IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 34,216

ALEXANDER HANNA and YON HUDSON,

Petitioners,

v.

GERALDINE SALAZAR, in her official Capacity as Santa Fe County clerk,

Respondent.

RESPONSE TO VERIFIED PETITION FOR WRIT OF MANDAMUS

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-504(G),(H) NMRA, I certify that this brief is proportionally spaced, was prepared using Microsoft Word 2010 in Times New Roman typeface, and its body contains 5,832 words.

Willie R. Brown

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response to Verified Petition for Original Writ in Mandamus* that was filed on July 22, 2013 was served on July 22, 2013, by hand delivery to:

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COMES NOW GERALDINE SALAZAR (hereafter, "the County Clerk" or "Santa Fe County Clerk"), who by and through her counsel, Willie Brown, Assistant County Attorney, hereby responds to the Verified Petition for Writ of Mandamus.

SUMMARY OF PETITIONERS' STATEMENT OF FACTS AND LAW

According to the Petition, Petitioners are two unrelated male residents at least 18 years of age of Santa Fe County, who allege to be long-term partners and seek to marry one another. Further, the Petition alleges that on June 6, 2013, Petitioners applied for a marriage license to marry one another which was denied by the County Clerk on the basis that they are both males. Petitioners claim that

county clerks have a mandatory, non-discretionary duty to issue marriage licenses to applicants able to contract and who are at least 18. They also allege that the denial violated Article II, § 18 of the New Mexico Constitution.

ARGUMENT AND AUTHORITIES

I. MANDAMUS ISSUED BY THE SUPREME COURT THROUGH ITS ORIGINAL JURISDICTION LIES ONLY AGAINST STATE OFFICERS, BOARDS AND COMMISSIONS.

A. A COUNTY CLERK IS NEITHER A STATE OFFICER, BOARD, OR COMMISSION.

Petitioners seek to invoke the Supreme Court's original jurisdiction under Article VI, § 3 of the New Mexico Constitution to address the matters complained of in the Petition. Yet Art. VI, § 3 provides that "[t]he supreme court shall have original jurisdiction in quo warranto and mandamus against all *state officers, boards and commissions,* and shall have a superintending control over all inferior courts..." (emphasis added) The County Clerk is not a state officer and is certainly not a board or commission. Therefore original jurisdiction in this Court appears to be in question.

County clerks, who must reside in the district/political subdivision that they represent, are local elected officials, not state officers. See N.M. Const. Art. V, § 13; N.M. Const. Art. VI, Sec. 22 ("A county clerk shall be elected in each county..."); NMSA 1978, §§ 4-44-4 (Listing county officers and their salaries.), 4-

40-3 ("The county clerk shall be *ex-officio* clerk of the board of county commissioners, shall attend the sessions of the board in person..."). The numerous county-related duties of county clerks are set forth in various articles in Chapter 4 ("Counties"), Chapter 1 ("Elections") and Chapter 14 ("Recording") of state law.

Statutes carefully distinguish between local officials such as county clerks and "state officers." See *e.g.* NMSA 1978, §§ 10-8-3 (distinction between "local public body" and the state and further distinction between public officers of the state and a "local public body"), 10-7E-7 (distinction between state and officials "at the local level"), and 10-11-2(P)(distinction between "the state" and a "county"). The Legislature recently broadened the reach of the Governmental Conduct Act, but preserved the distinction between an "elected or appointed official or employee of a state agency *or local government agency*." **ATTACHMENT A** (Excerpts of bill only.) NMSA 1978, § 10-16-2 (G), (I) and (K), enacted by Laws 2011, ch. 138, § 2, introduced by Senate Bill 432.[1] See also *State v. Maestas*, 2007-NMSC-001, ¶ 11, 140 N.M. 846 (Concluding that the 1993 compilation of § 10-16-2 (G), expressly excluded judges from the definition of public officer in a case involving the conviction of a municipal judge for five

[1] Link is to SB 432 on the Legislature's website for the 2011 Regular Session. Site was last visited on 7/2/13.
http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=S&LegType=B&LegNo=432&year=11

felony counts); *see* further the more recent attempted passage of a State Ethics Commission Act, in which House Bill 190 sought to narrow the application of the proposed law to, *inter alia*, a "state official," defined as "a person elected to an office of the executive or legislative branch of the state or a person appointed to a state agency." **ATTACHMENT B** (Excerpts of bill only.)[2]

The distinction between local and state officers is also clear in the differing methods used to discipline them. For example, in addressing who were "state officers" in a case involving application of Article IV, §§ 35 and 36 of the Constitution prescribing impeachment of state officers, this Court considered Article V, § 5, which authorizes the Governor to "...appoint all officers whose appointment or election is not otherwise provided for and may remove any officer appointed by him unless otherwise provided by law..." *State ex rel. Ulrick v. Sanchez*, 1926-NMSC-060, 32 N.M. 255. *Ulrick* distinguished between appointed state officials who could be summarily removed from office by the Governor and elected state officials who could only be removed by impeachment. Compare *State ex rel. King v. Sloan*, 2011-NMSC-020, 149 N.M. 620 (Where this Court ruled from the bench in an original-jurisdiction *quo warranto* action and removed a PRC

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[2] Link is to HB 190 on the Legislature's website for 2013. Site last visited on 7/2/13.http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=H&LegType=B&LegNo=190&year=13.

commissioner from office because of her felony convictions.); accord *Ward v. Romero*, 17 N.M. 88, 100 (S.Ct. 1912) ("[T]he district attorney under the constitution, is a State officer..."). *Ulrick* recognized that appointed state officers can be summarily removed by the Governor and elected state officers may be impeached by the Legislature pursuant to Article IV, §§ 35 and 36 of the State Constitution. Compare N.M. Const. art. VI, § 33.

The County Clerk, as an elected *county* official, is neither subject to summary removal from office by the Governor, nor subject to impeachment by the Senate. Instead, the County Clerk, like all elected county officers, is subject to removal from office only after recall pursuant to Article VI, § 22, or under the detailed procedures of NMSA 1978, §§ 10-4-1 to 10-4-29. See § 10-4-1 ("Any county...officer, may be removed from office on any of the grounds mentioned in this chapter and according to the provision hereof.").

Because the district courts have *exclusive original jurisdiction* in cases of mandamus (*see* NMSA 1978, § 44-2-3), there are few reported mandamus cases brought under this Court's original jurisdiction and none where a local official was the respondent. See, e.g., *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562; *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 6, 86 N.M. 359; *State ex rel Shepard v. Mechem,* 1952-NMSC-105, 56 N.M 762; *State v. Marron,* 1913-NMSC-092, 18 N.M. 426; *State ex rel. King v. Sloan, infra* and *New Energy*

Economy, Inc. v. Martinez, 2011-NMSC-006, 149 N.M. 207; see N.M. Const. art. VI, § 13; NMSA 1979, § 44-2-3. This suggests that the Court's original jurisdiction is very sparingly exercised only over state officials.

Instead of attempting to invoke this Court's original jurisdiction over local officials, which is not warranted by the Constitution, the Petitioners should have brought their action in district court under the district court's original jurisdiction. *See* NMSA 1978, § 44-2-3. To extend this Court's original jurisdiction as apparently proposed will set a negative precedent, expose local governments, including those located in areas of the State remote to Santa Fe, to petitions filed in this Court rather than in a local district court, and expose this Court to an indeterminate number of such petitions. The impact of such an expansion of this Court's original jurisdiction could be significant. Petitions pertaining to the personnel actions of sheriffs and taxation decisions of assessors could be filed daily.

B. THE GREAT PUBLIC IMPORTANCE DOCTRINE IS A RULE OF STANDING, NOT OF JURISDICTION, AND CANNOT BE USED TO CONFER ORIGINAL JURISDICTION CONTRARY TO THE CONSTITUTION.

The great public importance doctrine, cited by Petitioners, cannot be used as apparently suggested to confer jurisdiction on this Court absent some other independent basis for jurisdiction. The great public importance doctrine is a rule of *standing*; Petitioners appear to have standing to bring their claims, so the reason

for citation to the doctrine is unclear. *See ACLU v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471, where petitioners could not demonstrate any injury in fact under the mandamus statute and thus had no standing. *See also* NMSA 1978, § 44-2-5.

Moreover, the great public importance doctrine only applies to litigants seeking to establish standing "...as an overarching exception to all of these general standing requirements, allowing this Court to reach the merits of a case even when the traditional criteria for standing are not met, either by an individual or an organizational plaintiff." *ACLU, id.* at ¶ 12; accord *State ex rel. Sego v. Kirkpatrick, infra.* (A private party may vindicate the public interest in cases presenting issues of great public importance even though the party may not have standing.) Most noteworthy, when conferring standing under this doctrine, this Court seeks issues that implicate the very integrity and functioning of state government, considerations which are not present here. *See ACLU, id.* at ¶ 34, quoting *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 35, 130 N.M. 368 ("'this case involves nothing more than a potential violation of certain specific citizens' due process rights, and therefore does not rise to the level of a clear threat to the essential nature of government.'"); compare *State ex rel. Coll v. Johnson, infra.* (involving a clear threat to the essential nature of state government guaranteed by the State Constitution); *State ex rel New Mexico Voices for Children, Inc. v.*

Denko, 2004-NMSC-011, 136 N.M. 39 (attempting to cease enforcement of the Concealed Handgun Carry Act); *Cobb v. State Canvassing Bd.*, *infra.* (concerning certification of the results of the general and presidential election); *State ex rel. Clark v. Johnson*, *infra.* (Indian gaming compact entered into directly by the Governor raised separation of powers issue); *Gunaji v. Macias*, 2001-NMSC-028, 130 N.M. 734 (an election case implicating the State Constitution's guarantee of free and open elections); *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, 132 N.M. 282 (earlier attack on the validity of the Concealed Handgun Carry Act); *New Energy Economy, Inc. v. Martinez*, *infra.* (Governor's and cabinet secretary's suspension of rule-filing of a pending rule raised separation of powers issue); and *State ex rel. Stewart v. Martinez*, 2011-NMSC-045 (the partial veto of a bill by the Governor resulting in an unworkable piece of legislation held unconstitutional).

The great public importance doctrine has no bearing here because standing does not appear to be an obstacle, at least not in the district court, but more significantly, as noted, this Court reserves use of the doctrine for issues that implicate the very functioning of state government. Even assuming *arguendo* that this Court considered the issues framed by Petitioners as properly invoking the doctrine under some as yet unrecognized theory of "great public importance," it still could not hear the case because the Constitution limits mandamus in this Court as lying only against state officers, boards or commissions. N.M. Const. art. VI, §

3; *ACLU, id.* at ¶ 9 ("[S]tanding in our courts is not derived from the state constitution, *and is not jurisdictional.*") (emphasis added).

II. MANDAMUS DOES NOT LIE BECAUSE THE ISSUES RAISED BY PETITIONERS, EVEN IF OF GREAT PUBLIC IMPORTANCE, DO IMPORTANCE, DO NOT CONFER JURISDICTION AND CANNOT BE ANSWERED BECAUSE THE UNDERLYING FACTS THEY RAISE ARE IN DISPUTE.

For a number of reasons, mandamus is not the appropriate remedy for the allegations raised in the Petition. First and foremost, "[m]andamus is a drastic remedy to be invoked only in extraordinary circumstances" when there is not "a plain, speedy and adequate remedy in the ordinary course of law." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, relying on *Brantley Farms v. Carlsbad Irrigation Dist.,* 1998-NMCA-23, ¶12, 124 N.M. 698; *Cobb v. State Canvassing Board*, 2006-NMSC-034, ¶ 20, 140 N.M. 77, relying on *Ellinwood v. Morales*, 1986-NMCA-045, ¶ 8, 104 N.M. 243 ("Like all other extraordinary writs, '[m]andamus is an extraordinary remedy which is available only in cases wherein other remedies fail or are inadequate.'"). Mandamus will also not lie when there exists a plain, speedy and adequate remedy in the ordinary course of law. NMSA 1978 § 44-2-5.

Such a plain, speedy and adequate remedy for the allegations of the Petition exists under the Declaratory Judgment Act ("DJA") [§§ 44-6-1 to 44-6-15 NMSA 1978]. Declaratory judgment actions are appropriate "...when the rights, status or

other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof." DJA at § 44-6-13. Clearly, the rights of the Petitioners alleged here require construction of the statutes cited and, perhaps more significantly, require a determination whether the Constitution and laws affect the continued viability of those statutes.

Finally, "[t]he act compelled by a writ of mandamus 'must be ministerial, that is, an act or thing *which the public official is required to perform by direction of law* upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.'" *Rainaldi v. Public Employees Retirement Bd.,* 1993-NMSC-028, ¶ 6, 115 N.M. 650 (emphasis added) (internal cites omitted). Mandamus is used to enforce an existing right, not to resolve material issues of fact. *Concerned Residents for Neighborhood, Inc. v. Shollenbarger* 1991-NMCA-105, ¶ 12, 113 N.M. 667.

Because Petitioners purport to invoke the Court's original jurisdiction, there is no lower court record to rely on for facts to support the petition. And, in advancing their assertions to this Court, Petitioners have liberally cited facts that are not proven. They have also made legal assertions without citing to authority. *See* e.g., p. 5 ("Second, because the Clerk, *alongside clerks of numerous other New Mexico counties, is arbitrarily denying marriage licenses* on the basis of the sex or

sexual orientation of applicants..."); p. 9 first full sentence at top; p. 10 second full sentence at top; p. 16 first full sentence at top; p. 16 ("Many hundreds or thousands of New Mexican children are currently living in a family headed by a same sex couple."). Respondent disputes all of these unsubstantiated assertions as unfounded, unproven and unsupported.

According to *State ex. Rel. Sandel v. N.M. Publ. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 277, a petitioner invoking mandamus must demonstrate, *inter alia*, that they raise a legal issue concerning a non-discretionary duty of a government official that "can be answered on the basis of virtually no disputed facts." This demonstrates the wisdom of the requirement that petitions in mandamus against local government officials originate in district court for development of a record. As more fully addressed below, when the New Mexico Attorney General twice determines that the Clerk is prohibited by law from issuing marriage licenses to same sex couples, and when a determination of the required actions of the Clerk depends on whether state law violates the Constitution, there is no clear ministerial duty requiring the Clerk to issue a marriage license to the Petitioners which can be enforced through mandamus.

III. THE DOMESTIC AFFAIRS LAWS OF NEW MEXICO DO NOT SUPPORT PETITIONERS' INTERPRETATION OF THEIR PERCEIVED RIGHT TO BE ISSUED A MARRIAGE LICENSE.

Petitioners assert the existence of a non-discretionary duty of the Santa Fe County Clerk to issue a marriage license based on their reading of five select sections of the marriage laws, *viz.*, § 40-1-1 (describing marriage as contemplated by law as a civil contract); § 40-1-5 (prohibiting all those under the age of majority from marrying unless obtaining parental consent but outright prohibiting anyone under 16 from marrying); § 40-1-7 (prohibiting various degrees of incestuous marriage); § 40-1-10 (only county clerks may issue marriage licenses in New Mexico); § 40-1-14 (requiring couples to produce a marriage license prior to its solemnization)[3]. *See* Petition, paras. 9, 10, 11, 12, 13, 14 and 16.

From these assertions, Petitioners allege that "the County Clerk has no discretion to deny [them] a marriage license on the basis of their sex or sexual orientation...[and that]...reading a sex or sexual orientation requirement into the marriage statutes would be unlawful discrimination in violation of...the Equal Rights Amendment." *See* Petition, 3rd unnumbered page.

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[3]Effective June 14, 2013 and introduced as Senate Bill 299 that became law, recent legislative changes to Article 1 were compiled as Law 2013, ch. 144, §§ 5, 7, 9 and 14 (of the sections cited by the Petitioners). Various sections of existing law in Article 1 were amended, subject to repeal and replacement and in the case of § 40-1-5 cited to by Petitioners, outright repealed.

By disregarding *most* of the provisions that make up the marriage laws of New Mexico, Petitioners have ignored a basic tenet of statutory construction embodied in NMSA 1978, § 12-2A-18(A)(2) and (3) (1997) of the Uniform Statute and Rule Construction Act [12-2A-1 to 12-2A-20 NMSA 1978] ("A statute or rule is construed, if possible, to...(2) give effect *to its entire text*; and (3) *avoid* an...*absurd* or unachievable *result*.") (emphasis added).

The Domestic Affairs laws of New Mexico are compiled in Chapter 40 of the 1978 Annotated Statutes. Chapter 40 consists of some 16 separate articles, the first three of which bear the titles, "Marriage in General," "Rights of Married Persons Generally" and "Property Rights." Section 40-1-17 of the first article requires that "the form of application, license and certificate ... be substantially as follows ... [and] all such blanks to be provided free of cost by the county for public use." The very next section, *viz.*, § 40-1-18, contains a blank marriage license application that requires information be entered separately by the "*Male* Applicant" and the "*Female* Applicant." (emphasis added) Additionally, the form calls for verification by a county clerk of the date of premarital medical examination of the "*Bride*" and "*Groom*." (emphasis added) This language does not support the Petitioners' argument that the County Clerk's duty is non-discretionary; nor could it be concluded that the wording compels the performance of an act that the law specifically enjoins as a duty. If the law requires use of this

form and the County Clerk uses it, her issuance of a marriage license to the Petitioners could only be accomplished by her altering the form and thus acting outside of the law, that is, *ultra vires*: "Mandamus lies to compel the performance of a ministerial act or duty that is *clear and indisputable. New Energy Economy, Inc., infra* at ¶ 10; (emphasis added)(internal cites omitted) 'A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, *without regard to the exercise of his own judgment upon the propriety of the act being done.*'" *State ex rel. Perea v. Bd. of Comm'rs of De Baca County*, 1919-NMSC-030, ¶ 6, 25 N.M. 338. That is not the duty of the County Clerk.

According to the annotation in the 1978 compilation of Chapter 40, the section requiring the use of the statutory application form has been in statute *at least since 1961* when it was compiled as § 57-1-16 in the 1953 compilation of New Mexico statutes. According to the annotations, the second sentence of Article II, § 18 of the New Mexico Constitution, which provides that the equality of rights under the law shall not be denied on the basis of sex, was added to the New Mexico Constitution on November 7, 1972 and became effective on July 1, 1973, after the statutes that Petitioners complain of were enacted.[4]

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[4]As an historical reference, in March 1972, the Congress sent a proposed national Equal Rights Amendment to the states for ratification. **ATTACHMENT C**. It takes a ¾ ratification by all states to amend the U.S. Constitution, or 38 states.

Although § 12-2A-5 of the Uniform Statute and Rule Construction Act provides that "[u]se of a word of one gender includes corresponding words of the other genders [sic]" it is difficult to conclude that this rule of statutory construction could be interpreted as requiring county clerks to ignore a legislatively created form over 50 years old that *precedes* the 1972 constitutional amendment, when that form was clearly designed for the issuance of marriage licenses to members of the opposite sex. Terms such as "Male," "Female," "Bride," and "Groom" used by the Legislature must be interpreted as meaning what those terms meant when enacted and what they mean today. One need only look at how the issue was addressed by different New Mexico Attorneys General in 2004 and 2011. *See* N.M. Att'y Gen. Advisory Letter from Attorney General Patricia A. Madrid to state Senator Timothy Z. Jennings (Feb. 20, 2004) ("New Mexico statutes, as they currently exist, contemplate that marriage will be between a man and a woman."); *compare* N.M. Att'y Gen. Op. No. 11-01 (2011) ("Without an identifiable adverse public policy in this area, we conclude that a court addressing the issue would likely hold, pursuant to Section 40-1-4, that a valid same-sex marriage from another jurisdiction is valid in New Mexico.")

ATTACHMENT D. The measure failed, formally dying on June 30, 1982. **ATTACHMENT E.** See Certified Government Printing Office documents for Attachments C and E. http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-8.pdf; http://www.gpo.gov/fdsys/pkg/STATUTE-86/pdf/STATUTE-86-Pg1523.pdf.

The Santa Fe County Clerk did not decide to interpret the marriage laws of New Mexico to deny Petitioners a license, while simultaneously ignoring an important amendment to the State Constitution; rather, the marriage laws as currently written support issuance of a marriage license only to persons of the opposite sex from each other, and Art. II, § 18 does not apply to sexual orientation.[5] The obligation of the County Clerk is to enforce the laws, not weigh them against the Constitution. It is not just from Sections 17 and 18 that the conclusion must be drawn that marriage laws crafted by the Legislature were intended to benefit only opposite sex couples. Looking at the *entire* domestic affairs laws that apparently were brushed aside by the Petitioners in formulating their theory for relief, it becomes even more evident that this was the intent of the Legislature. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 415 (where several sections of a statute are involved, they must be read together so that all parts are given effect).

First, see Article 2, which addresses "Rights of Married Persons Generally," e.g., § 40-2-1 ("*Husband and wife* contract toward each other obligations of mutual respect, fidelity and support."); § 40-2-2 ("Either *husband or wife* may enter into any engagement or transaction with the other, or with any other person respecting

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[5] The same is probably not true of the equal protection clause of the same article. See para. IV, *infra.*

property, which either might, if unmarried..."); § 40-2-3 ("It shall not be necessary in any case for *the husband* to join with *the wife* when she executes a power of attorney for herself; nor shall it be necessary for the *wife* to join with the *husband* when he executes a power of attorney for himself."); and § 40-2-8 ("A *husband and wife* cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing, to an immediate separation, and may make provisions for the support of either of them and of their children during their separation."). Second, see Article 3, which addresses "Property Rights" e.g., § 40-3-1 ("The property rights of *husband and wife* are governed by this chapter unless there is a marriage settlement containing stipulations contrary thereto."); § 40-3-2 ("*Husband and wife* may hold property as joint tenants, tenants in common or as community property."); § 40-3-3 ("Neither *husband nor wife* has any interest in the property of the other, but neither can be excluded from the other's dwelling."); § 40-3-4 ("It is against the public policy of this state to allow one spouse to obligate community property by entering into a contract of indemnity whereby *he*[6] will indemnify a surety company in case of default of the principal upon a bond or undertaking issued in consideration of the contract of indemnity. No community property shall be liable for any indebtedness

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[6]This would be one of those situations where under proper statutory construction the reference to the pronoun "he" would also mean "she."

incurred as a result of any contract of indemnity made after the effective date of this section, unless both *husband and wife* sign the contract of indemnity."); § 40-3-12(B) ("Property or any interest therein acquired during marriage by a *woman* by an instrument in writing, in *her* name alone, or in *her* name and the name of another person not her *husband*, is presumed to be the separate property of the *married woman* if the instrument in writing was delivered and accepted prior to July 1, 1973."[7]); and § 40-3-12(C) ("The presumptions contained in Subsection B of this section are conclusive in favor of any person dealing in good faith and for valuable consideration with a *married woman* or her legal representative or successor in interest."). The term "husband" is defined as "[a] married man" *Black's Law Dictionary* 746 (7th ed 1999); the term "wife" is defined as "[a] woman united to a man by marriage" *Black's Law Dictionary* 1598 (6th ed 1990).

In each of the statutes cited above, the Legislature clearly intended to favor opposite sex marriage at a time when same-sex marriages were probably not considered. Thus, by including language in the first three sections of the Domestic Affairs chapter that singled out "husbands" and "wives," the Legislature intended to permit marriage licenses to be issued to persons seeking marriage to those of the

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[7]This provision was undoubtedly enacted to protect the rights of a woman to own property separately from her husband such that when she became married her property did not become community property. It only applied to property acquired by women after July 1, 1973. This language comported with the state's equal

opposite sex.[8] See *Gartner v. Iowa Department of Public Health*, 830 N.W.2d 335, 349 (S.Ct. 2013) (When a statute employs *both* masculine and feminine words, reading such a statute in a gender-neutral manner would destroy or change the plain and unambiguous language, and nullify the intent of the Legislature.); accord *Lewis v. Harris*, 188 N.J. 415, 437, 908 A.2d 196, 208 (S.Ct. 2006) ("With the exception of Massachusetts, every state's law, explicitly or implicitly, defines marriage to mean the union of a man and a woman." *[fn11]* "N.M. State. 40-1-18;")

Petitioners confuse laws enacted for a discriminatory purpose with laws enacted in the absence of any discriminatory motive, like the instant laws. They rely on *Romer v. Evans*, 517 U.S. 620 (1996) in which the United States Supreme Court struck down as unconstitutional a state constitutional amendment that no state or local government entity could adopt a measure, "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of

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rights-by-sex amendment (Art. II, §18) that became effective on the very same day—July 1, 1973.

[8]Except for the section protecting women's property rights added on July 1, 1973, all of the gender-specific provisions in law listed above predate the 1973-added equal-rights-by-sex amendment by as much as 66 years. Most of those sections were in law prior to statehood.

discrimination." *Romer, id.* at 624. *Compare United States v. Windsor*, 570 U.S. __ (2013) ("The stated purpose of the law [DOMA] was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'") *Windsor id.*, at page 21, relying on H.R. Rep. No. 104-664, pp. 12-13 (1996).

This Court previously concluded that the marriage laws in New Mexico do not permit common-law marriage where a couple presented themselves as married while also cohabitating. *In re Gabaldon's Estate,* 1934-NMSC-053, 38 N.M. 392. The majority of this Court met with a spirited dissent in its analysis of the history of relevant marriage laws during territorial days, concluding ultimately that it was up to the Legislature to *statutorily* permit common-law marriages. This Court reasoned that "the Edmonds-Tucker Act...in force [in New Mexico] from 1887 until statehood[,]" was rigorously enforced in the United States Territories and settled the issue that common-law marriages were not permitted.[9] **ATTACHMENT F.**

The Dissent in *Gabaldon*, in discussing the origin of who was qualified to marry and whether any ensuing contract was a sacrament in the Christian faith, or

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[9]While the referenced session law was obviously enacted to prohibit polygamy in the Utah Territory, Section 9 was made applicable to *all* United States Territories. The law contains more than 16 references distinguishing genders between husband and wife and married man and woman. See historic link, site last visited on 7/8/13. http://archives.utah.gov/research/guides/edmunds-tucker.pdf

was a natural and civil contract of marriage, quoted from *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54, which case according to the U.S. Supreme Court was attributed as collecting "all the learning upon this subject," and said, "Marriage, in its origin, is a contract of natural law; *it may exist between two individuals of different sexes*, although no third person existed in the world, as happened in the case of the common ancestors of mankind." *Gabaldon, id.* at ¶ 69, quoting *Dalrymple* and the U.S. Supreme Court in *Hallett v. Collins*, 51 U.S. 174, 10 HOW 174, 13 L. Ed. 376 (1850). The Dissent quoted from two attorney general opinions of the day. See e.g., N.M. Att'y Gen. Op. No. 1162 (1914) ("From the foregoing, you will see that it is not absolutely essential that *a man and woman*, who desire to enter into a marriage contract, should have the same solemnized by a minister of the gospel or a justice of the peace, but 'those who may so desire' can employ the services of a clergyman or civil magistrate."). *Gabaldon, id.* at ¶ 89.

As in *Gabaldon,* the issue in this case should be settled by the Legislature. The Legislature has made numerous attempts to do so. E.g., in 2005 HB86, HB445, SB495, SB576, SB597; in 2006 SB51; in 2007 HB4; in 2008 HB9, HJR3; in 2009 HB21, HB118, SB12, SB439; in 2010 HB121, HJM33, HJR8, SB146, SB183, SJR1; in 2011 HB474, HJR7, HJR8, SB375, SB395, SJR4; in 2012 HJR22; in 2013 HJR3, HJR4.[10] While the Legislature can certainly change the law

[10]All bills can be viewed at http://www.nmlegis.gov/lcs/billfinder/number.aspx.

in this area and recently amended parts of it,[11] the courts, as well as county clerks administering the law, must look to the plain language of a statute in determining its meaning. *See Diamond v. Diamond*, 2012-NMSC-022, ¶ 25, 283 P.3d 260. "In interpreting a statute, the Court's 'primary goal is to ascertain and give effect to the intent of the legislature.'" *Jolley v. AEGIS*, 2010-NMSC-029, ¶ 8, 148 N.M. 436, (internal quotation marks and citation omitted).

All that is relevant in mandamus is that the statutes provide for the issuance of licenses only to opposite sex couples. Mandamus requires the performance of an act that the public official is required to perform by law, "regardless of [her] opinion as to the propriety or impropriety of doing the act ..." *Rainaldi, ¶ 19, supra.*

IV. THE COUNTY CLERK DID NOT VIOLATE THE STATE'S EQUAL RIGHTS AMENDMENT BY DENYING A MARRIAGE LICENSE TO PETITIONERS.

Given the historical context of the State's marriage laws[12] and Equal Rights Amendment, the Petition seems to raise the issue whether denying a marriage

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[11] See Laws of 2013, Chapter 144, §§ 1-14, SB 299 ("Marriage License Cleanup") amending and repealing several sections of those laws but not the section (§ 40-1-18) prescribing the uniform form that all county clerks must use.

[12] "To insure a uniform system of records of all marriages hereafter contracted, and the better preservation of said record for future reference, the form of application,

license on the basis of same-sex (really, *sexual orientation*) is the same as denying a marriage license on the basis of the sex of the applicant, and raises the question of whether the County Clerk may analyze the constitutionality of a law. This argument demonstrates as well as any in the Petition the unreasonable expectations foisted on the County Clerk here; the County Clerk cannot be expected to undertake a legal analysis regarding whether New Mexico law runs afoul of the Equal Rights Act and Amendment and determine what the law should be.

The recent DOMA case, *not* relied on by Petitioners, ultimately determined part of that law's unconstitutionality not only because of DOMA's "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage...[,]" but because New York had recognized, then allowed, same-sex marriage which the Supreme Court concluded was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *United States v. Windsor, id.* at pp. 19-20. That DOMA was toxic was easily exposed by the Court: "DOMA seeks to injure the very class New York seeks to protect...DOMA writes inequality into the entire

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license and certificate provided herein shall be substantially as follows, each blank to be numbered consecutively corresponding with page number of the record book in the clerk's office..." NMSA 1978, § 40-1-18. This provision reads like a "purpose" or "policy" statement and can hardly be the basis of alleging discriminatory *animus* compared to the reason for the enactment of DOMA.

United States Code...DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Windsor, id.* at pp. 20 & 22.

Noteworthy, the New Mexico Human Rights Act did not prohibit discrimination on the basis of "sexual orientation" or "gender identity" until 2003. NMSA 1978, § 28-1-7; accord Laws of 2003, ch. 383, § 2. The marriage laws complained of by Petitioners pre-date this and are not based on "physical characteristics unique to one sex..."; do not employ "a gender-based classification that operates to the disadvantage of women..."; and do not treat "men and women differently" with respect to access to marriage licenses. *New Mexico Right to Choose/NARAL v. Johnson,* 1999-NMSC-005, ¶¶ 38,47,54, 126 N.M. 788, 801, 803-04; accord *City of Albuquerque v. Sachs*, 2004-NMCA-065, 135 N.M. 578 (upholding a city ordinance that prohibited public exposure of the female but not the male breast on the basis of unique physical characteristics attributable to each). While antiquated, the state's marriage laws complained of do not appear to violate the Equal Rights Amendment or Act and would pass muster under the states' rights analysis in *Windsor.* It is up to the Legislature to update those laws whether by statutory amendment or by constitutional amendment. The county clerks administering the domestic affairs laws on a day-to-day basis are in no position to address these significant and complex issues.

V. THE EQUAL PROTECTION ARGUMENTS ADVANCED BY PETITIONERS MISAPPREHEND THE PURPOSE OF MANDAMUS

Petitioners' final arguments directed at the County Clerk imply that the Clerk should have recognized that NMSA 1978, § 40-1-18 was unconstitutional under the equal protection clause of Art. II § 18 and should have refused to apply it. However, such arguments misapprehend the purpose of mandamus, which is to "compel the performance of an act which the law specially enjoins as a duty resulting from an office..." NMSA 1978, §§ 44-2-2 and 44-2-4.

While *Windsor, supra,* at 25, recognized that restrictions contained in DOMA on same sex marriage were not supportable under the equal protection clause of the Fifth Amendment ("... DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution ..."), it is neither the province of the County Clerk to make such determinations under constitutional law, nor is it the role of mandamus to compel her to do so. Generally, a party challenging the constitutionality of a statute has the burden of proving it is unconstitutional beyond a reasonable doubt. *City of Farmington v. Fawcett,* 1992-NMCA-075, 114 N.M. 537, 540. And, legislative enactments are presumed to be constitutional and valid. *Board of Trustees of the Town of Las Vegas v. Montano*, 1971-NMSC-025, 82 N.M. 340, 343. Even under the doctrine of qualified immunity, officials must first be in a position to understand that a rule exists before being held responsible for violations: "For an asserted right to be

'clearly established,' its 'contours . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Chavez v. Bd. Of County Comm'rs*, 2001-NMCA-065, ¶ 760, 130 N.M. 753, 760, (internal cites omitted); *cf., Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 16, 130 N.M. 25 (A public official is entitled to qualified immunity in the performance of a discretionary function if the constitutional or statutory right alleged to have been violated was not "clearly established" at the time of the official's conduct.). Given the longevity and historical context of the challenged marriage laws, it is difficult to reconcile Petitioners' mandamus claim being brought directly in this Court.

CONCLUSION

Mandamus was improvidently brought before this Court under its original jurisdiction, because Article VI, § 3 of the State Constitution limits jurisdiction to cases against state officers, boards and commissions. The County Clerk is neither. Nor can Petitioners claim "jurisdiction" under the "great public importance doctrine," since that doctrine concerns standing, not an issue here, and is applied to cases where the integrity of state government in terms of separation of powers is at issue. That is not the case here, this being a case where the rights of two individuals are at issue. The County Clerk correctly followed the state's marriage

laws which, viewed in their entirety, clearly apply only to persons of the opposite sex, and were enacted without any known sexually discriminatory *animus* decades *before* adoption of the state's Equal Rights Amendment and laws prohibiting employers from discriminating on the basis of sexual orientation. Accordingly, the petition fails and this Court should deny it.

Respectfully submitted,

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