOISES A. MORALES, JR.,
in his official capacity as Clerk of Rio Arriba County,
DONNA J. CARPENTER,
in her official capacity as Clerk of Roosevelt County,
DEBBIE A. HOLMES,
in her official capacity as Clerk of San Juan County,
MELANIE Y. RIVERA,
in her official capacity as Clerk of San Miguel County,

EILEEN MORENO GARBAGNI,
in her official capacity as Clerk of Sandoval County,
CONNIE GREER,
in her official capacity as Clerk of Sierra County,
REBECCA VEGA,
in her official capacity as Clerk of Socorro County,
ANNA MARTINEZ,
in her official capacity as Clerk of Taos County,
LINDA JARAMILLO,
in her official capacity as Clerk of Torrance County,
MARY LOU HARKINS,
in her official capacity as Clerk of Union County,
PEGGY CARBAJAL,
in her official capacity as Clerk of Valencia County,

Intervenors-Petitioners,

and

HON. ALAN MALOTT,

Respondent.

RESPONSE OF THE HONORABLE ALAN MALOTT TO VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL

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 statutory governing marriage deny those benefits to same sex couples. That unequal treatment violates Article II, § 8 of the New Mexico Constitution, and this Court should so declare.

I. RESPONDENT MADE NO ERROR IN HIS ORDER.

This Court exercises broad power in the context of its superintending control over inferior tribunals. "The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise." *Albuquerque Gas & Elec. Co. v. Curtis*, 1939-NMSC-024, 43 N.M. 234, 236, 89 P.2d 615, 616. While the writ normally issues to correct an erroneous decision of a lower court, it is not limited to that function. It is also appropriate where it is "necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense." *State ex rel. Transcon. Bus Serv. v. Carmody*, 1949-NMSC- 047, 53 N.M. 367, 378, 208 P.2d 1073, 1080.

The issue on which Respondent ruled is one of pressing constitutional significance, and one that has generated significant uncertainty among those officials charged with the issuance of marriage licenses. As discussed below, Respondent made no error in his ruling on that issue.

II. PORTIONS OF NEW MEXICO'S STATUTORY SCHEME GOVERNING MARRIAGE DENY THE BENEFITS OF MARRIAGE TO SAME-SEX COUPLES.

There are five articles in Chapter 40 of the New Mexico Statutes Annotated that touch directly on the marital relationship: articles 1, 2, 3, 3A, and 4. These statutes employ a mix of gender-neutral and gender-specific references. All told,

sixty-one provisions in those articles use either gender-neutral or gender-specific terminology.[1] Of those provisions, fourteen of them describe the parties to a marriage – and the parties holding legal rights as a consequence of marriage – as "husband" and "wife."[2] Those provisions touch on a broad array of legal rights accompanying marriage, from the obligations spouses have to one another (Section 40-2-1) to the presumption that property acquired during the marriage is community property (Section 40-3-12) to the ability of a court to make an allowance from the separate property of one spouse for payment of spousal support to the other (Section 40-4-12). One provision, NMSA 1978, § 40-1-7, prohibits incestuous marriages using gender-specific terms such as "brothers," "sisters," "uncles," "nieces," "aunts," and "nephews."

Several more provisions employ gender-neutral terminology. Perhaps most significantly, NMSA 1978, § 40-1-1 "defines" marriage by declaring that it "is contemplated by the law as a civil contract, for which the consent of the

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1 Several do not deal directly with spousal issues. For example, NMSA 1978, § 40-1-2 describes the parties with the legal authority to "solemnize" a marriage.

2 Those provisions are NMSA 1978, §§ 40-1-7, and -18, 40-2-1, -2, -3, and -8, 40-3-1, -2, -3, -8(B), and -12, and 40-4-3, -12, -14, and -20(A). Two provisions, Sections 40-3-8 and 40-4-20, alternatively employ gender-neutral and gender-specific terms in different places.

contracting parties, capable in law of contracting, is essential."[3] *See State v. Lard*, 1974-NMCA-004, 86 N.M. 71, 74, 519 P.2d 307, 310 ("'[m]arriage'" is a civil contract requiring a license"). Many other pertinent provisions also employ gender-neutral terminology, such as using the terms "person" or "applicant" to describe the individual parties to a marriage, *see* NMSA 1978, §§ 40-1-5, -6, -8, -11, & 20, or the terms "parties" or "couple" to refer to the marital couple. *See* NMSA 1978, §§ 40-1-9, -10, & -20. Respondent's interpretation of Section 40-1-1 as not prohibiting same-sex marriage is correct, but for purposes of Article II, § 18, that cannot end the inquiry.

Why? Because of the number of provisions defining the rights of married couples that do use gender-specific terms, describe the marital relationship as one between "husband" and "wife." *See* Black's Law Dictionary, (9th ed. 2009) (defining "husband" as a "married man," defining "wife" as a "married woman."). As described above, those provisions impact a significant number of the legal rights reserved to married couples. Indeed, NMSA 1978, § 40-3-1 states in relevant part that the "property rights of husband and wife are governed by"

3 It is worth noting, however, that Section 40-1-18, which sets forth the marriage license application form that is to be used substantially by the County Clerks, contains sections for "male applicant" and "female applicant."

Chapter 3. Read expansively, that would appear to limit ***all*** of the property rights of married couples to opposite-sex couples only.

Thus, while Section 40-1-1 may speak in gender-neutral terms, those substantive provisions that describe the legal rights of married couples frequently speak in gender-specific terms. As a result, a same-sex couple married pursuant to Section 40-1-1 would not enjoy the same legal benefits as those enjoyed by opposite-sex couples. That unequal treatment demands redress by this Court.

III. DENYING THE BENEFITS OF MARRIAGE TO SAME-SEX COUPLES VIOLATES ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION.

If equal protection of the law means anything in this context, it means that all married couples are entitled to the same legal recognition of their union. They are entitled to the same marriage licenses, the same disposition of their property, and the same means of dissolving their marital bonds should they choose to do so. Those statutes that, as described above, would reserve only for opposite-sex couples the legal benefits of marriage are unquestionably unconstitutional.

Virtually every recent judicial consideration of this issue has proceeded through an 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). The same analysis is applicable here.

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 held 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*, 1985-NMSC-055, 102 N.M. 768, 769-70, 701 P.2d 367, 368-69 (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 on the topic where that court declined to assign heightened scrutiny to the mentally "retarded." *See City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985).

The review of an equal protection challenge generally 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 legislature creates a class of similarly situated individuals who are treated dissimilarly." *Id.*, ¶ 10. Assuming this threshold is met, 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. *See id.*

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 denies to same-sex couples the legal benefits of marriage. *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 pursuant to Chapter 40 are similarly situated to opposite-sex couples doing the same thing.

In jurisdictions outside of New Mexico considering this precise question, it has been widely held that with respect to the institution of marriage, 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. Simply put, same-sex couples are similarly situated to opposite-sex couples with respect to the right to marry.

B. Gays and Lesbians Demonstrate the Characteristics of a Sensitive Class and New Mexico's Statutory Scheme Denying Many Benefits of Marriage to Same-Sex Couples 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*, 1971-NMCA-021, 82 N.M. 428, 431, 483 P.2d 309, 312; *State v. Sanchez*, 1973-NMCA-101, 85 N.M. 368, 371, 512 P.2d 696, 699. 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*, 932 A.2d at 610.

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.

Like other states, New Mexico long outlawed and prosecuted individuals for engaging in same-sex intimate relations. 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" to protect gays and lesbians "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.

ii. Gays and Lesbians Lack Sufficient Political Power to Gain the Right to Marry Through Majoritarian Political Processes.

The political powerlessness analysis inquires whether the group alleging unequal treatment can remedy discrimination through majoritarian political processes. *Breen*, 2005-NMSC-28, ¶ 19 ("a politically powerless group has no independent means to protect its constitutional rights"). If the group does possess adequate political power, then the courts will demur, and allow the political process to function. Underlying this inquiry is the notion of judicial restraint and the preference of the courts to stand aside and allow the political process to function without judicial intrusion. *See Sevcik v. Sandoval*, 911 F. Supp. 2d 996, *44-*45 (D.Nev. Nov. 26, 2012) ("political power is the factor that speaks directly to whether a court should take the extreme step of removing from the [p]eople the ability to legislate in a given area").

Despite the moniker "political powerlessness," a group need not be completely politically impotent to warrant a sensitive class designation. *See Breen*, 2005-NMSC-28, ¶ 29 (noting the political gains of the mentally disabled while still applying sensitive class protection to the group). Rather, the relevant rubric applied in a number of same-sex marriage cases has been whether the group is situated politically so as to affect a "prompt end to the prejudice and discrimination through traditional political means." *See Kerrigan*, 957 A.2d at 444; *see also Varnum*, 763 N.W.2d at 894 (characterizing this promptness standard as the

"touchstone" of the political powerlessness inquiry); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2D 294, 329 (D.Conn. 2012). Finally, the *Breen* Court also evinced approval for a standard of "relative" political powerlessness. 2005-NMSC-28, ¶ 28. In finding that the mentally disabled warranted suspect class designation, this Court took care to highlight the political gains of the group, while still recognizing that past political gains could be scuttled by ongoing and persistent discrimination. *Id.*

Despite the legislative strides noted above, majoritarian processes have largely failed to yield the right for same-sex couples to marry. Though a number of states have extended marital rights to same-sex couples in recent years, a decisive majority of states have failed to furnish that right. Washington and California are the only western states to recognize same-sex marriages. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1077-1078 (D. Haw. 2012). In fact, according to *Abercrombie*, only five states have legalized same-sex marriage through a majoritarian political process[4] and thirty-eight states continue to retain constitutional or statutory prohibitions on same-sex marriage. *Id.* With respect to the issue of same-sex unions, the legislature has repeatedly failed to enact legislation that would grant rights and recognition to same-sex domestic

4 Since *Abercrombie* was published, Maine has become the sixth state to legalize gay marriage through popular political processes.

partnerships, *see* S.B. 576, 47th Leg., 1st Sess. (2005); H.B. 603, 48th Leg., 1st Sess. (2007); H.B. 9, 48th Leg., 2nd Sess., (2008); H.B. 21, 49th Leg., 1st Sess. (2009); S.B. 183, 49th Leg., 2nd Sess. (2010), much less grant the right to gays and lesbians to marry.[5] Gays and lesbians in New Mexico are sufficiently "politically powerless" for the purposes of the *Breen* suspect class analysis.

iii. Because Sexual Orientation is an Integral Aspect of One's Identity, Same-Sex Orientation is an Immutable Characteristic Beyond a Person's Control.

The third and final factor in the *Breen* sensitive class analysis concerns whether "discrimination against the group [occurs] for reasons beyond its members' control." *See Scotts Landscaping*, 2008-NMCA-46, ¶ 16. This inquiry centers on whether the characteristic giving rise to the discriminatory conduct is an immutable one.

In many of the cases addressing the immutability of same-sex orientation in the equal protection context, courts have not focused on whether a person may, in the strictest sense, change same-sex orientation, but have instead assessed the

5 In the 2013 New Mexico legislative session, House Joint Resolution 3, which would have put the issue of legalizing same-sex marriage before the voters in the form of a proposed constitutional amendment, failed during the committee process. *See* H.J.R. 3, 51st Leg., 1st Sess. (N.M. 2013). However, it is also noteworthy that past efforts to explicitly define marriage as solely between a "man" and a "woman" have also failed in the state legislature. Such proposals have failed on at least four occasions. *See* H.B. 47, 48th Leg., 2nd Sess. (N.M. 2008); S.J.R. 1, 49th Leg., 2nd Sess. (N.M. 2010); H.J.R. 7, 50th Leg., 1st Sess. (N.M. 2011); H.J.R. 4, 51st Leg. 1st Sess. (N.M. 2013).

extent to which sexual orientation is central to a person's identity and therefore highly insusceptible to change. Several courts have concluded that same-sex identity is an immutable characteristic. *See, e.g., Kerrigan*, 957 A.2d at 438 ("[b]ecause sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so"); *In re Marriage Cases*, 183 P.3d at 442 ("[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment"); *Varnum*, 763 N.W.2d at 893 (same). As one judge neatly summarized, "it would be abhorrent for government to penalize a person for refusing to change" a characteristic that is "so central to a person's identity." *See Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989), 875 F.2d at 726 (Norris, C.J., concurring).

Although there is certainly disagreement, the weight of scholarly and legal authority appear to increasingly support the conclusion that same-sex orientation is an immutable characteristic. As a federal district court explained in 2012, many of the courts who concluded that sexual orientation was not immutable relied heavily upon the U.S. Supreme Court's "conceptualization" in *Hardwick v. Bowers*, 478

U.S. 186 (1986), of sexual 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 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. New Mexico's Marriage Statutes Treating Same-Sex Couples Differently Than Opposite-Sex Couples Do Not Survive Intermediate Scrutiny.

Applying intermediate scrutiny to the rationale supporting the denial of the benefits of marriage to same-sex couples demonstrates its unconstitutionality. Although several rationales have been advanced in other jurisdictions in opposition to same-sex marriage, two 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 merely 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 unlikely to 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 same-sex 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.

In sum, these rationales – and those similar to them – would be subject to rejection under the intermediate scrutiny standard articulated in *Breen*. As such, the current statutory prohibition on same-sex marriage under NMSA 1978, Chapter 40 is in violation of the Equal Protection Clause of the New Mexico Constitution.

D. There Is No Rational Basis for Treating Same-Sex Couples Differently Than Opposite-Sex Couples.

As discussed above, "tradition" is not a sufficient basis for the differential treatment of same-sex couples. Nor is moral disapproval of homosexuality or the alleged incapacity to raise children. There is ultimately no rational basis on which to treat same-sex couples differently than opposite-sex couples, particularly under New Mexico's heightened rational basis standard, which requires "a factual foundation in the record to support the basis [for the differential treatment] or a firm legal rational to support the basis." *Corn v. N.M. Educ. Fed. Credit Union*, 119 N.M. 199, 203, 889 P.2d 234, 238 (Ct. App. 1994); *accord Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 114 P.3d 1050. For the same reasons that such treatment fails intermediate scrutiny, it fails the rational basis test as well: there is neither a "factual foundation" nor a "firm legal rational" that justifies treating same-sex couples differently than opposite-sex couples in the marital context.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court issue its writ of superintending control to declare the denial of marriage licenses and the legal benefits of marriage to same-sex couples unconstitutional under Article II, § 18 of the New Mexico Constitution.

Respectfully submitted,

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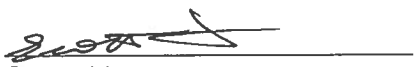
CERTIFICATE OF COMPLIANCE

As required by Rule 12-504(H) NMRA, I certify that this brief is proportionally spaced and the body contains 4,371 words. The brief was prepared using OpenOffice 3.2.1.

Scott Fuqua

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on counsel for Petitioners via First Class Mail on September 23, 2013.



Scott Fuqua