**IN THE NEW MEXICO SUPREME COURT**

**Case No. 34,216**

**ALEXANDER HANNA AND YON HUDSON,**

**Petitioners,**

**v.**

**GERALDINE SALAZAR, IN HER OFFICIAL CAPACITY AS SANTA FE COUNTY CLERK,**

**Respondent.**

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# BRIEF OF AMICI CURIAE NEW MEXICO STATE LEGISLATORS[1] IN SUPPORT OF RESPONDENT

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## STATEMENT OF COMPLIANCE

As required by Rule 12-504(H) NMRA, we certify that this brief complies with the type-volume limitation of Rule 12-504(G)(3) NMRA. According to Microsoft Office Word 2007, the body of this brief, as defined by Rule 12-504(G)(1) NMRA, contains 4,851 words.

## TABLE OF AUTHORITIES

***New Mexico Cases:***



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## INTRODUCTION

Over the course of the last decade or so, our Nation has been involved in a great debate about whether to redefine the age-old and vitally important institution of marriage to include same-sex couples. That question—which implicates the most profound social, philosophical, religious, moral, political, and legal values of the People—is an issue over which people of good will disagree.

And as to the definition of marriage, the People's democratic institutions are now fully engaged. Twelve States, plus the District of Columbia, have decided to redefine marriage. The rest have decided to maintain the traditional definition of marriage as the union of a man and a woman. The public debate continues throughout the Nation, and the world. And this is as it should be. The Supreme Court's recent *Windsor* decision underscored the importance of "the formation of consensus" within "a discrete community" for deciding what marriages the community will recognize. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

The Petitioners, though, wish to use this Court to cut off the democratic debate. They have asserted that a requirement of one man, one woman marriage violates the state constitution. Yet no institution has been more universally practiced by common consent—not only throughout the history of this Nation, but until little more than a decade ago, everywhere and always—than that of marriage as a union between man and woman. This fact alone precludes Petitioners'

remarkable claim that the traditional definition of marriage is unconstitutional. To the contrary, a social institution that has prevailed continuously in our history and traditions and virtually everywhere else throughout human history – with nearly universal support from politicians, courts, philosophers, and religious leaders of all stripes – can justly be said to be rational *per se*. And we submit that countless New Mexicans of goodwill have opted in good faith to preserve the traditional definition of marriage because they believe it continues to meaningfully serve important societal interests, and they cannot yet know how those interests will be affected if marriage is fundamentally redefined.

There is no warrant in precedent or precept for invalidating marriage as it has existed in New Mexico for all of its history, as it was universally understood throughout this Nation (and the world) until just the last decade, and as it continues to be defined in the overwhelming majority of States and Nations—and in diverse philosophical and religious traditions—throughout the world.

Neither the United States nor the New Mexico Constitution mandates the traditional gendered definition of marriage. But neither condemns it, either. This Court, accordingly, should allow the public debate in New Mexico regarding marriage to continue through the democratic process.

## SUMMARY OF ARGUMENT

Clearly established New Mexico precedent dictates that this Court should not entertain the Petitioners' request for a writ of mandamus. Mandamus lies only where an official's "duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 89 N.M. 313, 316, 551 P.2d 1360, 1363 (1976). That standard is not met here.

As an initial matter, there is no clear duty constraining New Mexico county clerks to issue marriage licenses to same-sex couples, as a proper mandamus action would require. New Mexico statutory law defines marriage in opposite-sex terms. For instance, it requires "male" and "female" applicants and the signatures of the "bride" and "groom." Similarly, this Court has defined marriage as a one man, one woman relationship, opining that "marriage is a civil contract between three parties—the husband, the wife, and the State." *Merrill v. Davis*, 100 N.M. 552, 554, 673 P.2d 1285, 1287 (1983) (quotation marks and citation omitted). It simply cannot be said that the clerks' "duty to perform [the issuance of marriage licenses to only opposite-sex couples] is clearly enjoined by law." Rather, the opposite is true: the current state of the law clearly requires New Mexico clerks to *only* issue marriage licenses to opposite-sex couples. Thus, mandamus is inappropriate and this Court should not consider the petition. *See infra*, Part I.A.

Mandamus is also inappropriate in this matter because there are "other adequate means to attain the desired relief," mandamus is inappropriate. *See State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 93, 149 N.M. 330, 248 P.3d 878. The Petitioners are free to challenge the constitutionality of New Mexico's marriage laws in the lower courts, where an evidentiary record can be developed. Indeed: both sets of Petitioners originally filed suit in the trial court but subsequently filed this mandamus action before litigation had gotten underway. By doing so, Petitioners try to short-circuit the normal process and ask this Court to settle the matter prematurely. Because mandamus does not lie where, as here, there are "other adequate means to attain the desired relief," this Court should not entertain the petition. *See infra*, Part I.B.

In addition to not presenting a petition for mandamus that meets this Court's requirements for such an extraordinary writ, the Petitioners have not presented reasons requiring that this Court should find New Mexico's marriage law unconstitutional. Contrary to the Petitioners' contention, neither the Equal Rights Amendment nor principles of equal protection require New Mexico to recognize same-sex marriage. *See infra*, Part II.

Almost every court to address whether laws requiring opposite-sex marriage constitute sex discrimination has flatly rejected the claim. Rather, they have held that marriage laws that prohibit men and women equally from marrying a person of

the same sex, but do not single out men or women as a class for disparate treatment, do not discriminate on the basis of sex. And this Court has ruled that laws that do not discriminate against one sex in favor of the other do not violate the Equal Rights Amendment. Additionally, the public records at the time the Amendment was being debated reveal that no one equated it with same-sex marriage. In fact, it was expressly said that such amendments would not require same-sex marriage. As a result, the Petitioners' reliance on the Equal Rights Amendment is misplaced. *See infra*, Part II.A.

Similarly, principles of equal protection do not support the Petitioners' argument that this Court should declare New Mexico's marriage laws unconstitutional. Equal protection does not require the State to ignore the biological difference between men and women. Marriage in New Mexico is a private promise between a man and a woman with a public purpose of responsible procreation. And the State has an interest in increasing the likelihood that children will be born and raised in stable and enduring family units by their own mothers and fathers. Thus, it regulates the institution of marriage. Because relationships between persons of the same sex do not have the capacity to produce children, they do not implicate this interest in responsible procreation and childrearing in the same way. *See infra*, Part II.B.

## ARGUMENT

### I. The Court Should Not Entertain The Petition for Writ of Mandamus.

"This Court has repeatedly observed that the writ of mandamus is an extraordinary remedy to be reserved for extraordinary circumstances." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 93, 149 N.M. 330, 248 P.3d 878. It should not be used as a vehicle for litigants to ask this Court to wade into matters prematurely. Rather, "since before statehood this Court has required (1) that a party seeking issuance have no other adequate means to attain the desired relief, and (2) the duty sought to be enforced is clear and indisputable." *Id.* Consequently, mandamus lies only where an official's "duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 89 N.M. 313, 316, 551 P.2d 1360, 1363 (1976). Mandamus therefore is "an extraordinary remedy which is available only in cases wherein other remedies fail or are inadequate." *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 20, 140 N.M. 77, 140 P.3d 498.

The Petition for Writ of Mandate before the Court in this matter fails to meet this Court's standard for granting such extraordinary relief for two reasons. First, it is not clear that same-sex marriage is authorized by New Mexico law such that clerks have a "clear and indisputable" duty to issue marriage licenses to same-sex

couples. Rather, New Mexico law seems to make "clear" that lawful marriage requires a man and a woman. *See infra*, Part I.A. Second, there is "other plain, speedy and adequate remedy in the ordinary course of law" available to the petitioners. So this is not a case where "other remedies fail or are inadequate." *See infra*, Part I.B. This Court should therefore not entertain the Petition, but should dismiss it.

### A. Clerks Do Not Have "Clear and Indisputable" Duty to Issue Same-Sex Marriage Licenses, So Mandamus Is Inappropriate.

There is no "clear and indisputable" duty constraining New Mexico county clerks to issue marriage licenses to same-sex couples, as this Court requires for the issuance of writs of mandamus. *See State ex rel. King*, 2011-NMSC-004, ¶ 93. If anything, it appears clear and indisputable that clerks have a duty to *not* issue marriage licenses to same-sex couples. Mandamus is therefore inappropriate.

#### 1. Statutory Law Defines Marriage in Opposite-sex Terms.

New Mexico law defines marriage in opposite-sex terms. For example, the law requires that all applications for marriage licenses be substantially the same as the uniform marriage license application form enacted by the state legislature. NMSA 1978 § 40-1-17 (1961). The uniform marriage license application form refers to a "Bride" and a "Groom," and requires both a "Male Applicant" and a "Female Applicant." NMSA 1978 § 40-1-18 (1961). The uniform application form does not allow for two male applicants or two female applicants. The Marriage

Certificate also requires the signature of a "Bride" and "Groom." *Id.* Thus, a same-sex couple is not eligible for a marriage license in the state of New Mexico, and county clerks have no "clear duty" to issue such licenses.

Additionally, New Mexico law describes the rights and responsibilities of married couples in terms of husbands and wives, and *only* in those terms. So we find statutes requiring that the "[h]usband and wife contract toward each other obligations of mutual respect, fidelity and support." NMSA 1978 § 40-2-1 (1907). And "[t]he property rights of husband and wife are governed by" the law applicable to property rights. NMSA 1978 § 40-3-1 (1907). Indeed, the "[h]usband and wife may hold property as joint tenants, tenants in common or as community property." NMSA 1978 § 40-3-2 (1907). "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." NMSA 1978 § 40-3-3 (1907). Community property cannot be made liable for any debts resulting from a contract of indemnity "unless both husband and wife sign the contract of indemnity." NMSA 1978 § 40-3-4 (1965).

The "Community Property Act," NMSA 1978 §§ 40-3-6 to -8, as amended through 1990), meanwhile, defines "community property" to mean "property acquired by either or both spouses during marriage which is not separate property[,]" and then immediately notes that "[p]roperty acquired by a husband and wife by an instrument in writing whether as tenants in common or joint tenants

or otherwise shall be presumed to be held as community property . . . ." NMSA 1978 § 40-3-8(B) (1990). Thus, we see that "spouses" and "husband and wife" are parallel, synonymous expressions for the same two people. *See id.*

Significantly, the Community Property Act describes its purpose as "to comply with the provisions of Section 18 of Article 2 of the constitution of New Mexico;" that is, the Equal Rights Amendment, by "making the provisions of the community property law of New Mexico apply equally to all persons regardless of sex." NMSA 1978 § 40-3-7 (1975). Yet the framers of the law thought nothing untoward about recognizing that "spouses" were a "husband and wife." § 40-3-8(B). Obviously, eradicating discrimination on the basis of sex, and complying with the provisions of the Equal Rights Amendment, does not require the creation of genderless marriage.

This Court has held that state constitutional provisions, and state statutes, are to be given the meaning that the legislature intended to give them at the time of enactment, and new meanings may not be poured into them. *See, e.g.*, *In re Generic Investigation into Cable Television Servs. in N.M.*, 103 N.M. 345, 348, 707 P.2d 1155, 1158 (1985) ("In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers. . . . [A] court may not broaden the scope of constitutional provisions beyond their intent . . . .") (internal citations omitted); *see also Montoya v. City of Albuquerque*, 82 N.M. 90, 94, 476

P.2d 60, 64 (1970) ("A statute must be interpreted as the Legislature understood it at the time it was enacted"). Neither the framers of the New Mexico Constitution, the authors of its marriage laws, nor the proponents of the Equal Rights Amendment would have contemplated that marriage in New Mexico was available to same-sex couples. In any event, it is certainly not true that county clerks have a "clear and indisputable" duty to issue marriage licenses to same-sex couples such that mandamus would be appropriate.

### 2. This Court's Holdings Define Marriage in Opposite-Sex Terms.

Not only does statutory law define marriage in terms of one man, one woman, but this Court's rulings do as well. For instance, this Court has noted that "[w]e agree with the court, in *Hewitt v. Hewitt*, 77 Ill.2d 49, 31 Ill.Dec. 827, 394 N.E.2d 1204 (1979), where it stated: '[M]arriage is a civil contract between three parties—the husband, the wife, and the State.'" *Merrill v. Davis*, 100 N.M. 552, 554, 673 P.2d 1285, 1287 (1983).

Both statutory and case law contemplate marriage as being only the union of one man and one woman. Tellingly, the Community Property Act, the purpose of which was to eliminate discrimination on the basis of sex, likewise contemplates marriage as requiring both a male and a female partner. It is erroneous to suggest that New Mexico county clerks have a "clear and indisputable" duty under New Mexico law to issue marriage licenses to same-sex couples. A petition for writ of

mandamus directing the clerks to issue such marriage licenses is therefore inappropriate, *see State ex rel. King*, 2011-NMSC-004, ¶ 93, so this Court should not consider it.

### B. Petitioners Have "Other Adequate Means to Attain the Desired Relief," So Mandamus Is Inappropriate.

Additionally, because Petitioners have "other adequate means to attain the desired relief," mandamus is inappropriate. *See id.* The Petitioners desire a declaration that New Mexico law requiring one man, one woman marriage is unconstitutional. They should seek that relief in the trial courts, so that the State has opportunity to conduct an evidentiary hearing to demonstrate its interest in the law, and so that a record can be developed for this Court's review. *See New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 (1998) (even where heightened scrutiny applies, the State gets the opportunity to demonstrate its interest).

Each set of Petitioners originally their filed actions in the trial courts. *See Griego v. Oliver*, D-202-CV-2013-02757; *Hanna v. Salazar*, D-0101-CV-2013-01525. Neither case has yet been litigated, or even answered. The fact that they filed in the court below demonstrates that the Petitioners have "other adequate means to attain the desired relief." Besides, this Court is not a fact-finding court, and there has not been an evidentiary record created below. If this Court agrees to hear this mandamus petition, it will authorize the opening of the floodgates for

every challenge to New Mexico law to be brought in this Court as an original action. Public policy counsels against such a result.

It might be that the Petitioners' challenge to the constitutionality of the state marriage law will ultimately be heard by this Court. But now is not the proper time for this Court to take up these arguments. Because the trial courts are capable of granting the relief the Petitioners seek, this Court should not entertain extraordinary petitions for writ of mandamus. *See State ex rel. King*, 2011-NMSC-004, ¶ 93.

## II. If the Court Entertains This Petition, It Should Deny It.

In addition to not presenting a petition for mandamus that meets this Court's requirements for such an extraordinary writ, the Petitioners have not presented reasons requiring that this Court should find New Mexico's marriage law unconstitutional.

### A. Defining Marriage As One Man, One Woman Does Not Violate the Equal Rights Amendment.

The New Mexico Equal Rights Amendment (the "ERA"), in pertinent part, provides, "Equality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18.

The Legislature has always understood that defining marriage as one man, one woman does not run afoul of the Equal Rights Amendment. As already noted, the Legislature enacted the Community Property Act, §§ 40-3-6 to -8, "to comply

with the provisions of [the Equal Rights Amendment]." NMSA 1978 § 40-3-7 (1975). And in that Act, the Legislature used the terms "both spouses" and "husband and wife" synonymously. *See* NMSA 1978 § 40-3-8(B) (1990).

Indeed, New Mexico's marriage law does not run afoul of the ERA because it is gender-neutral. That is, opposite-sex marriage laws do not discriminate on the basis of sex because they treat men and women equally: each man or woman may marry one person of the opposite sex, and each man or woman is prohibited from any other marital relationship. This conclusion is borne out by the weight of case law from other jurisdictions, the interpretation of the ERA by New Mexico courts, and public records of the understanding of the ERA at the time it was enacted.

### 1. Most Courts Have Found That Opposite-Sex Marriage Does Not Constitute Sex Discrimination.

Almost every court to address whether laws requiring opposite-sex marriage constitute sex discrimination has flatly rejected the claim. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 598 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 988 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11(N.Y. 2006); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 876-77 (2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004); *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Dean v. Dist. of Columbia*, 653 A.2d 307, 363 n.2 (D.C. 1995) (Steadman, J., concurring); *Singer v. Hara*, 522 P.2d 1187, 1192

(Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).[2]

Typical of these decisions is the Vermont Supreme Court, which held that its marriage laws "do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker*, 744 A.2d at 880 n.13. Similarly, the California Supreme Court rejected a sex discrimination challenge to the state's marriage statutes by noting that "[i]n drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes do not treat men and women differently." *In re Marriage Cases*, 183 P.3d at 436. Rather, "[p]ersons of either gender are treated equally and are permitted to marry only a person of the opposite gender. . . . [so] the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex as that concept is commonly understood." *Id.*

This Court should follow the weight of other court decisions and decline to recognize marriage law requiring one man and one woman to be sex discrimination.

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[2] *But see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (finding, without citing authority for the proposition, that that a claim of sexual orientation discrimination "is equivalent to a claim of discrimination based on sex" because "[s]exual orientation discrimination can take the form of sex discrimination.").

### 2. This Court's ERA Jurisprudence Reveals That The ERA Does Not Require Same-Sex Marriage.

As this Court recognized, "not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination." *Johnson*, 1999-NMSC-005, ¶ 38. Consequently, a threshold requirement of a valid claim under the ERA is that the challenged classification discriminates against one sex in favor of the other. *Id.* So a law that "singles out for less favorable treatment a gender-linked condition that is unique to women" violates the ERA. *Id.* ¶ 47. But a university rule banning opposite-sex persons from visiting in bedrooms of sex-segregated residence halls did not violate the ERA, because it treated male and female students equally. *Futrell v. Ahrens*, 88 N.M. 284, 288, 540 P.2d 214, 218 (1975). Similarly, an alimony statute that "treats husband and wife with exact equality in all its provisions" does not violate the ERA. *Schaab v. Schaab*, 87 N.M. 220, 223, 531 P.2d 954, 957 (1974).

New Mexico's opposite-sex marriage requirement is like the requirement that only women be allowed in sex-segregated college dorms considered in *Futrell*. It treats men and women equally. In *Futrell*, any woman could enter the women's residence hall, but no man could. Similarly, any man could enter the men's residence hall, but no woman could. And the *Futrell* Court upheld that restriction against a challenge pursuant to the ERA because it treated men and women equally. New Mexico's marriage law, meanwhile, allows any man to marry any

woman, and any woman to marry any man, subject to the age and kinship requirements. This treats men and women equally and does not impermissibly discriminate against one sex in favor of the other. Consequently, it does not violate the ERA.

### 3. The History of the ERA Suggests That Opposite-Sex Marriage Does Not Constitute Sex Discrimination.

Additionally, the history of the passage of the ERA leads to the conclusion that those who passed it did not contemplate it requiring same-sex marriage. Paul Benjamin Linton, Esq., *Same-Sex Marriage and the New Mexico Equal Rights Amendment*, 20 Geo. Mason U. Civ. Rts. L.J. 209 (2010). Mr. Linton has ably researched the public record at the time of the ERA's passage. He notes that the "record includes commentary by constitutional experts on the purpose and effect of the proposed amendment, scholarly studies undertaken to evaluate the likely impact of the amendment on state law, newspaper accounts of the debate over the equal rights amendment in the legislature, and the contemporary public understanding of the amendment, as reflected in newspaper articles, editorials and letters to the editor." *Id.* at 222.

Nowhere in the record is there the slightest indication that the framers intended to legalize same-sex marriage, or thought that the ERA required same-sex marriage. *Id.* at 222-230. Rather, the record indicates that it was thought that the ERA would have no effect on one man, one woman marriage. For example, when

the ERA was being proposed, it was noted in the Albuquerque Journal and several other state newspapers that the ERA was very similar to the federal equal rights amendment. *Id.* at 227 (*citing* Bill Feather, *Women's Rights First State Amendment on Ballot*, Albuquerque J., Oct. 8, 1972, at F6; Bill Feather, *3 Constitution Changes Faces [sic] NM Voters Nov. 7*, The (Santa Fe) N.M., Oct. 8, 1972, at A-4; Bill Feather, *Three Constitutional Amendments Offered*, Portales News Trib., Oct. 8, 1972, § 1, at 8). Likewise, in a debate held a short time before the vote to ratify the ERA, New Mexico State Senator I.M. (Ike) Smalley said that the amendment was "very similar" to the proposed federal equal rights amendment. *See* Leah Jean Clutter, *Rhetoric Flows During ERA Debate at City Hall*, Deming Graphic, Oct. 30, 1972, at 7. This comparison to the federal equal rights amendment is significant because the principal Senate sponsor of the federal equal rights amendment—Senator Birch Bayh—acknowledged that the amendment would not mandate recognition of same-sex marriage by the states. Linton, *supra*, at 228 (*citing* 118 Cong. Rec. 9331 (1972) (statement of Sen. Bayh) ("stating that the federal equal rights amendment would not affect the authority of the states to prohibit same-sex marriages so long as the prohibition applied to both men and women")).

As already noted, state constitutional provisions must be given the meaning that the legislature intended to give them at the time of enactment, and new

meanings may not be poured into them. *In re Generic Investigation*, 103 N.M. at 348, 707 P.2d at 1158 ("In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers. . . . [A] court may not broaden the scope of constitutional provisions beyond their intent . . . .") There is no evidence suggesting that the framers and proponents of the Equal Rights Amendment contemplated that marriage in New Mexico was available to same-sex couples. In fact, the evidence suggests just the opposite.

Finding that the ERA requires same-sex marriage would be contrary to the weight of courts that have considered the question and would pour into the ERA a meaning that the framers did not intend. It also would contradict this Court's jurisprudence by establishing an ERA violation in the absence of discrimination against one sex in favor of the other. If this Court reaches the question, it should therefore find that the ERA does not require that the State allow same-sex marriage.

### B. Defining Marriage As One Man, One Woman Does Not Violate Equal Protection Principles.

Additionally, defining marriage as one man, one woman does not violate equal protection principles. The first task in evaluating an equal protection claim is to identify the precise classification at issue. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973). By defining marriage as the union of man and woman, societies throughout history have drawn a line between opposite-

sex couples and all other types of relationships, including same-sex couples. This is the precise classification at issue here, and it is based on an obvious difference between same-sex and opposite-sex couples: the natural capacity to create children, which as a matter of indisputable biological fact requires both a man and a woman. This distinction goes to the heart of society's traditional interest in regulating intimate relationships.

Given this undeniable biological difference, the traditional definition of marriage satisfies equal protection under any standard of review, for even when heightened scrutiny applies, "[t]he Constitution requires that [a State] treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). And "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

Throughout human history, societies have regulated sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, an animating purpose of marriage is to increase the likelihood that children will be born and raised in stable and enduring family units by their own mothers and fathers. Because relationships between persons of the same sex do not have the capacity to produce

children, they do not implicate this interest in responsible procreation and childrearing in the same way. Equal protection does not require the State to ignore this difference. *See, e.g.*, *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001).

Redefining marriage as a genderless institution would work a profound change in an institution critical to the stable progression of society from generation to generation. Principles of Equal Protection Clause does not require the State to disregard reasonable concerns that this profound change, by severing any inherent connection between marriage and the creation and nurture of the next generation, could impair the ability of marriage to serve this critical societal function.

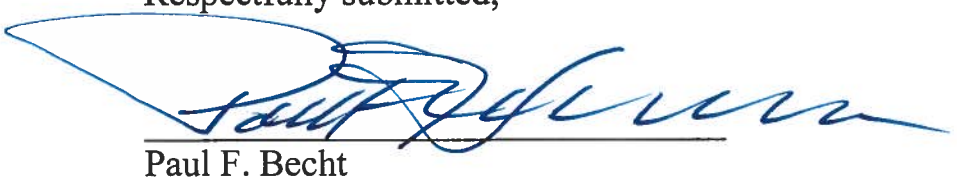
Redefining marriage would affect not only same-sex couples but all members of society. By democratically choosing to maintain marriage as the union of one man and one woman, the People of New Mexico demonstrate their continued belief that this matter is best resolved by the People themselves, not by their courts. The Equal Protection Clause does not prohibit the People of New Mexico – or of any State – from making this choice. To the contrary, it leaves them free to do what they are doing – debating this controversial issue and seeking to resolve it in a way that will best serve their families, their children, and, ultimately, their society as a whole.

## CONCLUSION

For these reasons, amici respectfully request that this Court deny Petitioners' request for a writ of mandamus and leave the debate over the definition of marriage to the People of New Mexico and their democratic processes.

Date: July 19, 2013

Respectfully submitted,



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SUBSCRIBED AND SWORN TO before me this 19th day of July, 2013.

NOTARY PUBLIC Maria Sifert

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My commission expires: 2/28/2015