

IN THE SUPREME 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,
MONICA LEAMING and CECELIA TAULBEE, and
JEN ROPER and ANGELIQUE NEUMAN,

Plaintiffs-Real Parties in Interest,

v.

MAGGIE TOULOUSE 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,

STATE OF NEW MEXICO, ex rel.,
NEW MEXICO ASSOCIATION OF COUNTIES, et al,

Intervenors-Petitioners,

and

HON. ALAN M. MALOTT,

Respondent.

**GERALDINE SALAZAR'S RESPONSE TO VERIFIED PETITION FOR A WRIT OF
SUPERINTENDING CONTROL**

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SUPREME COURT OF NEW MEXICO
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**STATE OF NEW MEXICO, ex rel.,
NEW MEXICO ASSOCIATION OF COUNTIES,
as the collective and organizational representative of
New Mexico's thirty-three (33) counties and
M. KEITH 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 J. 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,
PATRICK 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 Otera 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 CARABAJAL,
in her official capacity as Clerk of Valencia County,

Intervenors-Petitioners,

and

HON. ALAN M. MALOTT,

Respondent.

**GERALDINE SALAZAR'S RESPONSE TO VERIFIED PETITION FOR A
WRIT OF SUPERINTENDING CONTROL**

COMES NOW GERALDINE SALAZAR (hereafter, "Santa Fe County Clerk"), who by and through her counsel, Willie Brown, Assistant County Attorney, hereby responds to the Verified Petition for a Writ of Superintending Control filed by the New Mexico Association of Counties ("NMAC" or "Petitioners") with this Court as Petitioners-Intervenors, on September 5, 2013.

PROCEDURAL POSTURE OF THIS LITIGATION

Defendants, Santa Fe County Clerk and Bernalillo County Clerk, are identified in the Petition as real parties in interest in the underlying case. The

Petition provides a factual underpinning that gave rise to their involvement in that case. Additionally, as can be discerned from the attached select portions of the 25-page “Seconded Amended Complaint for Declaratory and Injunctive Relief” filed in the 2nd Judicial District Court on August 16, 2013, two couples presented themselves to the Santa Fe County Clerk on August 14, 2013 to obtain marriage licenses but were denied such by the Clerk. **EXHIBIT 1.** Critical to the posture of the proceedings below is the trial court’s issuance of a “Declaratory Judgment, Injunction, and Peremptory Writ of Mandamus.” **EXHIBIT 2.** On August 26, 2013, the trial court in (Albuquerque) case number D-202-CV-2013-2757 issued a peremptory writ of mandamus and injunction against both the Santa Fe County and Bernalillo County Clerks. The trial court also entered a declaratory judgment to the effect that the state’s marriage laws did not prohibit issuance of a marriage license to otherwise qualified couples on the basis of sexual orientation or gender of its members; additionally, to the extent they might be read to prohibit issuance of a marriage license to otherwise qualified same sex couples, those same laws were declared unconstitutional and unenforceable under Article II, Section 18 of the New Mexico Constitution. The trial court incorporated much of its interim order into the September 3, 2013 “Final Declaratory Judgment” attached as Exhibit 1 to the Verified Petition.

Alleged by Petitioners though not attached, the Santa Fe County Clerk was ordered in an “Alternative Writ of Mandamus” in (Santa Fe) case number D-101-CV-2013-02182, to either comply with a mandatory, nondiscretionary duty to issue marriage licenses without regard to a person’s sex or sexual orientation¹, or show cause why not. **EXHIBIT 3.** As is apparent from paragraphs 14 through 17 of the “Alternative Writ,” issuance of a marriage license by the Santa Fe County Clerk must be carried out because denial of that license if based on sexual orientation is contrary to the equal rights and due process provisions of Article II, Section 18 of the New Mexico Constitution.

ARGUMENT AND AUTHORITIES

I. A WRIT OF SUPERINTENDING CONTROL IS AN APPROPRIATE EXTRAORDINARY REMEDY TO SEEK FOR THE ULTIMATE DISPOSITION OF THE ISSUES RAISED BY PETITIONERS.

Petitioners have methodically and cogently laid out the reasons, urgent necessity, and supporting authority for invoking this Court’s superintending control over state courts that are grappling with same-sex marriage challenges. They appropriately cite to this Court’s decision in *State ex rel. Schwartz v.*

¹Upon information and belief, on August 23, 2013, the Santa Fe County Clerk issued a marriage license to the petitioners in case no. D-101-CV-2013-02182; likewise, on August 26, 2013, the Bernalillo County Clerk issued a marriage license to Petitioners Miriam Rand and Ona Lara Porter in case no. D-202-CV-2013-2757. That would appear to make the cases against those parties moot.

Kennedy, 1995-NMSC-069, for the proposition that this Court should agree to issue a writ of superintending control to provide a prompt and final resolution to the troubling question at issue.

As Petitioners properly point out, the dilemma faced by County Clerks is three-part: *First*, a high probability exists that uniformity among the counties will not be achieved in the absence of a final definitive answer applicable statewide to the same-sex marriage question. Petitioners point out that "...litigation has been filed against eight (8) Counties (Santa Fe, Taos, Los Alamos, Sandoval, Doña Ana, Grant, San Miguel, and Valencia), either seeking to allow or seeking to prohibit issuance of marriage licenses to same-sex couples." See **Verified Petition, p. 16, para. 35**. They also indicate "five (5) Counties...are issuing marriage licenses to same-sex couples pursuant to district court orders, three (3) Counties...are issuing marriage licenses to same-sex couples without a court order, each of which is now facing litigation regarding its authority to issue same-sex marriage licenses without a court order." *Id.* "[A]nd the remaining twenty-four (24) counties are not issuing marriage licenses to same-sex couples and are not yet facing litigation (though that changes daily)." *Id.* Moreover, one of the named Intervenor-Petitioners, Lynn Ellis, County Clerk of Doña Ana County, is himself a named party in a pending suit sounding in mandamus, injunctive and declaratory relief brought by state

Republican lawmakers challenging his issuance of same-sex marriage licenses.²

EXHIBIT 4. Without prompt guidance to the district courts about the proper resolution of these cases, the county clerks will be unable to uniformly and consistently administer the State’s marriage laws. This is exactly the situation that the writ is intended to address. *See* N.M. Const. art. VI, § 3 (“The supreme court shall have...a superintending control *over all inferior courts;*”); accord *District Court v. McKenna*, 1994-NMSC-104, ¶ 3, 118 N.M. 402 (“The power of superintending control is the power to control the course of ordinary litigation in inferior courts.”) (internal cites omitted); *State v. Roy*, 1936-NMSC-048, ¶ 40 N.M. 397; *McKenna id.* (“Inherent within that power is the authority to regulate pleading, practice, and procedure in the district courts.”) (internal cites omitted).

Second, no case presents a better circumstance for exercise of the writ than this one. Superintending control is intended to address “...exceptional circumstances, such as cases in which ‘the remedy by appeal seems wholly inadequate...or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship[, or] costly delays and unusual burdens of expense.’” *Schwartz, infra.* at ¶ 8 (internal quotation marks and citations omitted).

²See Albuquerque Journal article, dated September 7, 2013 entitled “Sued Cruces clerk uses social media for legal expenses.” <http://www.abqjournal.com/259086/news/sued-cruces-clerk-uses-social-media-for-legal-expenses.html>. Site last visited on September 16, 2013.

It may be exercised “where it is deemed to be in the public interest to settle the question involved at the earliest moment.” *Schwartz, id.*, (internal quotation marks and citations omitted); see also *State Racing Comm’n v. McManus*, 1970-NMSC-134, ¶¶ 9-10, 82 N.M. 108 (questions “of great public interest and importance” may require this Court to use its power of superintending control).

Here the remedy granted by the District Court is potentially inadequate because it applies to two counties among 33; the potential for “mischief” in the form of forum shopping still exists, and obvious potential extraordinary hardship exists as this issue is slowly litigated in the remaining counties. And, a resolution to this question is absolutely in the public interest. Even though plaintiffs and many other couples have obtained marriage licenses in Bernalillo and Santa Fe Counties and have married, the validity of these marriages has not been definitively established; it is inarguably in the public interest to settle this matter now so these persons can move forward confident in their status as married couples. So even though some might argue that the cases might be moot, they are not. Even so, this Court has decided cases of statewide interest even where moot. *Cobb v. N.M. State Canvassing Board*, 2006-NMSC-034, ¶¶ 10, 14, 140 N.M. 77.

(“This Court may review moot cases that present issues of (1) substantial public interest or (2) which are capable of repetition yet evading review.”)³

For similar reasons, this Court exercised its superintending control in redistricting cases by appointing retired District Court Judge James Hall to preside over redistricting litigation, saying that “[n]umerous complaints by various parties were filed in different state district courts challenging the constitutionality of the current distribution of voters under the State and Congressional maps.” *Maestas v. Hall*, 2012-NMSC, ¶ 9, _ N.M. ___, 274 P.3d 66. This Court was concerned with consistency, judicial economy, fairness and the resolution of an issue of statewide importance, languishing in multiple district courts before multiple judges. Relevant to the fairness issue was the timing issue, a concern in this case also, for the longer that uncertainty about the status of same-sex marriage exists here, the more potential for prejudice to persons who have obtained licenses. Clearly if the constitutionality of the restrictions in marriage laws on same-sex marriage in New Mexico were settled once and for all and on a statewide basis, there would be no need to litigate that issue 33 times; this would afford obvious benefits to judicial

³Cobb involved a legal challenge by two presidential candidates from non-mainstream political parties against the State Canvassing Board of the Secretary of State who had conditioned a recount on the deposit of \$1.4 million to cover the costs of the recount. The public would otherwise have to bear this cost since the election had already been decided and any change to the New Mexico electorate from a recount would not change that.

economy, the resources of the parties, uniformity and consistency. Moreover, if five (5) district courts have already misinterpreted the law and/or the State Constitution, then as Petitioners point out the putative families “receiving these marriage licenses need to know for a legal certainty if they are valid under New Mexico law.” **See Petition, p. 17, para. 39.** Even though there is not a single district court decision that has concluded that same-sex marriage is prohibited under the State’s marriage laws or unprotected by the State Constitution, absent some definitive statement from this Court, there will be many opportunities for such a ruling.

Closely aligned with the ability of this Court to hear moot cases, is that this case presents an issue of substantial public interest. *Cobb, id.* at ¶¶ 10, 14. Absent a decision by this Court binding upon all lower courts, the answer to the question of whether same-sex marriage is legal in New Mexico might vary from couple to couple, and might depend on such disparate factors as the region where the question is being asked, religious beliefs, personal biases or even political party affiliation. The DOMA case elevated the issue of same-sex marriage to national attention. *Windsor, id.* at slip op. at 21 (“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.*, relying on H.R. Rep. No. 104-664, pp. 12-13 (1996). The Supreme Court observed:

Accordingly, some states concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Windsor id., at pages 14-15; and see *Id.* at 15, in which the Court informs “New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.” “In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.” *Id.* at 7, referring to *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E.2d 941. The Court observed further that “State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g.*, *Loving v. Virginia*, 388 U. S. 1 (1967)...” *Id.* at 16. The Court also observed that “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Loving*, 388 U.S. 1, 12, relying on *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

Given the breadth of the issue that permeates every county in New Mexico, the issue of whether same-sex marriage is legal in New Mexico requires a

definitive reading of the state's marriage laws alongside Article II, Section 18 of the Constitution. Thereafter, a determination can be made how district courts are to reconcile the ultimate concept of marriage as a fundamental and basic civil right. The urgency in resolving the issue and irreparable harm that will occur if not resolved, is apparent in the reality of numerous same-sex couples having been recently married under the reasonable belief that their marriages are valid. This case presents issues of substantial public interest and importance. *See Concha v. Sanchez*, 2011-NMSC-031, 45, 150 N.M. 268 (“[T]his Court has long recognized that our superintending control...‘will be exercised if the remedy by appeal is wholly or substantially inadequate, or if the exercise thereof will prevent irreparable mischief, great, extraordinary or exceptional hardship, costly delays, or unusual burdens in the form of expenses.’”) (internal cites omitted).

Third, until resolved by this Court, the potential for inconsistent rulings exists, with the attendant threat to judicial economy and judicial resources. The petition recites the numerous cases already pending in multiple courts. Judges within a single judicial district might even issue conflicting ruling on the issue of same-sex marriage. The probability of this occurring is demonstrated in the First Judicial District where same-sex marriage cases are pending concerning the Santa Fe and Los Alamos County Clerks. **See Petition, p. 16, para. 35.** This *ad hoc* and uncertain way to resolve the important questions: whether consenting adults of the

same sex are authorized to marry in New Mexico; whose marriage certificates are currently valid; and whose are invalid—is untenable. Our failure to settle this now will be a collective failure to the many couples who have received licenses and become married, and could still have unintended consequences for those couples in the years hence if the question is not resolved. That the unintended consequences of decisions on the marriage laws have played out badly in our courts in the past, is something which New Mexicans should seek to avoid with respect to the instant issue. *See e.g. In re Gabaldon's Estate*, 1934-NMSC-053, ¶ 100, 38 N.M. 392 (This Court failed to recognize common law marriage, sparking a vigorous dissent complaining that the decision was “...fraught with consequences fearful to the interests of society, would tend to flood the courts with litigation, unsettle property rights, and disturb settled rights of inheritance.”); *cf., United States v. Windsor*, 570 U.S. ___ (2013) (IRS refused to refund a \$363,053 estate tax payment to a surviving spouse of a same-sex married couple because the federal DOMA did not recognize such marriages as valid.)

Put simply, the district courts need appellate guidance on how to resolve these challenges, and superintending control is an appropriate method to effectuate predictability and settle the issue once and for all. The United States Supreme

Court recently remarked that DOMA's⁴ enactment evidenced Congress' interference with the equal dignity of same-sex marriages, a dignity conferred by *the States* in the exercise of their sovereign power. *Windsor, id.*, slip op. at 21. The Court specifically emphasized that it was for states to decide whether same-sex marriage was authorized:

The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.

Windsor, id., slip op. at 20.

During the past eight years, our Legislature has made numerous though ultimately unsuccessful efforts to change the state's marriage laws and thus settle the issue of same-sex marriage one way or the other. 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, HJR4.⁵ Given the Legislature's inability to resolve the same-sex

⁴DOMA is the federal Defense of Marriage Act, 110 Stat. 2419, and is codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

⁵All bills can be viewed at <http://www.nmlegis.gov/lcs/billfinder/number.aspx>.

marriage issues by statutory or constitutional amendment, the use of superintending control over the inferior courts is even more incumbent, and is a valid way to provide direction to the district courts and make uniform what litigants of this issue can and should reasonably expect as an outcome. Article III, Section 1 of the New Mexico Constitution is its separation of powers provision and would likely not permit what occurred in New Jersey, namely, an order was issued by the state's highest court directing its legislature to amend existing law to permit same-sex marriage. *Lewis v. Harris*, 188 N.J. 415,463, 908 A.2d 196, 224 (2006), (“To bring the State into compliance with Article I, Paragraph 1⁶ [New Jersey’s equal protection guarantee] so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.”)⁷

Writs of superintending control should not be used for the issuance of advisory opinions. *Jones v. Murdoch*, 2009-NMSC-002 145 N.M. 473; relying on

⁶N.M. Const. art. I, ¶1. “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

⁷Further litigation ensued because instead of enacting legislation that would permit same-sex couples to marry, the New Jersey General Assembly enacted a so-called Civil Union Act, compiled at N.J.S.A. 37:1-28 to -36. **EXHIBIT 5.**

the dissent in *Williams v. Sanders*, 1969-NMSC-124, ¶ 11, 80 N.M. 619,621. This case presents an active and important case and controversy and should be decided.

II. DENIAL OF SAME-SEX MARRIAGE IS PROHIBITED UNDER THE EQUAL RIGHTS AMENDMENT OF ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION.

There is debate whether New Mexico's marriage laws allow for same-sex marriage. However, what the laws allow for is not germane given that a reasoned interpretation of the New Mexico Constitution warrants an inexorable conclusion that recognition of same-sex marriage is required. According to the annotations to Article II, Section 18 of New Mexico Constitution, the second sentence known as the "Equal Rights Amendment" (ERA) was added to the Constitution on November 7, 1972, becoming effective on July 1, 1973. Section 18 provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

Judge Mallot's final order concluded that same-sex couples have a constitutional right to marry because implying conditions of sexual orientation on a right to enter a civil contract such as marriage would violate Article II, Section 18. **See Petition, Ex. 1, paras. 9-13.** No appellate court in the state has yet held that the State Constitution likens discrimination "on the basis of sex," with discrimination "on

the basis of sexual orientation” or “on the basis of gender.” While the former is prohibited by the Constitution, the latter is not yet prohibited by the Constitution, at least not by any holding of the state’s appellate courts. *Compare 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).

The New Mexico Human Rights Act (NMHRA), which prohibits discrimination in public accommodations and housing, 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. Earlier this year, this Court decided *Elane Photography LLC v. Willock*, 2013-NMSC-___, ___ N.M. ___, #33,687. That case, decided under application of the NMHRA but not the State Constitution, determined that “the NMHRA prohibits a public accommodation from refusing to serve a client *based on sexual orientation*, and Elane Photography violated the law by refusing to photograph Willock’s same-sex commitment ceremony.” *Id.* at 2013-NMSC-___, ¶ 18, (emphasis added). This Court found unavailing Elane Photography’s argument that photographing a same-sex

commitment ceremony was contrary to the owner's belief and contrary to their First Amendment rights of free speech.⁸

While the issue of county clerks' justification to deny or permit the issuance of marriage licenses to same-sex couples is a case of first impression, this Court provided significant guidance in *Elane Photography, id.* (with emphasis), on how to approach that issue when it stated that "New Mexico has a strong state policy of promoting equality for its residents *regardless of sexual orientation.*" Citing to Section 28-1-7 (defining unlawful discriminatory practices); NMSA 1978, § 29-21-2 (2009) (prohibiting profiling by law enforcement on the basis of sexual orientation); NMSA 1978, § 31-18B-2(D) (2007) (including sexual orientation as a protected status under the Hate Crimes Act); *Chatterjee v. King*, 2012-NMSC-019, ¶ 36, 280 P.3d 283 (recognizing that a child can have two legal parents of the same sex); *In re Jacinta M.*, 1988-NMCA-100, ¶ 11, 107 N.M. 769, (holding that a children's court could not find a custodian unsuitable solely because of his or her sexual orientation).

In *NARAL, id.* at 1999-NMSC-005, ¶¶ 2, 10, 27, 38, 47, and 54, this Court imposed a heightened judicial scrutiny in determining whether a gender-based classification in a state rule that operated to the disadvantage of women was

⁸There are no assertions that personal beliefs or discriminatory animus are at issue in the instant case. Instead, the case is about interpretation of century-old marriage laws in the context of a modern, equal rights constitutional provision.

presumptively unconstitutional and would require the State to demonstrate a compelling justification for its disparate treatment of women and men with respect to their eligibility for medical assistance. The case involved a rule enacted by the Human Services Department [HSD] that prohibited the use of state funds to pay for abortions for Medicaid-eligible women except: to save a mother's life, to end an ectopic pregnancy, or when a pregnancy resulted from rape or incest. Because there is no counterpart to New Mexico's ERA in the United States Constitution, "the federal equal protection analysis [was] inapposite..." *Id.* at 29.

This Court in *NARAL* saw the ERA as intending to supplement and expand the guaranties of the traditional Equal Protection Clause of the Bill of Rights. *Id.* at 30, (internal quotation marks and citations omitted). Moreover, the ERA was seen "...as the culmination of a series of state constitutional amendments *that reflect an evolving concept* of gender equality in this state." *Id.* at 31, (emphasis added). After discussing the history of lawful discrimination against women both during and after territorial times, this Court then observed that "Many of these early laws were repealed or amended in direct response to the passage of the [ERA] in 1972...[and that the ERA] requires a searching judicial inquiry concerning state laws that employ gender-based classification." *Id.* at 31-36. *Cf.* NMSA 1978 § 2-3-13.1 (2013) (requiring the Legislative Council Service to use gender-neutral language in drafting bills and to replace gender-specific language

with gender-neutral language where appropriate). This Court looked beyond the classification to the purpose of the HSD rule then ascertained whether within the meaning of the ERA “the classification operated to the disadvantage of persons so classified.” *Id.* at 38-40, relying on Ruth Bader Ginsburg, “Gender and the Constitution,” 44 *Univ.Cn.L.Rev.* 1, 37-38. Ultimately, this Court determined that the State failed to provide a compelling justification for treating men and women differently, and concluded that HSD’s rule violated the ERA to Article II, Section 18 of the State Constitution. Under the analysis in *NARAL*, it becomes immediately apparent that any purpose that could be read into the current marriage laws that would prohibit a couple from marrying based on their gender, would not survive the ERA’s mandate that no one can be denied equality of rights under law based upon their sex.

Breen v. Carlsbad Municipal Schools, 2005-NMSC-028, 138 N.M. 331, a related case, involved a challenge under both the New Mexico and United States Constitutions as well as the Americans with Disabilities Act, that the Workers’ Compensation Act treated workers with mental impairments differently than workers with physical impairments. This Court agreed that the law created a class of similarly situated individuals who were treated dissimilarly. After analyzing the attendant facts and laws, the Court applied intermediate scrutiny as applicable to the “sensitive class” of individuals challenging the statute’s constitutionality

because of the “historical discriminatory treatment of persons with mental disabilities.” *Breen, id.* at ¶¶ 16-17, 28. The Court cautioned that “[t]he courts should be sensitive to classes of people who are discriminated against not because of a characteristic that actually prevents them from functioning in society, but because of external and artificial barriers created by societal prejudice.” *Breen, id.* at ¶ 20.

Employing a two-prong test for determining under intermediate scrutiny whether challenged legislation will be upheld, this Court examined:

- (1) the governmental interests served by the [legislative classification], and
- (2) whether the classifications under the statute bear a substantial relationship to any such important interests.

Breen, id. at ¶ 30 (internal cites omitted). Once intermediate scrutiny is applied, the party supporting the law’s constitutionality bears the burden of showing that the discriminatory legislative classification is based on a ‘reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.’” *Breen, id.* at ¶ 30 (internal cites omitted). The law in *Breen* was determined to violate the equal protection guarantees by discriminating against the mentally disabled. *Id.* at 50.

Assuming that intermediate scrutiny should apply to the marriage laws because same-sex individuals belong to a class “...of people who are discriminated

against not because of a characteristic that actually prevents them from functioning in society, but because of external and artificial barriers created by societal prejudice[,]"⁹ the next step in the analysis would require a showing that the discriminatory legislative "classification is substantially related to an important government interest." *Breen, id.* at ¶¶ 17, 18, 20, 28 and 30. Moreover, intermediate scrutiny could also apply in the instant case because the current marriage laws can be read to "restrict the ability to exercise an important right[,]" namely, the right to marry. *Breen, id.* at ¶¶ 17; *cf., Skinner v. Oklahoma, infra.* Further, "intermediate 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, id.* at ¶ 21.

In a case in which a marriage statute [§ HRS 572-1] limited marriage as between a man and a woman, the Supreme Court of Hawaii concluded that the Hawaii Constitution did not give rise to fundamental rights of persons of the same

⁹In analyzing whether a disadvantaged and partially politically powerless group should be considered a sensitive class, this Court looked to United States Supreme Court cases, first noting the case of *United States v. Virginia*, ("intermediate scrutiny is applied to classifications based on gender because "our Nation has had a long and unfortunate history of sex discrimination.") *Breen id.* at 19, quoting 518 U.S. 515,531(1996) (quoting from *Frontiero v. Richardson*, 411 U.S. 677,684 (1974).

sex to marry. A lower court had granted judgment on the pleadings in favor of the state agency that had refused to grant marriage licenses to same-sex couples in strict compliance with the law. The Hawaii Supreme Court then required the lower court to reconsider its decision by applying a strict scrutiny test to determine if the sex-based classification violated the state's equal protection clause.¹⁰ *Baehr v. Lewis*, 74 Haw. 530 (1993).

Three years later, the lower court declared that the sex-based classification, on its face and as applied in § HRS 572-1, was unconstitutional and violated the equal protection clause of Article I, Section 5. *Baehr v. Miike*, 1996 WL 694235, 65 USLW 2399 (1st Cir.Ct. Haw. Honolulu 1993). This effectively legalized same-sex marriage in Hawaii since all marriage licenses are issued by its Department of Health whose director was the real party in interest in the litigation. The *Lewis* Court attributed to Hawaii's marriage laws that a "monopoly on the business of marriage creation has been codified by statute for more than a century...descended from an 1872 statute of the Hawaiian Kingdom, conditions a valid marriage contract on '[t]he marriage ceremony be[ing] performed in the State by a person or society with a valid license to solemnize marriages...accords the DOH sole

¹⁰"No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Hawaii Const., art. I, § 5.

authority to grant licenses and to solemnize marriages...” *Baehr v. Lewis, id.* at 560.

Significant to the instant case, the Hawaii courts agreed with the couples that refusal to let them marry deprived them of a multiplicity of rights and benefits, then recited a number of the most salient marital rights and benefits worthy of note:

(1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates...; (2) public assistance from and exemptions relating to the Department of Human Services...; (3) control, division, acquisition, and disposition of community property...; (4) rights relating to dower, curtesy, and inheritance...; (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code...; (6) award of child custody and support payments in divorce proceedings...; (7) the right to spousal support...; (8) the right to enter into premarital agreements...; (9) the right to change of name...; (10) the right to file a nonsupport action...; (11) post-divorce rights relating to support and property division...; (12) the benefit of the spousal privilege and confidential marital communications...; (13) the benefit of the exemption of real property from attachment or execution...; and (14) the right to bring a wrongful death action...;

Baehr v. Lewis, infra. at 561 (internal cites omitted). *Accord Lewis v. Harris, infra.* (Under the equal protection guarantee of New Jersey’s Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.); *also see Goodridge, infra.* at 969, (The State’s ban on same-sex marriage did “not meet the rational basis test for either due process or equal protection” under the Massachusetts Constitution.).

In the instant case, Judge Malott's order points out the shortcomings of the current marriage laws to the issues at hand. The order noted, "A specific prohibition of same sex marriage does not exist...although the statutory scheme does specifically prohibit marriage between minors without consent of their parents or court order, incestuous marriage, and marriage between those lacking contractual capacity...[and that]...Each *couple*¹¹ desiring to marry pursuant to the laws of New Mexico shall first obtain a license from a county clerk of this state..."

See Petition, Ex. 1, paras. 6, (emphasis in original).

It follows logically that even without resorting to the Constitution, there is no specific impediment contained in current law for marriage licenses to be issued to same-sex couples. However, some county clerks by reason of their declining to issue marriage licenses without court orders and at least some state lawmakers, [EXHIBIT 4] do not uniformly agree with that interpretation. In *Breen* this Court noted "that Congress and the New Mexico Legislature have enacted laws to ensure better living standards for those with mental disabilities...[but]...this group, chiefly because of its history of invidious discrimination, is nonetheless susceptible to the type of baseless stereotyping that has motivated and perpetuates the more subtle forms of gender-based classifications." *Breen id.* at ¶ 25. Under the analysis

¹¹The order succinctly points out that "[T]hese statutes do not define or limit the definition of 'couple' to a heterosexual pair of contractually capable people nor exclude those of same sex orientation from that term." **See Pet'n, Ex. 1, para. 7.**

in *Breen*, decided six years after *NARAL*, application of the two-prong “intermediate scrutiny” test would demonstrate that any discriminatory inference or interpretation that the state’s marriage laws could prohibit a couple from marrying based on their gender, would violate the ERA. See *Elane Photography, id.* ¶ 18 (listing laws and cases making it clear discrimination based on sexual orientation is prohibited).

That the current marriage laws in distinguishing between the sexes are not substantially related to any known important government interest other than a link to their obviously-outdated territorial context, the more modern view of what our ERA mandates regarding this gender-based classification is found in the NMHRA. Cf., *Elane Photography, id.* at ¶ 18 (“New Mexico has a strong state policy of promoting equality for its residents regardless of sexual orientation.”). While there is no important government interest in the laws being interpreted as denying same-sex marriages, it is now quite evident that there is an important government interest in the laws being interpreted as permitting same-sex marriages.

III. DENIAL OF SAME-SEX MARRIAGE IS PROHIBITED UNDER THE EQUAL PROTECTION CLAUSE OF ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION.

The Equal Protection clause (EPC) of the State Constitution is contained in the same section as the ERA. EPC provides, “nor shall any person be denied equal

protection of the laws.” N.M. Const., art. II, § 18. In the case of *ACLU of NM v. City of Albuquerque*, 2006-NMCA-078, ¶ 19, 139 N.M. 761, the Court of Appeals discussed the three levels of review applicable in determining whether a city ordinance violated the EPC:

‘*Strict scrutiny* applies when the violated interest is a fundamental personal right or civil liberty’ guaranteed by the constitution...*Intermediate scrutiny* applies when legislative classifications infringe on important but not fundamental rights, or involve sensitive but not suspect classes...If [an] ordinance ‘does not affect a fundamental right or create a suspect classification, nor impinge upon an important individual interest,’ *rational basis* review applies...Under *rational basis*, the challenger has the burden to demonstrate that the ordinance is not rationally related to a legitimate state interest, defined by our Courts as the absence of a ‘firm legal rationale or evidence in the record to the support the ...classification.’”

ACLU id. at ¶ 19 (internal cites omitted) (emphasis added).

The case of *NARAL*, discussed in Section II above, was decided under the EPC and the ERA, while *Breen*, also discussed in Section II above, was decided solely under the EPC. Although Justice Minzner stated in *NARAL* that “[w]e construe the intent of this amendment [the ERA] as providing something beyond that already afforded by the general language of the Equal Protection Clause[,]” the levels of review were applied to determine whether the gender-based classifications under review were constitutional. *NARAL, id.* at ¶¶ 30, 36-37. It has already been suggested herein that this Court should employ an intermediate scrutiny, in part because this Court has not yet held that same-sex individuals have

a fundamental right to marry. *Cf. Lewis v. Harris, infra.* (no fundamental rights of persons of the same sex to marry in Hawaii); *Baehr v. Lewis, infra.* (no fundamental right under New Jersey Constitution of same-sex persons to marry); *Goodridge v. Department of Public Health, infra* (rational basis test used to determine that the distinction between gender in denying same-sex marriage was unconstitutional). In each of these cases, the laws prohibiting same-sex marriage were declared invalid under their respective EPCs. *Compare Wachocki v. Bernalillo Cnty. Sheriff's Dep't*, 2010-NMCA-021, ¶ 36, 147 N.M. 720 (“Federal substantive due process protection extends only to a narrow and limited set of fundamental rights, which include the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.”) (internal quotes omitted), *aff’d*, 2011-NMSC-039, 150 N.M. 650. Because denying marriage on the basis of gender in New Mexico cannot be construed as being substantially related to any important governmental interest, it would violate the Equal Protection Clause.

CONCLUSION

Because mandamus under Article VI, § 3 of the State Constitution is limited to cases against state officers, boards and commissions, which county clerks are neither, this Court in exercising its superintending control is requested to focus on fashioning a remedy, if warranted, toward the inferior courts as to the issues raised

by Petitioners. As presented, the issue of whether same-sex marriages are valid in New Mexico permeates all counties and has far reaching effects within and beyond the confines of the state. The Legislature has not resolved the issue despite numerous attempts. Some clerks have simply issued marriage licenses in the absence of any litigation. In Santa Fe and Bernalillo Counties, the Clerks have issued marriage licenses to their respective parties in this litigation, appearing to render the Clerks' status moot. However, the issue could recur and not be judicially reviewed.

This Court can review moot cases that present issues of substantial public interest that can recur. Whatever the historical impetus of the New Mexico marriage laws, they are clearly outdated if interpreted to prohibit same-sex marriage. While interpretation of the ERA reflects an evolving concept of gender equality, the lower courts must be sensitive to classes of people who are discriminated against, not because of a characteristic that actually prevents them from functioning in society, but because of external and artificial barriers created by societal prejudice. To the extent they prohibit the issuance of marriage licenses to same-sex couples, the marriage laws are unconstitutional as violating the ERA and equal protection clauses of Article II, Section 18.

Under its constitutional power of superintending control, this Court is urged to issue definitive guidance to the district courts that address:

- (1) the standards of review for denial of same-sex marriage licenses in the context of the ERA and EPC clauses (e.g., intermediate scrutiny);
- (2) whether same-sex marriage is a fundamental right under the New Mexico Constitution;
- (3) whether discrimination on the basis of sexual orientation or gender is also discrimination on the basis of sex as prohibited by the ERA;
- (4) the viability of the marriage laws in permitting license issuance only to opposite sex applicants; and
- (5) the validity of marriage licenses issued to-date to same-sex couples whether by judicial order or by clerks *sua sponte*.

Respectfully submitted,
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SANTA FE COUNTY CLERK
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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 5,995 words.



Willie R. Brown

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Geraldine Salazar's Response to Verified Petition for a Writ of Superintending Control* was served on September 23, 2013, by first class mail to the following:

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EXHIBIT 1

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GREGORY T. IRELAND

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

Ann Hart

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

v.

No. D-202-CV-2013-02757

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

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs are committed same-sex couples who seek the freedom to marry in New Mexico. Each Plaintiff couple has committed to build a life and a home together and to share together as a family the joys and hardships that life may bring them. Each of the Plaintiff couples are, and have been for many years, bound to each other by personal commitment and shared responsibility for the happiness, health and well being of one another and, in some cases, their children and other family members. For any different-sex couple that has made such a weighty and enduring commitment, New Mexico provides a legal institution—civil marriage—that honors and supports their bond in countless intangible and tangible ways. Indeed, the institution of civil marriage exists for the very purpose of recognizing such personal and public commitments of two people to each other. But, unlike other couples who have made a similar commitment to one another, New Mexico denies civil marriage to these Plaintiffs for the sole

reason that the members of these couples are persons of the same sex. Each Plaintiff has been denied the freedom to marry the person she or he loves, and this denial violates Plaintiffs' fundamental rights and liberties under the New Mexico Constitution.

2. Plaintiffs seek a declaration that it is unlawful to deny same-sex couples the freedom to marry on the basis of sex or sexual orientation because such denial deprives them of fundamental rights and liberties, as alleged herein, and otherwise violates the New Mexico Constitution.

3. Plaintiffs seek injunctive relief: (a) that Defendant Maggie Toulouse Oliver, in her official capacity as Bernalillo County Clerk ("Bernalillo County Clerk") and Defendant Geraldine Salazar, in her official capacity as Santa Fe County Clerk ("Santa Fe County Clerk") (or collectively, "Clerks") and Defendant the State of New Mexico ("the State"), (or collectively, "Defendants"), prescribe and furnish forms for the application for license to marry, the license to marry, and the marriage certificate that do not discriminate on the basis of sex or sexual orientation; (b) that Defendants implement and enforce all aspects of the state's marriage law, NMSA 1978, Chapter 40, Article I, without discriminating on the basis of sex or sexual orientation, including without limitation that they take all steps necessary, including the preparation and issuance of detailed instructions as may be required, to procure the uniform observance of NMSA 1978, Chapter 40, Article I, without discrimination on the basis of sex or sexual orientation; and (c) requiring Defendants to treat Plaintiffs, once married in conformance with the licenses issued by the Clerks as prayed for herein, equally with all other married couples under the Constitution and laws of New Mexico.

JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter of this action pursuant to the New Mexico Constitution, Art. VI § 13, and NMSA 1978 § 44-6-1 et seq. (“the Declaratory Judgment Act”). This Court has personal jurisdiction over Plaintiffs and Defendants.

5. Venue is proper in this Court pursuant to NMSA 1978 § 38-3-1 because the Bernalillo County Clerk’s offices are located in this county, Plaintiffs Miriam Rand and Ona Lara Porter reside in this county, and because the acts and events giving rise to this Complaint occurred in this county.

PLAINTIFFS

Rose Griego and Kimberly Kiel

6. Plaintiffs Rose Griego (“Rose”), age 47, and Kimberly Kiel (“Kim”), age 44, have maintained an intimate and committed relationship of mutual protection and support for the past eight years. They live together in Santa Fe. Kim is a financial advisor with an independent private practice; Rose is an accountant by trade and owns her own accounting business.

7. Kim and Rose had a traditional commitment ceremony for about 130 guests at the Folk Art Museum in Santa Fe in October of 2010. The ceremony was a momentous occasion for Rose and Kim because it allowed them to have their families and friends bear witness to their declarations of love and commitment to one another, but their joy in celebrating their union was somewhat tempered by the state’s failure to recognize their relationship.

8. Kim and Rose have experienced firsthand the importance even to intimate family members of the legal and social status of marriage. Rose’s sister died a few years ago, and her family did not allow her sister’s boyfriend of ten years to keep any of her belongings after her death or allow him to participate in the decision making surrounding her funeral arrangements. Rose was astonished that her family kept pointing to the couple’s failure to marry in response to

her pleas to allow her sister's long-term boyfriend access to her sister's belongings. Rose does not fault her family, but the experience was instructive, and the couple came to understand the importance of marriage to others: marriage serves as notice that a couple is truly committed, truly family. After the experience, Kim and Rose hired an attorney to put every legal document in place that they could in an attempt prevent a similar situation from happening to one of them.

9. Before they spent the thousands of dollars necessary to duplicate only some of the rights married couples automatically enjoy, Rose was hospitalized. Even though Kim had taken her to the emergency room, the hospital refused to provide Kim with any information about Rose's condition or treatment. It was only after Rose's family arrived that Kim was able to learn Rose's prognosis.

10. Kim has two children from a previous relationship, who are now in college. Her children refer to Rose as their step-mother. Her children recognize the couple's love for and commitment to one another, but Kim and Rose want everyone else to recognize the same. Kim and Rose want to get married, but are unable to do so in New Mexico.

Miriam Rand and Ona Lara Porter

11. Plaintiffs Miriam Rand ("Miriam"), age 63, and Ona Lara Porter ("Ona"), age 66, have maintained an intimate and committed relationship of mutual protection and support for the past twenty-five years. They live together in Albuquerque, New Mexico. Miriam is the owner of Family Matters, LLC, and assists families through the process of adoption, and Ona is the President and CEO of Prosperity Works, a state wide non-profit which focuses on eliminating poverty, building assets for the poor, and challenging racial, gender and class inequities.

12. When they first started dating, Miriam had one daughter from a previous relationship and Ona had two, all of whom are now adults. From the time they combined households, Miriam and Ona loved each other's children as if they were their own. Their

youngest daughter who was just three when they combined families went so far as to go to court to change her surname to Porter-Rand in order to reflect the importance of both of the mothers in her life.

13. Miriam and Ona's middle daughter, Cherif, who is now 41, is debilitated by multiple sclerosis. Miriam and Ona are caring for Cherif, and Ona has adopted Cherif's fourteen-year-old daughter, who herself has cerebral palsy, because Cherif is no longer able to care for her daughter as a result of her disability. Miriam plans to initiate a second parent adoption to ensure that if something were to happen to Ona, their granddaughter would be protected. Although Miriam, Ona, and their granddaughter are a family to all that know them, as individuals, Miriam and Ona do not have automatic legal authority to make important decisions for one another or their child, and they have had to pay significant legal bills to protect their relationship and prove it to others, unlike different-sex couples who can simply marry.

14. Both Miriam's and Ona's mothers died within a year of each other. Before they died, Miriam and Ona cared for each other's aging parents. Even though Miriam and Ona shared the responsibility of their mothers' end of life care, they were faced with restrictive next of kin and family only limitations on visitation and decision making. To facilitate the familial responsibility they had taken on together as a couple, they were forced to pretend to be sisters.

15. Despite the fact that Miriam and Ona cared for each other's mothers as a family, when Miriam's mother died, Ona was not eligible for bereavement leave; and when Ona's mother passed, Miriam was also ineligible.

16. In the year, Miriam and Ona have suffered through the serious illnesses and deaths of several other family members, including Miriam's sister, Miriam's brother-in-law and Ona's brother. The denial of marital rights hampered Miriam and Ona's abilities to visit, to make decisions for, and to care for each other's siblings.

17. Miriam and Ona celebrate their anniversary on the day they signed a mortgage together. On the subject of their anniversary date, they say "it says little about the life of unimaginable love that we have shared for more than 25 years, the children we have raised together, the mothers we have nursed and then buried, the granddaughter we have adopted and whose opportunity for a future of independence, happiness, and productivity is dependent upon our consistent attention to every developmental opportunity that we can manage, or the grown daughter for whom almost total care is essential and ever changing. But that contract is what we have." What they want, however, is the state's legal recognition of their deep commitment to one another and their family. Miriam and Ona want to get married, but are unable to do so in New Mexico.

A.D. Joplin and Greg Gomez

18. Plaintiffs Aaron Joplin ("A.D."), age 34, and Greg Gomez ("Greg"), age 52, have maintained an intimate and committed relationship of mutual protection and support for the past seven years. They live together in Farmington New Mexico. Aaron just earned his bachelor's degree in business management from New Mexico Highlands University. Greg works as an interior designer.

19. Both A.D. and Greg are very committed to their community. A.D. and Greg on the Board of Directors of SafeZone at San Juan College, an organization which assists area lesbian, gay, bisexual, transgender or questioning area residents in finding unprejudiced and necessary community support, including unprejudiced counseling and medical care. A.D. is also a peer advocate for a study being conducted by the Behavioral Health Research Center of the Southwest. Greg is on the advisory board for this project.

20. A.D. and Greg do not have any biological children, but they have continued a relationship with a former long-term foster child, now 24 years old, who calls them both Dad.

many legal protections that marriage provides, Cecilia and Monica had to pay to create documents to duplicate only some of the rights that married couples enjoy in New Mexico. They hope the documents are sufficient, but worry they are not.

32. Cecilia and Monica want to enjoy the same peace of mind that different-sex couples take for granted. They want to publically demonstrate their love and commitment and to have the state of New Mexico recognize the same. They want to get married, but they cannot in New Mexico.

Jen Roper and Angelique Neuman

33. Plaintiffs Jen Roper (“Jen”), age 44, and Angelique Neuman (“Angelique”), age 45, have maintained an intimate and committed relationship of mutual protection and support for the past 21 years. Jen and Angelique first met as undergraduate students enrolled at New Mexico Tech University, where they both studied materials engineering. Angelique is an engineer at Los Alamos National Laboratories (LANL), where she has been employed since 1996. Jen was employed at LANL from 1997 until 2005, when she resigned to take care of her and Angelique’s children. Until recently, Jen also worked at the Boys & Girls Club in Santa Fe.

34. Twelve years ago, Jen and Angelique adopted three brothers from the custody of Children Youth & Family Department. The boys are now 15, 16, & 18, and Jen and Angelique have dedicated themselves to creating a loving and safe environment for their family. After his May 2013 high school graduation, Jen & Angelique’s eldest son enlisted in the U.S. Army and recently began basic training.

35. Jen and Angelique consider themselves married, and many years ago decided to marry in their home state – New Mexico. Jen and Angelique’s sons are long-time supporters of Jen’s and Angelique’s commitment and efforts to legally marry.

36. On December 19, 2012, Jen was diagnosed with stage 4 glioblastoma – the most aggressive form of brain cancer, and was forced to stop working. Jen underwent surgery on December 24, 2012, which partially removed the tumor. At that time, doctors gave her an 18-month prognosis. Following the surgery, Jen suffered a stroke, which resulted in right-side paralysis, memory loss, difficulty with recall, and vision impairment. Jen has stabilized for the time being, but her physical and mental capabilities will likely continue to deteriorate.

37. Jen and Angelique live in Santa Fe with their sons. Due to her ongoing medical needs, Jen is currently undergoing in-patient treatment at an assisted living facility in Los Alamos, and is unable to travel. Angelique spends hours every day with Jen at the assisted living facility, and the children visit often.

38. Jen and Angelique have long desired to marry, but Jen's illness has created urgency for the couple. The family's struggles with Jen's health and limited future have increased the couple's commitment to each other and have placed in stark relief the importance of recognition for Jen's and Angelique's long-standing relationship. Before Jen dies or before her medical condition leaves her unable to contract, Jen and Angelique want to get married, but they are currently unable to do so in New Mexico, and are unable to travel outside New Mexico to marry elsewhere.

39. Jen and Angelique's inability to marry also inflicts significant practical harms on them and their children, because they are unable to access any of the many benefits that depend on marriage, including those relating to Jen's disability. Although Jen and Angelique's sons receive Social Security disability benefits as a result of Jen's inability to work, Angelique cannot collect spousal benefits because they cannot legally marry.

DEFENDANTS

40. Maggie Toulouse Oliver is sued in her official capacity as Bernalillo County Clerk. As Bernalillo County Clerk, she is a constitutional officer of the State and is responsible for executing the law of the State as it relates to her official duties. N.M. Const. Art. VI, §22; NMSA 1978 §4-40-1 et seq. and *passim*. Among these duties, she is charged with furnishing applicants with the application for license to marry, the license to marry, and the marriage certificate, see NMSA 1978, §§ 40-1-10, to 40-1-19, and more comprehensively, with implementing and enforcing compliance with the marriage eligibility requirements set forth in NMSA 1978, Chapter 40, Article 17.

41. Geraldine Salazar is sued in her official capacity as Santa Fe County Clerk. As Santa Fe County Clerk, she is a constitutional officer of the State and is responsible for executing the law of the State as it relates to her official duties. N.M. Const. Art. VI, §22; NMSA 1978 §4-40-1 et seq. and *passim*. Among these duties, she is charged with furnishing applicants with the application for license to marry, the license to marry, and the marriage certificate, see NMSA 1978, §§ 40-1-10, to 40-1-19, and more comprehensively, with implementing and enforcing compliance with the marriage eligibility requirements set forth in NMSA 1978, Chapter 40, Article 17.

42. The State is sued pursuant to section 13 of the Declaratory Judgment Act, NMSA 1978 § 44-6-1 et seq., which states in pertinent part that “the state of New Mexico...may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico...or any of the laws of the state of New Mexico...” Since this action calls for the Court to determine that the statutes of New Mexico related to marriage licenses violate the New Mexico Constitution to the extent that they deny the right of Plaintiffs to marry, the State is a proper party.

**PLAINTIFFS' ATTEMPTS TO OBTAIN MARRIAGE LICENSES
IN BERNALILLO COUNTY**

43. On March 21, 2013, Kim and Rose, and Miriam and Ona each appeared at the Bernalillo County Clerk's offices in order to obtain a marriage license. On June 4, 2013, A.D. and Greg, Therese and Tanya, and Monica and Cecilia each appeared at the Bernalillo County Clerk's offices in order to obtain a marriage license. Each Plaintiff couple had proper identification, and was prepared to complete the application and to tender the appropriate fee. Each Plaintiff couple spoke briefly with an employee of the Bernalillo County Clerk's office who is responsible for issuing marriage licenses, and explained that they wanted to apply for a marriage license.

44. For each couple, the Bernalillo County Clerk's employee, acting upon behalf and under the authority of the Bernalillo County Clerk, stated that he or she could not issue them a license because the couple was of the same sex or because of the sexual orientation of each couple.

45. Each Plaintiff individually and each Plaintiff couple is otherwise qualified to contract to marry and to be married under the laws of State of New Mexico in that each Plaintiff is over the age of eighteen, no Plaintiff is part of an existing marriage, and neither Plaintiff couple is related to each other within the degrees of kinship set forth in NMSA 1978 § 40-1-7.

**PLAINTIFFS' ATTEMPTS TO OBTAIN MARRIAGE LICENSES
IN SANTA FE COUNTY**

46. On August 14, 2013, two Plaintiff Couples, Miriam and Ona and Jen and Angelique, appeared at the Santa Fe Clerk's office in order to obtain marriage licenses. They each had proper identification, and were prepared to complete the application and to tender the appropriate fee. They spoke briefly with an employee of the Santa Fe County Clerk's office who

is responsible for issuing marriage licenses, and explained that each Plaintiff Couple wanted to apply for a marriage license.

47. The Santa Fe County Clerk's employee, acting upon behalf and under the authority of the Santa Fe County Clerk, stated that he or she could not issue them marriage licenses because they were of the same sex or because of their sexual orientation.

48. They were otherwise qualified to contract to marry and to be married under the laws of State of New Mexico in that they are over the age of eighteen, are not part of an existing marriage, and are not related to each other within the degrees of kinship set forth in NMSA 1978 § 40-1-7.

GENERAL ALLEGATIONS

New Mexico's Historical Discrimination Against Lesbian and Gay People

49. Each Plaintiff identifies as a lesbian, gay or bisexual. Lesbian, gay and bisexual people, including Plaintiffs, are members of a minority group that historically has been discriminated against in New Mexico and subjected to unequal treatment by the law and society solely because of their sexual orientation—a factor which bears no connection to the ability of the individual to lead a productive life or to contribute to society. Despite recent progress in eliminating anti-gay discrimination, lesbian, gay, and bisexual people remain a politically disadvantaged minority group.

50. For example, until 1975 New Mexico criminalized consensual sexual intimacy between persons of the same sex. Numerous convictions were upheld by the courts of this state, which repeatedly rejected the arguments of criminal defendants that the statute violated their constitutional rights by subjecting them to punishment solely for private, consensual intimate conduct. See State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976) and numerous cases cited therein. By criminalizing for many decades the most private and intimate aspects of lesbian, gay

and bisexual people's lives, the State marked them as outcasts and invited public and private discrimination in all aspects of their lives.

51. New Mexico also lacked any state laws protecting lesbian, gay and bisexual people against discrimination until 2003. These protections were enacted only after advocates had fought for more than a decade to secure passage of antidiscrimination legislation. Bills prohibiting sexual orientation discrimination were introduced and ultimately defeated by opponents in 1991, 1993, 1997, 1999, and 2001. *See* S.B. 91 (1991); N.M. H.B. (1993); H.B. 277 (N.M. 1999). H.B. 360 (N.M. 2001). For decades prior to the 2003 legislation, lesbian, gay and bisexual people had no legal recourse if they were fired from a job, denied an apartment, or refused service by a business. Moreover, while state law now provides some recourse, even after antidiscrimination legislation was enacted, lesbian, gay and bisexual people continued to face discrimination in employment, public accommodations and other areas, including state employees who faced adverse employment actions on the basis of their sexual orientation. *See* Williams Institute, New Mexico—Sexual Orientation and Gender Identity Law and Documentation of Discrimination (Sept. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/NewMexico.pdf>.

52. Lesbian, gay and bisexual people in New Mexico likewise have been unable to secure legislation that would provide legal recognition to their relationships. Bills to establish domestic partnerships for same-sex couples were defeated in 2005, 2007, 2008, 2009, and 2010, in many cases without ever having been brought to a floor vote in the Senate. In short, lesbian, gay and bisexual New Mexicans have long faced discrimination at the hands of the State, and have remained unable to end this state-sanctioned discrimination through the political process.

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NO: D 202 CV 2013 2757

ROSE GRIEGO & KIMBERLY KIEL, et al.,

Plaintiffs,

v.

MAGGIE TOULOUSE OLIVER, et al.,

Defendants.

ENDORSED
FILED IN MY OFFICE THIS

AUG 26 2013

Anthony J. ...
CLERK DISTRICT COURT

CATHY CHAVEZ

DECLARATORY JUDGMENT, INJUNCTION, AND
PEREMPTORY WRIT OF MANDAMUS

THIS MATTER having come before the Court upon the Second Amended Complaint for Declaratory and Injunctive Relief; the Court having reviewed the entire file; the Court having convened a hearing in open Court on August 26, 2013; and the Court being sufficiently advised:

THE COURT FINDS:

1. There is jurisdiction over the parties and the subject matter.
2. The material issues of fact herein are not in dispute. Plaintiffs are same sex couples who have shared lengthy committed relationships. Having made these deep personal and social commitments, they wish to enter into the state-sanctioned contract of marriage. Defendants are, respectively, the County Clerks of Bernalillo County, New Mexico, and Santa Fe County, New Mexico. The Court further adopts the parties' stipulated facts as set forth in open court.
3. In order to enter into the state-sanctioned contract of marriage, any couple must obtain a Marriage License from a county clerk. Sec. 40-1-1, *et seq.*, NMSA. Defendants are charged with the clear and unambiguous duty to provide Marriage Licenses to qualified couples upon application. Sec. 41-1-10, NMSA. Plaintiffs, and those similarly situated throughout New

Mexico, are otherwise qualified to obtain a marriage license and to enter into the contract of marriage [Section 40-1-1, 40-1-6, and 40-1-7, NMSA] and have either already been denied a Marriage License by Defendants or who will, to a certainty, be denied a Marriage License by Defendants on the basis of their same sex orientation.

4. An “actual controversy” exists between the parties. Section 44-6-1, *et seq.*, NMSA.

5. A specific prohibition of same sex marriage does not exist in Section 40-1-1 through 40-1-20, NMSA, although the statutory scheme does specifically prohibit marriage between minors without consent of their parents or court order, incestuous marriage, and marriage between those lacking contractual capacity.

6. Section 40-1-10, NMSA, establishes the necessity for a marriage license and states:

Each *couple* desiring to marry in New Mexico shall obtain a license
from a county clerk...

(emphasis added)

but these statutes do not define or limit the definition of “couple” to a heterosexual pair of contractually capable people nor exclude those of same sex orientation from that term.

7. It is arguable that the use of both gender neutral and gender specific terms in our laws on “Domestic Affairs,” Section 40-1-1 through 40-15-4 NMSA supports the conclusion that New Mexico statutes do not allow same sex marriages; *e.g.*, *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Lewis v. Harris*, 908 A.2d 196 (NJ 2006); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). And it is also arguable that our Territorial Legislature did not even consider same sex marriage when it established the statutory scheme in 1862. From this, some might argue that Defendants are prohibited from issuing Marriage Licenses to same sex couples or, at least, that there is no clear, non-discretionary duty to do so. *See, State of New Mexico's Response to Verified Petition for Writ of Mandamus 8/12/13 Supreme Court # 34227.*

8. It is, however, beyond argument that the People of the State of New Mexico considered, and spoke clearly to ensure “equality of rights under the law” in 1972 by adoption of *Article II, Section 18, Constitution of New Mexico*. Article II, Section 18 provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. *Equality of rights under the law shall not be denied on account of the sex of any person.*

(emphasis added)

9. Accordingly, whether or not our statutory scheme in Section 40-1-1, *et seq.*, does, or does not, allow same sex marriage is of little consequence to the outcome of this litigation because the voice of New Mexicans in adopting Art. II, Section 18 in 1972 clearly prohibits such discrimination against same sex applicants and the Defendants’ clear, non-discretionary duty to issue a license to “each couple” otherwise qualified stands clearly and inexorably through all the rhetoric.

10. Implying conditions of sexual orientation on one’s right to enter civil contracts such as marriage is a violation of Article II, Section 18’s mandate that “equality of rights shall not be denied on account of the sex of any person.”

11. Implying conditions of sexual orientation on one’s right to enter civil contracts such as marriage is a violation of Article II, Sections 18’s mandate that “no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.”

12. Whether based in statute, or Constitutional protections, Defendants have a non-discretionary duty to issue a Marriage License to “each couple” otherwise qualified upon application for same and no valid excuse for not performing that duty has been asserted.

13. Gay and Lesbian citizens of New Mexico have endured a long history of discrimination. See, *Breen v. Carlsbad Municipal Schools*, 2005 NMSC 028. Denial of the right to marry continues this unfortunate, intolerable pattern and establishes irreparable injury on Plaintiffs' part. *Loving v. Virginia*, 388 U.S. 1 (1967). *U.S. v. Windsor*, (U.S. Supreme Court June 26 2013; see, www.supremecourt.gov/opinions/12pdf/12-307_6j37pdf.)

14. There is a substantial public interest in vindicating the rights of all citizens under the law and in preventing the ongoing violation of our constitutional rights. *Awad v. Ziriox*, 670 F.3d 1111 (10th Cir. 2012); *Herrera v. Santa Fe Public Schools*, 792 F. Supp.2d 11744 (DC N.M. 2011). There is no benefit to the parties or the public interest in having this matter progress through a lengthy path of litigation while basic constitutional rights are compromised or denied on a daily basis. Accordingly, the Court finds Plaintiffs have established both that they face imminent and irreparable injury and lack a speedy or adequate remedy at law.

15. The grant of the relief sought by Plaintiffs in this matter would have little or no impact upon Defendants Oliver and/or Salazar. They would still function in accordance with their duties and the relief sought would have little, or no, administrative or economic impact on the operation of their offices.

16. For the reasons set forth above, the operative facts being undisputed, Plaintiffs have demonstrated a significant likelihood of success on the merits of their claim.

17. To the extent not previously set forth, the allegations of the Second Amended Complaint filed August 16, 2013, are incorporated herein. A true copy thereof is attached hereto.

18. It is appropriate to enjoin and restrain Defendants from refusing to issue Marriage Licenses to same sex couples on the basis of their sexual orientation or gender.

19. It is appropriate to issue this Peremptory Writ of Mandamus requiring Defendants, and each of them, to perform their non-discretionary statutory duty to issue a Marriage License to "each couple" otherwise qualified who applies for same without regard to their sexual orientation or gender.

WHEREFORE, it is Ordered:

Declaratory Judgment

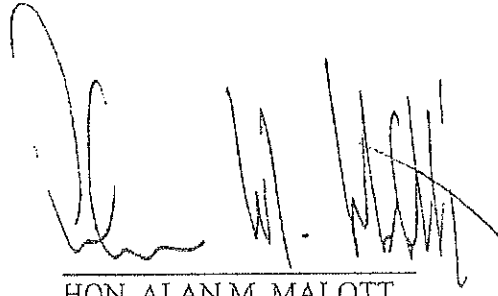
1. Section 40-1-1, *et seq.*, NMSA does not preclude nor prohibit issuance of a Marriage License to otherwise qualified couples on the basis of sexual orientation or the gender of its members.
2. To the extent Section 40-1-1, NMSA, may be read to prohibit issuance of a Marriage License to otherwise qualified same sex couples, those prohibitions are unconstitutional and unenforceable under Article II, Section 18, Constitution of New Mexico.

Writ of Mandamus

3. Immediately upon receipt of this Writ, Defendants Oliver and Salazar, as the County Clerks of Bernalillo County and Santa Fe County, New Mexico, respectively, shall comply with and shall perform their non-discretionary statutory duty to issue a Marriage License upon application from "each couple" otherwise qualified without regard to the couple's sexual orientation or the gender of its members.

Injunctive Relief

4. Defendants Oliver and Salazar, and each of them, are hereby enjoined and restrained from refusing to issue a Marriage License to "each couple" otherwise qualified who applies for same on the basis of the couple's sexual orientation or the gender of its members.



HON. ALAN M. MALOTT

Dated: 8/26/13

Copies of the foregoing were hand delivered to all counsel of record in open court on August 26, 2013.

STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE

RECEIVED FOR
GERALDINE SALAZAR
SANTA FE COUNTY CLERK,
BY: *Dina Salazar*
TIME: *11:05 AM*
DATE: *Aug 23, 2013*

STATE OF NEW MEXICO ex rel.
ALEXANDER HANNA and YON HUDSON,

Petitioners,

v. No. D-0101-CV-2013-02182

GERALDINE SALAZAR, in her official
capacity as Santa Fe County Clerk,

Respondent.

50:TTW 8Z 0NU 8L

ALTERNATIVE WRIT OF MANDAMUS

TO: Geraldine Salazar,
Santa Fe County Clerk

GREETINGS. Whereas it appears to the Court as follows:

1. Whereas Petitioners are residents of Santa Fe County who desire to marry one another in Santa Fe County.
2. Whereas, before they may be married, Petitioners are required by the State of New Mexico to have a marriage license. *See* NMSA 1978, §§ 40-1-10, 40-1-14 (1862-63).
3. Whereas Respondent is the Clerk of Santa Fe County and is authorized by virtue of that office as the only entity that can issue marriage licenses in Santa Fe County. *See* § 40-1-10.

4. Whereas Respondent has a mandatory, non-discretionary duty to issue marriage licenses in accordance with the Constitution and marriage statutes of New Mexico,
5. Whereas the requirements for obtaining a marriage license in New Mexico are that the parties be capable of entering into a contract, not closely related, and the age of majority. *See* §§ 40-1-1, 40-1-6, 40-1-7.
6. Whereas there is no requirement as to sex or sexual orientation for obtaining a marriage license in New Mexico. *See id.*
7. Whereas Petitioners are able to contract under the law, are not related to a specified degree, and are both at least eighteen years of age. *See id.*
8. Whereas, on June 6, 2013, Respondent denied Petitioners a license to marry one another because they are both male.
9. Whereas Respondent denied Petitioners a marriage license for a requirement that is not contained in the marriage laws of the State of New Mexico. *See id.*
10. Whereas Respondent acted outside her statutory authority to deny Petitioners their marriage license. *See id.*

11. Whereas same-sex marriages performed in other jurisdictions are valid under the laws of the State of New Mexico. § 40-1-4 (recognizing that all marriages celebrated outside New Mexico are valid in New Mexico if valid in the place where the marriage was entered into); *see also In re Bivians' Estate*, 98 N.M. 722, 726, 652 P.2d 744, 748 (Ct. App. 1982) (“New Mexico applies the rule of comity, that the law of the place of contract governs the validity of a marriage.”).
12. Whereas at least one New Mexico court has determined that a same-sex marriage performed in New Mexico, pursuant to a license issued by a New Mexico County Clerk, was legal.
13. Whereas making a legal right contingent upon one’s sex is discrimination based on sex.
14. Whereas reading a sex or sexual orientation requirement into the laws of New Mexico violates the state constitution, which mandates that “[e]quality of rights under law shall not be denied on account of the sex of any person.” N.M. Const. Art. II, § 18.
15. Further, “no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.” *Id.*

16. Whereas denying marriage licenses on the basis of sex does not further a compelling state interest.
17. Whereas denying marriage licenses on the basis of sexual orientation is not rationally related to a legitimate state interest.
18. Whereas Respondent has breached her mandatory non-discretionary duty to issue marriage licenses in accordance with the Constitution and marriage statutes of the State of New Mexico by denying Petitioners a marriage license because of their sex or sexual orientation.
19. Whereas Petitioners have a clear legal right to a marriage license in Santa Fe County.
20. Whereas Petitioners filed a petition for a writ of mandamus with this Court, requesting a writ issue to the County Clerk requiring her to issue them a marriage license pursuant to her statutory duties (Verified Petition for Writ of Mandamus attached as Ex. 1).
21. Whereas Petitioners have no plain, adequate, and speedy remedy in the ordinary course of the law.
22. Whereas Petitioners are both beneficially interested and uniquely affected by Respondent's conduct in denying marriage licenses on the bases of sex or sexual orientation.

THEREFORE you are commanded forthwith to:

1. Comply with your mandatory, nondiscretionary duty to issue marriage licenses on an equitable, nondiscriminatory basis, without regard to sex or sexual orientation, as required by the Constitution and marriage statutes of the State of New Mexico; or
2. Show cause before this Court at 3:30 p.m. (time) on the 26th (date) day of September, 2013 (month), why you should not do so.


DISTRICT COURT JUDGE



STEPHEN T. PACHECO
CLERK OF THE DISTRICT COURT

BY: 

Deputy

Dated: August 22, 2013.

William Sharer, et. al.,

v.

Lynn Ellins

CASE DETAIL

CASE #	CURRENT JUDGE	FILING DATE	COURT
D-307-CV-201302061	Martin, James Thomas	08/29/2013	LAS CRUCES District

PARTIES TO THIS CASE

PARTY TYPE	PARTY DESCRIPTION	PARTY #	PARTY NAME
D	Defendant	1	ELLINS LYNN
	ATTORNEY: CARRILLO RAUL A.		
D	Defendant	2	ELLINS LYNN
	ATTORNEY: CARRILLO RAUL A.		
P	Plaintiff	1	SHARER WILLIAM
	ATTORNEY: BECHT PAUL F.		
P	Plaintiff	2	HALL JIMMIE
	ATTORNEY: BECHT PAUL F.		
P	Plaintiff	3	ROCH DENNIS
	ATTORNEY: BECHT PAUL F.		
P	Plaintiff	4	STICKLER JAMES
	ATTORNEY: BECHT PAUL F.		
P	Plaintiff	5	HERRELL YVETTE
	ATTORNEY: BECHT PAUL F.		
P	Plaintiff	6	NEVILL STEVE
	ATTORNEY: BECHT PAUL F.		
P	Plaintiff	7	GALLEGO DAVID
	ATTORNEY: BECHT PAUL F.		

CIVIL COMPLAINT DETAIL

COMPLAINT DATE	COMPLAINT SEQ #	COMPLAINT DESCRIPTION	DISP	DISP DATE
08/30/2013	1	OPN: COMPLAINT		

COA SEQ #	COA DESCRIPTION
1	Mandamus Prohibition

PARTY NAME	PARTY TYPE	PARTY #
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REGISTER OF ACTIONS ACTIVITY

EVENT DATE	EVENT DESCRIPTION	EVENT RESULT	PARTY TYPE	PARTY #	AMOUNT
09/06/2013	MEMORANDUM				
	Memorandum in Response to Verified Petition for Writ of Mandamus and Immediate Stay, and Complaint for Injunctive and Declaratory Relief				
09/06/2013	CERTIFICATE OF SERVICE				
	Certificate of Service for Answer and Memorandum				
09/06/2013	ANSWER				
	Answer to Verified Petition for Writ of Mandamus and Immediate Stay, and Complaint for Injunctive and Declaratory Relief				
09/05/2013	JDG: JUDGE RECUSAL				
	Notice of Recusal - The Honorable James T. Martin recuses				
	1 pg				
	WILLIAM SHARER etal vs LYNN ELLINS				
	NOTE: EXCUSAL OF JUDGE MARTIN WAS FILED 8/30/13 -				
	& WILL BE REASSIGNED ON SEPT 17, 2013				
09/04/2013	CERTIFICATE OF SERVICE				
	Certificate of Service of Notice of Peremptory Excusal and Acceptance of Service and Entry of Appearance e-filed on 08/30/13 to Paul F. Feeht.				
	1pgs				

08/30/2013 ACCEPTANCE OF SERVICE D 1

Acceptance of Service and Entry of Appearance

08/30/2013 JDG: JUDGE

EXCUSAL/PEREMPTORY

CHALLENGE

Notice of Peremptory Excusal - the Honorable James T. Martin

is excused - Raul Carrillo, Jr. obo def/rsp

1 pg

WILLIAM SHARER etal vs LYNNE ELLINS

NOTE: PARTIES HAVE 10 WORKING DAYS TO AGREE TO A JUDGE & HAVE THAT JUDGE ACCEPT THIS CASE/OTHER- WISE WILL BE REASSIGNED ON: SEPT 17, 2013

08/29/2013 OPN: PETITION P 1

VERIFIED PETITION FOR WRIT OF MANDAMUS AND IMMEDIATE STAY, AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF -

JUDGE ASSIGNMENT HISTORY

ASSIGNMENT DATE	JUDGE NAME	SEQ#	ASSIGNMENT DESCRIPTION
08/29/2013	Martin, James Thomas	1	INITIAL ASSIGNMENT

EXHIBIT 5

SUPREME COURT OF NEW JERSEY
M-949 September Term 2009
058389

FILED

JUL 26 2010

ORDER

MARK LEWIS, ET AL.,

Plaintiffs-Movants,

v.

GWENDOLYN L. HARRIS, ETC., ET AL.,

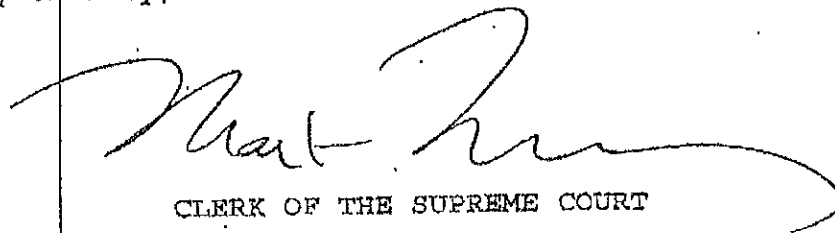
Defendants-Respondents.


CLERK

This matter having been opened to the Court by plaintiffs' motion for an order in aid of litigant's rights, Rule 1:10-3, and the Court having considered the application, together with the briefs and exhibits filed in support thereof, and for good cause shown, it is hereby ORDERED:

This matter cannot be decided without the development of an appropriate trial-like record. Plaintiffs' motion is therefore denied without prejudice to plaintiffs filing an action in Superior Court and seeking to create a record there. We reach no conclusion on the merits of plaintiffs' allegations regarding the constitutionality of the Civil Union Act, N.J.S.A. 37:1-28 to -36.

Witness, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of July, 2010.


CLERK OF THE SUPREME COURT

LONG, J., dissenting.

Plaintiffs are six committed same-sex couples who have filed a motion in aid of litigants' rights claiming that almost

four years after Lewis v. Harris, 188 N.J. 415 (2006), and three-and-one-half years after passage of the Civil Union Act, N.J.S.A. 37:1-28 to -36, they still are denied the "full rights and benefits enjoyed by heterosexual married couples" mandated by the equal-protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution. In their papers, plaintiffs detail a host of workplace, public accommodation, family law, economic, and various other "rights and benefits" that, they allege, are not afforded to them despite the Civil Union Act and the command in Lewis.

In addition to certifications by the parties, plaintiffs cite to the report of the Civil Union Review Commission, N.J.S.A. 37:1-36, a body established by the Legislature as part of the Civil Union Act to evaluate the Act's success, which concluded that civil unions have failed to deliver the mandate of equality guaranteed by Article I, Paragraph 1. However, plaintiffs' record has not been tested in the crucible of a litigated matter. Thus, we realize that we do not have a sufficient basis for debating the merits of the application, which raises a matter of general public importance and one of constitutional significance.

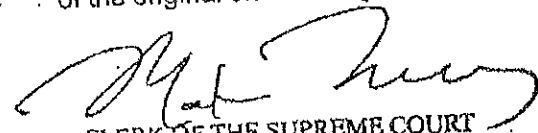
The next step should be the development of a record on which those important issues can be resolved quickly. At the very least, oral argument would have helped to guide us on the best procedural course for creating such a record.

We are disappointed that three members of the Court have voted to deny the motion without oral argument and that plaintiffs must now begin anew and file a complaint in the Superior Court seeking the relief to which they claim they are entitled. If plaintiffs' allegations are true -- and we will not surmise whether they are or are not -- then the constitutional inequities should be addressed without any

unnecessary delay. Therefore, we would hope that the proceedings in the Superior Court will be conducted with all deliberate speed.

CHIEF JUSTICE RABNER and JUSTICES RIVERA-SOTO and HOENS join in the Court's Order. JUSTICE LONG dissents from the Order, joined by JUSTICES LAVECCHIA and ALBIN.

The foregoing is a true copy
of the original on file in my office.


CLERK OF THE SUPREME COURT
OF NEW JERSEY