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 OF THE ATTORNEY GENERAL'S OFFICE TO VERIFIED PETITION FOR WRIT OF MANDAMUS

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

ARGUMENT AND AUTHORITY

There is no doubt that Article II, § 18 of the New Mexico Constitution requires the State to treat equally any of its citizens seeking legal recognition of

their marriage, and that any statutory scheme interfering with that guarantee of equality is flatly unconstitutional. Moreover, there is little doubt that the New Mexico statutes governing the legal institution of marriage do not permit the issuance of a marriage license to a same sex couple. There is, however, substantial doubt as to whether the issues raised in the Petition are properly considered in the context of this Court's mandamus power. This Response analyzes each of these propositions in order, concluding that (1) it is unconstitutional to deny same-sex couples the benefits of legal marriage; (2) that New Mexico's statutes do, in fact, prohibit such marriages, and (3) that mandamus is not the appropriate vehicle for making these legal determinations.

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

Though Petitioners advance multiple constitutional arguments, because of persuasive authority from other courts favoring equal protection analysis, *see, e.g., United States v. Windsor*, 570 U.S. ___, *20 (June 26, 2013); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), this Response analyzes New Mexico's prohibition of same-sex marriage only under Article II, § 18 of the New Mexico Constitution. As fleshed out in detail below, the prohibition is unconstitutional.

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

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

discussed in more depth below, the *Breen* Court acted on this approach by applying a sensitive class (*i.e.*, heightened scrutiny) designation to the mentally disabled, 2005-NMSC-28, ¶ 14, a departure from a U.S. Supreme Court decision on the topic where that court declined to assign heightened scrutiny to the mentally "retarded." *See City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985).

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

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

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

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

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

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

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

B. For Purposes of the New Mexico Constitution, Gays and Lesbians Demonstrate the Characteristics of a Sensitive Class and New Mexico's Statutory Classification Prohibiting Same-Sex Marriage is Therefore Subject to Intermediate Scrutiny.

Because of the building universe of authority subjecting to intermediate scrutiny classifications targeting gays and lesbians for disparate treatment in marital rights (and the relative dearth of authority in support of applying strict scrutiny), the Attorney General submits that intermediate scrutiny is appropriate in this case. *See, e.g., Varnum*, 763 N.W.3d at 896 (applying intermediate scrutiny); *Kerrigan*, 957 A.2d 407 at 476-477 (same); *Windsor v. United States*, 699 F.3d 169, 185 (2nd Cir. 2012), *aff'd* 570 U.S. ___ (2013).

New Mexico courts employ intermediate scrutiny to review legislative classifications "infringing important but not fundamental rights, and involving sensitive but not suspect classes." *See Pinnell v. Board of County Comm'rs.*, 1999-NMCA-74, ¶ 27, 127 N.M. 452, 982 P.2d 503 (citation omitted). The burden rests

with the party supporting the legislation, who must establish that "the state action is substantially related to an important government interest." *Breen*, 2005-NMSC-28, ¶ 13.

In *Breen*, this Court set forth a New Mexico-specific approach to identifying the presence of a sensitive class for purposes of intermediate scrutiny. "[I]ntermediate scrutiny is justified if a discrete group has been subjected to a history of discrimination and political powerlessness based on a characteristic or characteristics that are relatively beyond the individuals' control such that the discrimination warrants a degree of protection from the majoritarian political process." *Breen*, 2005-NMSC-28, ¶ 21. Subsequent court decisions have broken out these criteria into discreet elements, namely: (1) a long history of societal discrimination against the group, (2) systematic denial of the group from the political process, and (3) discrimination against the group for reasons beyond its members' control. *See Scotts Landscaping*, 2008-NMCA-46, ¶ 16.

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

As with the mentally disabled, found by both the *Breen* and *Cleburne* Courts to be targets of historical discrimination, gay New Mexicans have historically been subjected to laws that resulted in discrimination against them. In fact, until 1975,

consensual sexual intimacy between persons of the same sex in New Mexico was expressly prohibited and actively prosecuted under the state's anti-sodomy law. *See* NMSA 1953, §§ 40A-9-61(Vol. 6, 2d Repl.) (1963, repealed, Laws 1975, ch. 109 § 8). On multiple occasions, the courts of New Mexico flatly rejected arguments that consensual same-sex sexual relations constituted constitutionally protected conduct. *See, e.g., Washington v. Rodriguez*, 82 N.M. 428, 431, 483 P.2d 309, 312 (Ct. App. 1971); *State v. Sanchez*, 85 N.M. 368, 371, 512 P.2d 696, 699 (Ct. App. 1973). New Mexico is hardly exceptional in waiting until 1975 to repeal an anti-sodomy law. To wit, "until the Supreme Court's [2003] decision in *Lawrence v. Texas*, it was not unconstitutional under the Fourteenth Amendment for a state to enact legislation making it a crime for two consenting adults of the same sex to engage in sexual conduct in the privacy of their home." *See Conaway*, 932 A.2d at 610.

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

in matters of employment, housing, and public accommodations. *See* NMSA 1978, § 28-1-7. However, these anti-discrimination measures were not passed until 2003, after multiple failures to enact the protections in 1991, 1993, 1997, 1999, and 2001. *See* Brad Sears, New Mexico – Sexual Orientation and Gender Identity Law and Documentation of Discrimination 7 (The Williams Institute 2009), available at http://www.escholarship.org/uc/item/63k8x206.

Like other states, New Mexico long outlawed and prosecuted individuals for engaging in same-sex intimate relations. As the Supreme Court noted in *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973), with respect to women by reference to the 1964 Civil Rights Act and ERA, and the *Breen* court noted with respect to the mentally disabled by reference to laws enacted to "ensure better living standards" for the mentally disabled, 2005-NMSC-28, ¶¶ 25, 27, the legislature's enactment of Section 28-1-7 "show[s] the continuing need that mentally disabled persons have for protection from societal discrimination." *Id.* As such, there is a largely uncontroverted basis on which to conclude that gays and lesbians in New Mexico have suffered a long history of societal discrimination adequate to warrant a sensitive class designation.

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

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

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

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

Despite the legislative strides noted above, majoritarian processes have largely failed to yield the right for same-sex couples to marry. Though a number of states have extended marital rights to same-sex couples in recent years, a decisive majority of states have failed to furnish that right. Washington and California are the only western states to recognize same-sex marriages. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1077-1078 (D. Haw. 2012). In fact, according to *Abercrombie*, only five states have legalized same-sex marriage through a majoritarian political process. *Id.*[1] And, according to *Abercrombie*, thirty-eight states continue to retain constitutional or statutory prohibitions on same-sex marriage. 884 F. Supp. 2d. at 1078. With respect to the issue of same-sex unions, the legislature has repeatedly failed to enact legislation that would grant rights and

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

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

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

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

In many of the cases addressing the immutability of same-sex orientation in the equal protection context, courts have not focused on whether same-sex

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

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

Although there is certainly disagreement, the weight of scholarly and legal authority appear to increasingly support the conclusion that same-sex orientation is an immutable characteristic. As a federal district court explained in 2012, many of the courts who concluded that sexual orientation was not immutable relied heavily

upon the U.S. Supreme Court's "conceptualization" in *Hardwick v. Bowers*, 478 U.S. 186 (1986), of sexual orientation as "purely behavioral." *See Pedersen*, 881 F. Supp. 2d at 324-325. The Supreme Court has since expressly "rejected the artificial distinction [set forth in *Bowers*] between status and conduct in the context of sexual orientation." *Pedersen*, 881 F. Supp. 2d at 324-325. As a consequence, the "precedential underpinnings of those cases declining to recognize homosexuality as an immutable characteristic have been significantly eroded." *Id.* at 325.

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

C. Applying Intermediate Scrutiny Reveals that New Mexico's Prohibition on Gay Marriage is an Invalid Classification that Violates the Equal Protection Clause of Our State Constitution.

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

Although several rationales have been advanced in other jurisdictions in opposition to same-sex marriage, two appear to have emerged prominently: (1) that same-sex marriage undermines procreation by undermining the institution of marriage; *Varnum*, 763 N.W.2d at 899, 901-02; *Abercrombie*, 884 F. Supp. 2d at 1106; and (2) that same-sex marriage undermines morality and tradition. *Pedersen*, 881 F. Supp. 2d at 341-42.

Notions that tradition or morality are adequate rationales to sustain prohibitions on same-sex marriage have generally not weathered constitutional review. As a multitude of courts have maintained, the imprimatur of "tradition," without more, is merely an empty argument that serves to maintain a discriminatory classification for "its own sake." *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996); *Kerrigan*, 957 A.2d at 478. Equal protection plainly prohibits status-based classifications absent the presence of at least a legitimate government interest that bears at least a rational relationship to the challenged classification. *See Romer*, 517 U.S. at 365. That rationale must be "separate from the classification itself." *Varnum*, 763 N.W.2d at 898. Therefore, on its own, a desire to continue tradition by maintaining a discriminatory classification is a fallacious, circular argument that is unlikely to survive constitutional scrutiny. *See Romer*, 517 U.S. at 635; *Varnum*, 763 N.W.2d at 898. Arguments based on

"morality" are vulnerable to similar attacks. As the *Lawrence v. Texas* court made clear, without any additional asserted state interest, "[m]oral disapproval of [homosexuals] ... is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." 539 U.S. 558, 582. Thus, without supplemental rationales, tradition or morality-based arguments do not constitute an adequate basis to maintain a discriminatory classification.

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

While it is generally undisputed that encouraging procreation registers as both a legitimate and important governmental interest, *see, e.g., Conaway*, 932 A.2d at 630, it is less clear that this interest is substantially related to prohibiting gay marriage. When employing heightened scrutiny, no court has found the necessary substantial relationship to uphold a classification discriminating against gays and lesbians. *See, e.g., Varnum*, 763 N.W.2d at 899; *In re Marriage Cases*, 183 P.3d at 431-32. In *Varnum*, for instance, the court found that the responsible procreation rationale was "not substantially related to the asserted legislative

purpose" because, among other things, "the statute is significantly under-inclusive with respect to the objective of increasing procreation because it does not include a variety of groups that do not procreate for reasons such as age, physical disability or choice." 763 N.W.2d at 902.

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

II. NEW MEXICO LAW DOES NOT PERMIT SAME SEX MARRIAGE.

Examination of the entire statutory framework that governs marriage in New Mexico reveals a clear legislative intent to limit marriage to opposite-sex couples. Further, New Mexico's current statutory definition of marriage was enacted by the 1862-1863 Territorial Legislature, an important contextual element in the analysis. For these reasons, New Mexico statutory law does not currently authorize same-sex marriage.

A. New Mexico's Statutory Scheme Governing Marriage Employs Both Gender-Specific and Gender-Neutral Terms in Characterizing the Parties to a Marriage.

The New Mexico statutes governing marriage, contained in Chapter 40, include a multitude of pertinent provisions. In characterizing the marital parties, these statutes employ a mix of gender-neutral and gender-specific references. NMSA 1978, § 40-1-1 "defines" marriage by employing gender-neutral terms, declaring that "[m]arriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential," *see State v. Lard*, 86 N.M. 71, 74 (Ct. App. 1974) ("'[m]arriage'" is a civil contract requiring a license"). The current language of Section 40-1-1 was adopted during the 1862-1863 session of the Territorial Legislature. *See* 1862-1863 N.M. Laws at 64. While Section 40-1-1 employs no gender-specific, opposite-sex references, other sections in Article 1 do. Notable is Section 40-1-18, a model marriage license application form. The form, which is to be employed "substantially" by county clerks, contains sections for a "male" and a "female" applicant. Section 40-1-7, which prohibits incestuous marriages, also employs gender-specific, opposite-sex references in describing the prohibited unions, *i.e.* "uncles and nieces, aunts and nephews," with no reference to same-sex pairings. However, a multitude of other Sections in Article 1 employ gender-neutral terminology, namely, by using the terms "person" or "applicant" to describe the individual parties to a marriage,

see NMSA 1978, §§ 40-1-5, -6, -8, -11, & 20, or the terms "parties" or "couple" to refer to the marital couple. *See* NMSA 1978, §§ 40-1-9, -10, & -20.

In Articles 2, 3, and 4 of Chapter 40, a number of references are made to "husband" and "wife," terms which are of a gender-specific character under the law. *See* Black's Law Dictionary, (9th ed. 2009) (defining "husband" as a "married man," defining "wife" as a "married woman."). Articles 2 and 3 enumerate the rights and responsibilities of a married couple, while Article 4 governs dissolution of a marriage. Section 40-2-1 states that "[h]usband and wife contract towards each other obligations of mutual respect, fidelity and support." In Section 40-2-2, it is clarified that "[e]ither husband or wife may enter into any agreement or transaction with the other." The first Section of Article 3, which governs property rights between spouses, states in relevant part that the "property rights of husband and wife are governed by this chapter." NMSA 1978, § 40-3-1. A number of other provisions in these two articles also characterize the parties to a marriage as "husband" and "wife." *See, e.g.*, NMSA 1978, §§ 40-3-2, -3, -4 -8(B), -12 & -4-3.

B. Authority in Other States Decisively Indicates that Statutory Schemes Like New Mexico's do not Authorize Same-Sex Marriage.

State courts in New York, New Jersey, Massachusetts, and Minnesota have considered analogous statutory schemes and concluded that a mix of gender-

specific and gender-neutral terminology does not convey the right for same sex couples to marry. These courts have also examined the contexts whereunder legislatures adopted the relevant statutes, relying upon the historical origins and plain meaning of the term "marriage" to buttress the conclusion that gender-neutral definitional statutes like New Mexico's Section 40-1-1 do not confer the right of same-sex marriage. This overwhelming weight of authority compels the conclusion that the New Mexico Territorial Legislature did not intend to confer the right of marriage to same-sex couples in its 1862-1863 legislative session when it enacted the "definition" of marriage now contained in Section 40-1-1.

Perhaps most compelling is the extensive treatment of the issue by the state courts of New York, where the statutory scheme governing marriage closely mirrors New Mexico's in both form and content. In particular, New York laws governing marriage employ a gender-neutral definition of marriage that is a near carbon-copy analogue of New Mexico's. Adopted in 1909, New York's definition of marriage provides that "[m]arriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential." N.Y. Dom. Rel. Law § 10 (2012). In addition to this gender-neutral definition of marriage, the state's domestic relations statutes contain a number of provisions which employ gender-specific terms in referring to

the parties to a marriage, much like the scheme under New Mexico law. *See, e.g.*, N.Y. Dom. Rel. Law §§ 12, 15, & 50; *see also Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006); *Shields v. Madigan*, 783 N.Y.S. 2d 270, 274-275 (N.Y. Sup. Ct. 2004).

New York courts have relied on the historical meaning of the term "marriage" and basic tenets of statutory construction to conclude that the legislature intended to limit marriage to opposite-sex couples. Applying the tenet that "all parts of an act are to be read consistently and construed together," *Shields*, 783 N.Y.S.2d at 275, both the *Hernandez* and the *Shields* courts analyzed the gender-neutral definitional statute in the context of the larger statutory scheme governing marriage. *Id.*; *Hernandez*, 855 N.E.2d at 1. Both courts found that New York law prohibited same-sex marriage. *Shields,* 783 N.Y.S.2d at 274-75; *Hernandez*, 855 N.E.2d at 1.

In New Jersey, before the state passed a law expressly limiting marriage to opposite-sex couples, the state supreme court noted that the limitation on marriage to opposite-sex couples was "clear from the use of gender-specific language in the text of various statutes." *See Lewis v. Harris*, 908 A.2d 196, 208 (N.J. 2006). In Massachusetts, the state's high court likewise assessed a gender-neutral definition of marriage alongside other gender-specific provisions governing marriage. In

Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003), the court focused on the common law origins and the "everyday meaning" of the term marriage in reaching the conclusion that Massachusetts's gender-neutral statute did not, on its own, validate same-sex marriage. *Id.* at 952-53. Finally, in Minnesota, the supreme court similarly relied upon the entire statutory scheme governing marriage to conclude that a gender-neutral definition of marriage did not authorize same-sex unions. *Baker v. Nelson*, 191 N.W.2d 185, 185-186 (Minn. 1971).

C. Accepted Maxims of Statutory Construction Coupled with the Historical Roots of New Mexico's Statutory Scheme Suggest that the Current Scheme does not Authorize Same-Sex Marriage in New Mexico.

The logic employed in the aforementioned authorities applies directly to the interpretation of the scheme set forth in Chapter 40 of the New Mexico Statutes, and unequivocally counsels a conclusion that same-sex marriage is not authorized under our statutory scheme governing marriage. A review of New Mexico's entire scheme, plus the historical context around the adoption of New Mexico's statutory definition of marriage, suggest that the 1862-1863 Territorial Legislature intended to limit marriage to opposite-sex couples. As with New York, Massachusetts, New Jersey, and Minnesota, a review of the entire scheme reveals an intent on the part of the legislature to limit marriage to same-sex couples. In particular, as the *Shields* court highlighted in analyzing New York law, Chapter 40 employs the

gender-specific references in "core components" of the New Mexico laws governing marriage discussed above. These provisions are "central to the conduct...of the institution of marriage." *See Shields*, 738 N.Y.S.2d at 275. To read the definition in Section 40-1-1 separate and apart from the entire scheme is to disregard the directives of this Court that statutory schemes are to be interpreted comprehensively.

Finally, considering the era in which the definition of marriage contained in Section 40-1-1 was adopted – namely the Civil War period, 50 years prior to New Mexico statehood – the likelihood that the Territorial Legislature contemplated, much less authorized same-sex unions seems unlikely. As the Minnesota Supreme Court noted, "[i]t is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term [marriage] in any different sense [but to authorize exclusively opposite-sex unions]." *See Baker*, 191 N.W.2d at 185-186. So it is with the 150-year old understanding that New Mexico law does not authorize same-sex marriage.

III. MANDAMUS DOES NOT LIE IN THIS CASE.

The Court should carefully consider the appropriateness of mandamus relief under the circumstances presented by this Petition. First, this Court's original jurisdiction does not reach to non-State officers such as County Clerks. Second,

New Mexico law establishes no non-discretionary duty to issue marriage licenses to same sex couples. Third, Petitioners' attempted invocation of this Court's mandamus power threatens to turn mandamus into an alternative to declaratory judgment actions properly filed in district court.

A. This Court's Mandamus Power Does Not Extend Beyond State Officials.

The New Mexico Constitution describes this Court's mandamus power in Article VI, § 3: "The supreme court shall have original jurisdiction in quo warranto and mandamus against all ***state*** officers, boards and commissions. . . ." The Santa Fe County Clerk is, of course, a County and not a State officer. The Attorney General has been unable to locate a single reported decision in which this Court issued an extraordinary writ against a County officer.

New Mexico's statutes governing mandamus issued by district courts are not so limited. In NMSA 1978, § 44-2-4, district courts are vested with the power to issue mandamus "to ***any*** inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station" (emphasis added). Comparing this provision to Article VI, § 3 demonstrates that district courts may issue writs of mandamus to County officials, whereas this Court's jurisdiction is limited to State officers.

Issuing a writ of mandamus to Respondent would thus represent an expansion of the jurisdiction conferred by Article VI, § 3, and presents the very real threat of overloading the Court's docket with mandamus actions concerning any dispute a party has with any local or county official: county tax assessment protests, local zoning disputes, and any other dispute concerning only county or local officials would all be fair game.

B. The County Clerk Has No Non-Discretionary Duty to Issue Marriage Licenses to Same Sex Couples.

As discussed in Section II above, Petitioners are wrong to assert that NMSA 1978, §§ 40-1-1, 40-1-5, and 40-1-7 establish a non-discretionary duty on the part of New Mexico's County Clerks to issue marriage licenses to same-sex couples. On the contrary, when taken as a whole, New Mexico's regulation of marriage precludes such issuance. At a minimum, the statutory scheme raises questions of interpretation that are incompatible with the existence of a non-discretionary duty.

"Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207, 247 P.3d 286. It does not have application in the absence of a non-discretionary duty, even in cases of great constitutional importance that present questions this Court may ultimately have to answer. If there is no non-discretionary duty to enforce through mandamus, this Court must answer those

constitutional questions in the due course of litigation, *i.e.* on appeal of a decision rendered by the lower courts, not through the exercise of its extraordinary writ power.

C. Mandamus Does Not Lie As An Alternative to a Declaratory Judgment Action.

Petitioners, in the guise of mandamus, seek declaratory relief typically reserved for declaratory judgment actions. In seeking that relief they understandably rely on *State ex rel. Clark v. Johnson,* 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11, but the reliance is misplaced. First, Petitioners seek a determination not about the constitutionality of a State officer's actions, as did the *Clark* petitioners, but instead about the constitutionality of a statutory scheme. Second, *Clark* did not abandon the existence of a non-discretionary duty as a fundamental, necessary predicate to the exercise of mandamus relief. That duty may look different in a case of prohibitory mandamus (like *Clark*) because our Constitution and statutes generally describe what State officials can do, and rarely describe what they cannot do. It is thus easier to say that a statute requires action than to say that it requires inaction. Nonetheless, in *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55, this Court described *Clark* as holding that the exercise of mandamus

> may be appropriate when the petitioner presents a purely legal issue concerning ***the non-discretionary duty of a government official*** that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

(emphasis added).

The Petition fails at least two of these requirements. The Attorney General agrees that the Petition presents a fundamental constitutional question of great public importance. It is less clear, however, why that question cannot be answered through a direct appeal of a declaratory judgment action.[3] *See* NMSA 1978, § 44-2-5 ("The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.") (quoted in *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878). And, of course, the statutes at issue do not present the non-discretionary duty Petitioners assert. Mandamus is thus an inappropriate vehicle for resolving the questions raised by the Petition.

CONCLUSION

Mandamus does not properly lie in this case, and the Court should accordingly deny the Petition. Should the Court reach the merits of the

3 In *Clark*, the Court was concerned that the compacting tribes were incurring significant construction expenses in reliance on those compacts. *See Clark*, 120 N.M. at 569. Here there may be facts that similarly demand immediate action, but it is unclear what they would be.

constitutional argument raised by the Petition, the Attorney General respectfully requests that the Court declare New Mexico's prohibition on same-sex marriage unconstitutional under Article II, § 18 of the New Mexico Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-504(H) NMRA, I certify that this brief is proportionally spaced and the body contains 5,985 words. The brief was prepared using OpenOffice 3.2.1.

Scott Fuqua

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on counsel for Petitioners via First Class Mail on July 22, 2013.

Scott Fuqua