IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.,
NEW MEXICO ASSOCIATION OF COUNTIES, et al.,
Intervenors - Petitioners,
v.

S. Ct. No. 34,306
Dist. Ct. No. D-202-CV-201302757

THE HON. ALAN M. MALOTT,
District Judge - Respondent,
and

ROSE GRIEGO, et al.,
Plaintiffs - Real Parties in Interest,
and

MAGGIE TOULOUSE OLIVER, et al.,
Defendants - Real Parties in Interest.

BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-REAL PARTIES IN INTEREST ROSE GRIEGO, ET AL. ON BEHALF OF

EQUALITY NEW MEXICO, NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, NEW MEXICO NATIONAL ORGANIZATION FOR WOMEN, PFLAG NEW MEXICO, SOUTHWEST WOMEN'S LAW CENTER, FREEDOM TO MARRY, PROSPERITY WORKS, AMERICAN VETERANS FOR EQUAL RIGHTS - BATAAN CHAPTER, TRANSGENDER RESOURCE CENTER OF NEW MEXICO, HUMAN RIGHTS ALLIANCE, ORGANIZERS IN THE LAND OF ENCHANTMENT, MEDIA LITERACY PROJECT, NEW MEXICO LESBIAN AND GAY LAWYERS ASSOCIATION, ANTI-DEFAMATION LEAGUE, PACIFIC ASSOCIATION OF REFORM RABBIS, TEMPLE BETH SHALOM OF SANTA FE, THE UNITARIAN UNIVERSALIST CONGREGATION OF SANTA FE, REV. TALITHA ARNOLD, REV. KATHRYN A. SCHLECHTER, RISING SUN MINISTRIES, METROPOLITAN COMMUNITY CHURCH OF ALBUQUERQUE

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STATEMENT OF COMPLIANCE

As required by Rule 12-504(H) NMRA, counsel certifies that this brief complies with the type-volume limitation of Rule 12-504(G)(3) NMRA. This brief was produced in Microsoft Word 2010; its body, as defined by Rule 12-504(G)(1) NMRA, consists of 5,893 words.

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INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the following groups and individuals: Equality New Mexico, National Organization for Women Foundation, New Mexico National Organization for Women, PFLAG New Mexico, Southwest Women's Law Center, Freedom to Marry, Prosperity Works, American Veterans for Equal Rights-Bataan Chapter, Transgender Resource Center of New Mexico, Human Rights Alliance, Organizers in the Land of Enchantment, Media Literacy Project, New Mexico Lesbian and Gay Lawyers Association, Anti-Defamation League, Pacific Association of Reform Rabbis, Temple Beth Shalom of Santa Fe, The Unitarian Universalist Congregation of Santa Fe, Rev. Talitha Arnold, Rev. Kathryn A. Schlechter, Rising Sun Ministries, Metropolitan Community Church of Albuquerque.

As described in the Motion for Leave to File Amicus Brief, each of these Amici has a significant interest in this case. The civil rights groups represent LGBT clients who face discrimination in their lives, many of whom wish to marry. The religious organizations and leaders welcome LGBT congregants under their faiths and as part of their faith communities, believe that all members of humanity are created equal before God, conduct weddings for same-sex couples and seek to have all people treated equally in this respect by the state. The advocacy and educational groups all work to achieve equal treatment for citizens in New Mexico,

including LGBT New Mexicans.

SUMMARY OF PROCEEDINGS

Amici incorporate by reference the statement of the Summary of Proceedings in Brief of Plaintiffs-Real Parties in Interest Response to Petition for Writ of Superintending Control.

ARGUMENT

This case is about allowing loving, committed same-sex couples in New Mexico to receive a marriage license and the State respecting those marriages on an equal footing with all others.

For many years, most "citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage" and "define themselves by their commitment to each other." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

Inspired by the Supreme Court's ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), committed gay and lesbian couples first began seeking marriages licenses from their states in the 1970s. Although *Loving* had rejected "restrict[ions on] the freedom to marry solely because of racial classifications" and the deprivation of "liberty" embodied in the "freedom to marry," *Id.* at 12, none of these couples' efforts were successful. The judicial response has been characterized as treating the claims as "preposterous" and on par with arguments that men "had a right to get pregnant." David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L.Q. 523, 525 (1999).

Much has changed since the 1970s. From these inevitably inauspicious beginnings came "a new perspective, a new insight," *Windsor*, 133 S.Ct. at 2689,

as gay people and same-sex couples continued the distinctly American journey of coming closer to inclusion in the circle of citizenship. Increasingly, gay people come before their government as equals. *See Romer v. Evans*, 517 U.S. 620, 633-34 (1996). Moral objections to homosexuality are no longer permissible justifications for discriminatory treatment. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Like others, gay people and same-sex couples are experiencing that "the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

In this State, "sexual orientation" is an impermissible basis for discrimination under the Human Rights Act, NMSA 1978, § 28-1-7 (2004); in the Hate Crimes Act, NMSA 1978, § 31-18B-2(D) (2007); and in law enforcement profiling. NMSA 1978, § 29-21-2 (2009). These laws demonstrate that gay people are understood as a class meriting concern and consideration. Nor can private actors otherwise covered by non-discrimination laws excuse different treatment by framing their objections as targeting same-sex "conduct" rather than status. *Elane Photography, L.L.C. v. Willock*, 2013-NMSC-___, *11-13 (No. 33,687, Aug. 22, 2013). Reflecting the reality of family life, the law increasingly acknowledges that children may have same-sex parents. *E.g.*, *Chatterjee v. King*, 2012-NMSC-019, ¶¶ 36, 5 (ruling effectuates "public policy . . . encourag[ing] the support of children

. . . by providers willing and able to care for the child."). Lawmakers have begun addressing the legal chasm in which same-sex couples live their lives. *See* N.M. Exec. Order No. 2003-010 (2003) (domestic partner benefits for qualified state workers); Uniform Health-Care Decisions Act, NMSA 1978, §§ 24-7A-1 to -18 (1995, as amended through 2009) (authorizing designation of a same-sex partner as medical decision-maker).

The State's blunt exclusion of same-sex couples from the legal institution of marriage nonetheless remains, denying same-sex couples a profound relationship that is a critical part of self-definition and expresses deep commitment and fidelity to another person. That exclusion inflicts "a deep and scarring hardship," *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003), tells them their relationships are *not* "worthy," *Windsor*, 133 S.Ct. at 2696, and denies them "a dignity and status of immense import," *id.* at 2692, effectively fencing them out of the circle of equal citizenship.

Amici urge this Court to find that the continued exclusion of same-sex couples from marriage violates the State constitutional guarantees of liberty, due process, and equal protection.

I. Denying Plaintiffs the Freedom to Marry the Person They Love Denies Them Liberty and the Pursuit of Happiness Under the State Constitution.

A. The State Constitution Applies to Plaintiffs' Claim That They Are Denied the Fundamental Right to Marry.

Amici agree with Plaintiffs that denying the freedom to marry violates the federal and state constitutions. The State Constitution is the appropriate guide in this case because the questions presented here have not been definitively decided by the U.S. Supreme Court. A state constitutional analysis is appropriate where the federal analysis is flawed, where there are structural differences between state and federal law, or where there are distinctive state characteristics. *New Mexico Right to Choose/NARAL v. Johnson,* 1999-NMSC-005, ¶ 28, 126 N.M. 788; *State v. Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 777 (same, and where federal law "undeveloped").

The right to marry is undoubtedly fundamental under the United States Constitution. *See, e.g.*, *Loving*, 388 U.S. at 12 ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals"); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (right to marry applies in the prison setting).

More than forty years ago, the U.S. Supreme Court summarily dismissed due process, privacy claims and sex discrimination claims of a same-sex couple whose state courts denied their freedom to marry. *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), *affirming Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The constitutional landscape is so dramatically different now that *Baker* lacks any precedential or persuasive force. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). *Zablocki* and *Turner* affirm that marriage is fundamental for *all* persons. *Lawrence* acknowledges that gay people may "seek autonomy" to enjoy the same liberties as all other Americans. 539 U.S. at 574. Sex discrimination now receives intermediate scrutiny. *E.g., Frontiero v. Richardson*, 411 U.S. 677 (1977) (plurality opinion). Sexual orientation discrimination, which the petitioners did not even present as a question, has been rejected in a powerful line of recent cases. *Romer*, 517 U.S. at 623 (equal protection guarantee does not tolerate "classes among citizens" (citing *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896)); *Lawrence*, 539 U.S. at 575 (invalidating sodomy laws as advancing *both* "equality of treatment" and "respect for conduct protected by the substantive guarantee of liberty"); *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2990 (2010) (rejecting idea that discrimination permissible when based on gay people's "conduct" and declining to distinguish between "status and conduct"). Most recently, *Windsor* held that the federal Defense of Marriage Act ("DOMA")

"interfere[d] with the equal dignity of same-sex marriages," 133 S.Ct. at 2693, and thus violated the Due Process Clause's prohibitions on "the power to degrade or demean" and on denying equal protection. *Id.* at 2695. *See also Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010).

B. Excluding Plaintiffs From Marriage Violates Article II, Sections 4 and 18 of the State Constitution.

Article II, Section 4 of the New Mexico Constitution protects the "inherent and inalienable rights" of "enjoying and defending life and liberty," while Article II, Section 18 adds, "[n]o person shall be deprived of . . . liberty . . . without due process of law . . . ." N.M. Const. art. II, §§ 4, 18. The freedom to marry eminently qualifies as a protected right under the State Constitution where it meets the factors identified in *State v. Druktenis*, 2004-NMCA-032, ¶¶ 89-96, 135 N.M. 223: (1) the U.S. Supreme Court recognizes the right as fundamental; (2) Plaintiffs are similarly situated to others who are eligible for the right; and (3) Plaintiffs' ability to exercise the right is abridged.

1. Marriage Is a Protected Fundamental Right Under Federal Law.

Marriage enjoys a distinguished pedigree as a fundamental right under the U.S. Constitution. *See* Part I.A., *supra*. Safeguarding the ability "to define one's identity" through marriage is "central to any concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). *See also Goodridge*, 798 N.E.2d at 955 (choice of whether and whom to marry "a momentous act[] of self-definition"). *Lawrence*

confirmed that gay people and same-sex couples are included among those who may "seek autonomy" in exercising the constitutionally protected "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence,* 539 U.S. at 574. *See also Windsor*, 133 S. Ct. at 2695.

2. Plaintiffs Are Similarly Situated to Others Who May Marry.

Plaintiffs share in "intimate family decisions and relationships" like others who seek to marry. *Druktenis*, 2004-NMCA-032, ¶ 94. Each couple has built a family life together, accepted responsibility for each other and, in some instances, for children as well.

Turner, which struck a nearly total ban on marriages of incarcerated persons, provides additional insights in the analysis of "similarly situated" by identifying other "important attributes" of marriage.

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, . . . most . . . marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a pre-condition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits . . . .

Turner, 482 U.S. at 95-96 (1987).

As *Turner* acknowledged, it is important to the Plaintiffs to stand before family and friends and express their "personal dedication," "emotional support[,] and public commitment." *Id.* The Plaintiffs' allegations demonstrate their "deep attachments and commitments" as well as their sharing "a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of [their lives]." *Roberts*, 468 U.S. at 620. Each Plaintiff couple's shared journey through life's joys and considerable challenges exemplifies the "loyalty" and "harmony in living" between married partners that renders their union "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Second, *Turner* specified the "exercise of religious faith" as another "important and significant aspect of the marital relationship. 482 U.S. at 95-96.[1] Many people, including some same-sex couples, value marriage as a religious "rite" as well. Beginning with the United Church of Christ and the Union of Reform Judaism, many religious faiths acknowledge the inherent dignity of lesbian

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[1] This case involves only access to state-created and regulated marriage licenses. S*ee, e.g., Poteet v. Poteet*, 1941-NMSC-025, ¶ 10, 45 N.M. 214 (marriage is a civil contract). In our constitutional system, every faith is free to define marriage on its own terms, and no clergy or religious institution could be forced to perform or host a wedding against its beliefs.

and gay individuals.[2] Additionally, a large spectrum of American faith groups and religious observers affirm same-sex couples' relationships, including through marriage.[3]

Third, whether tangible or intangible, "[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." *Goodridge*, 798 N.E.2d at 955; *see also id.* at 955-956 (citing property rights, presumptions of parentage, evidentiary rights, statutory benefits, and intangible protections). Moreover, following *Windsor*, married same sex couples are also eligible for many federal programs as married persons, including workplace benefits for federal civilian and military employees and retirees, equal tax treatment, and immigration benefits. *Changes to Federal Benefits After the Supreme Court's Ruling on the Defense of Marriage Act (DOMA)*, http://blog.usa.gov/post/61597227689/changes-to-federal-benefits-after-the-supreme-courts (last updated Sept. 18, 2013).

By joining in marriage, a couple makes a voluntary commitment that also transforms their legal status to each other and the world. *Compare Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage creates "a new relation") and *Windsor*,

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[2] *See* Brief of *Amici Curiae* Bishops of the Episcopal Church, et al. on the Merits and in Support of Affirmance at 8-14, *United States v. Windsor*, 133 S. Ct. 2675 (2013).

[3] *Id.* at 15-19.

133 S. Ct at 2694 ("Responsibilities, as well as rights, enhance the dignity and integrity of the person."), with *Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶¶ 6, 12, 140 N.M. 16 (domestic partners have no legal interest or financial responsibilities as spouses and thus cannot claim spousal protections on automobile insurance policies).[4]

Important as tangible protections are, marriage is far more than a sum of rights and responsibilities. Accordingly, some states that provided equivalent benefits at the state level have struck those separate systems as denying equal protection. *See In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (In light of history of discrimination, and "because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm."). *See also Sevcik v. Sandoval*, 911 F. Supp. 2d 996

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[4] So consequential is marriage for workplace benefits that marriage advocacy is part of labor organization's advocacy for economic rights of working people. *See* Brief of AFL-CIO, et al. as *Amici Curiae* Supporting Respondents and Suggesting Affirmance, *Hollingsworth v. Perry,* 133 S. Ct. 2652 (2013). Many leading businesses also supported equal marriage and opposed DOMA at the Supreme Court. *See* Brief of American Companies as Amici Curiae in Support of Respondents, *Hollingsworth v. Perry,* 133 S. Ct. 2652 (2013); Brief of 278 Employers and Organizations Representing Employer as *Amici Curiae* in Support of Respondent, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

(D. Nev. 2012), *appeal docketed* No. 12-17668 (9th Cir. Dec. 4, 2012) (federal equal protection challenge to Nevada's Registered Domestic Partnership).

Finally, as *Turner* stated, sexual intimacy is often anticipated in the relationship. The ability to engage in such intimacy is a protected liberty for all persons. *Lawrence*, 539 U.S. at 567; *Druktenis*, 2004-NMCA-032, ¶ 94 (acknowledging *Lawrence*'s protection for intimacy of same-sex couples).

C. Amici Legislators Misunderstand the Liberty Guarantee, the Role of History, and the Nature of the Right.

Disputing Plaintiffs' claim, Amici Legislators assert that "[a] purported right to marry a person of the same sex is not a fundamental constitutional right." **[Brief of Amici Curiae New Mexico Legislators in Support of Intervenors-Petitioners ("BACL") 16]**. Claiming that Plaintiffs seek a new right to "same-sex marriage" misconstrues the nature of the liberty interest at stake and the role of history in constitutional interpretation.

Narrowing the liberty interest to the identities of these parties repeats the error made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and repudiated in *Lawrence*. The *Bowers* Court had recast the right at stake in a challenge by a gay man to Georgia's sodomy statute as a claimed "fundamental right" of "homosexual sodomy," 478 U.S. at 191, and then rejected as "facetious" the idea that such a right is "'deeply rooted in this Nation's history and tradition.'" *Id.* at 194. In *Lawrence*, the Supreme Court held that framing of the issue in *Bowers* "disclose[d]

the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. *See also id.* ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.")

Likewise, in *Loving*, the U.S. Supreme Court did not determine whether there was a fundamental, historic right to "miscegenic," or mixed-race marriages just as *Zablocki* did not ask whether there was a fundamental right for the poor to marry. Only after acknowledging the well-established and general fundamental right to marry did the Supreme Court consider the application of the right in the context of the state's denial of marriage to a particular class of people.

As to history, Amici Legislators' claim that there is "no long history of a right to marry a person of the same sex" misses the point. **[BACL 16]** (citation omitted). Marriage itself is both traditionally protected and rooted in our history and traditions. In any event, history and tradition are "not in all cases the ending point of the substantive due process inquiry," *Druktenis*, 2004-NMCA-032, ¶ 92 (quoting *Lawrence*, 123 S.Ct. at 2480). A fundamental right is not restricted to those who have historically had the ability to exercise it. *Loving* is a case in point. There the Supreme Court acknowledged that members of the Congress passing the 14th Amendment intended for anti-miscegenation laws to survive despite the

pledge of equal protection of the laws. 388 U.S. at 9. Later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court noted that "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause . . . ." 505 U.S. at 847–48.

Last, the claim that marriage is a protected right only or primarily because it may be a setting for procreation muddles separate and distinct rights. The many purposes of marriage cannot be swept aside in favor of a claimed definitional uber-interest in "procreation and childrearing" premised, as Amici see it, on "the natural capacity to create children" that exists in some opposite-sex relationships. **[BACL 9, 6]**. In fact, this assertion is simply the selective imposition of a biological procreation requirement on same-sex couples that the State has never seen fit to impose on anyone else. No state has ever required prospective spouses to agree to procreate, to remain open to procreation, or even to be able to procreate, to be eligible to marry. *See, e.g.*, H.R. Rep. No. 104-664, at 14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919 ("[S]ociety permits heterosexual couples to marry regardless of whether they intend or are even able to have children."); *see also Lawrence,* 539 U.S. at 604 (Scalia, J., dissenting) ("[W]hat justification could there

possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.") (citation omitted). In *Turner*, the right to marry was also protected for those incarcerated individuals who could not "procreate" with their spouse. 482 U.S. at 95.

More specifically, the fundamental rights to marry and to procreate are separate rights. "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original). Accordingly, individuals possess a fundamental right to choose whether or not to procreate that is not dependent on their marital status. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 687 (1977) ("individual autonomy in matters of childbearing is not dependent" on marital status); *Griswold*, 381 U.S. at 485-86 (married couples' right to use contraception and avoid procreation). *See also Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 37, 111 N.M. 336 (tort action arising from failed tubal ligation procedure; acknowledging "legally protected interest in limiting the size of [one's] family").

As the Massachusetts high court summarized, "[p]eople who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most,

married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage." *Goodridge*, 798 N.E.2d at 961.

Plaintiffs have upheld their end of the social compact. They abide by the laws; they live with integrity; they volunteer in their communities; they work hard at their jobs; and, above all else, they love, value and care for their families. Plaintiffs ask for the same security and respect under New Mexico's laws and constitution that their neighbors enjoy through the freedom to commit in marriage.

II. The Exclusion of Same-Sex Couples From Marriage Violates the Equal Protection Guarantees of the New Mexico Constitution.

Article II, Section 18 of the New Mexico Constitution provides that "[n]o 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." N.M. Const. art. II, § 18. Equal protection "guarantees that the government will treat individuals similarly situated in an *equal* manner." *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 7, 138 N.M. 331 (emphasis added); *see also Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, ¶ 9, 143 N.M. 726 (clause is "mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment" (quoting *Wagner v. AGW Consultants*, 2005-NMSC-16, ¶ 21, 137 N.M. 734)). Courts must strike "government . . . classifications that are unreasonable,

unrelated to a legitimate statutory purpose, or are not based on real differences." *Breen*, 2005-NMSC-028, ¶ 7 (quoting *Madrid v. St. Joseph Hosp.*, 1996-NMSC-64, ¶ 34, 122 N.M. 524).

A. Plaintiffs Are Similarly Situated to Other Persons Eligible to Marry.

The threshold consideration in an equal protection challenge is whether Plaintiffs "are similarly situated to another group but are treated dissimilarly." *Breen*, 2005-NMSC-028, ¶ 8. Plaintiffs meet that test.

For one, each couple meets the requirements for a state marriage license, but unlike others so qualified, is barred from marrying. *See Kerrigan*, 957 A.2d at 424 (finding same-sex couples similarly situated, in part, by reference to statutory requirements).

The purpose of the State's marriage laws, as in other states, is to "provid[e] an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) (citation omitted) (internal quotation marks omitted). The protections conferred on spouses and the mutual rights and obligations they owe each other reflect that they are "in committed and loving relationships, many raising families," and that "[s]ociety benefits" in myriad ways from "the stable framework" provided by marriage. *Id.*, 763 N.W.2d at 883 (finding same-sex

couples similarly situated). *See also, Kerrigan*, 957 A.2d at 424 (same); *In re Marriage Cases*, 183 P.3d at 400 (same).

When two adults love one another, are qualified to marry, and wish to assume the commitment and responsibilities of marriage, it *undermines* the purpose and the very mission of New Mexico's marriage laws to bar them from doing so.

B. The Court Should Apply Strict Scrutiny or At Least Intermediate Scrutiny.

Assuming that same-sex and different-sex couples are similarly situated with respect to marriage's purposes, this Court assesses the level of scrutiny based on "either the rights that the legislation affects or the status of the group of people it affects." *Breen*, 2005-NMSC-028, ¶ 8. Amici agree with Plaintiffs that strict scrutiny applies (or at least intermediate scrutiny[5]) because the marriage laws "affect[] the exercise of a fundamental right or a suspect classification" *Id.* ¶ 12 (citing *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 16, 125 N.M. 721). While this Court looks to federal case law, it has applied the three tiers to "different groups and rights than the federal courts." *Breen*, 2005-NMSC-028, ¶ 14.

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[5] *See, e.g., Breen*, 2005-NMSC-028, ¶ 28; *Richardson v. Carnegie Library Rest.*, 1988-NMSC-084, ¶ 36, 107 N.M. 688.

Amici also agree with Plaintiffs that there are three bases for applying strict scrutiny to Plaintiffs' exclusion from marriage.

First, for the reasons stated in Part I, *supra*, the right to marry is fundamental and constitutionally guaranteed, thereby triggering strict scrutiny. *Richardson*, 1988-NMSC-084, ¶ 28. Under federal law, unequal access to a fundamental right by itself violates the equal protection guarantee. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (classifications impinging on the exercise of a fundamental right are "presumptively invidious").

Second, the State's marriage laws deny "[e]quality of rights under law . . . on account of the sex of [persons]," N.M. Const. art. II, § 18, thereby inviting strict scrutiny. *NARAL*, 1999-NMSC-005, ¶ 27.

The sex classification is evident when considering Plaintiffs Rose Griego and Kimberly Kiel. Any eligible man may marry Ms. Kiel, and the only reason Ms. Griego is forbidden is because of her sex. This is literally discrimination because of sex. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring) ("[A]n individual's choice of marital partner is constrained because of his or her own sex."). While men and women are both affected, the equal protection inquiry "does not end with a showing of equal application," *Richardson*, 1988-NMSC-084, ¶ 38 (quoting *McLaughlin v. Florida*, 379 U.S.184, 191 (1964)), but requires a showing that the classification is "constitutionally legitimate." *Id.* The legislative history of

the ERA is irrelevant where a sex classification is present. *See also Loving*, 388 U.S. at 9.

Specifying a different-gender requirement for marriage also reflects the gender-role stereotypes that women should form intimate relationships with men, not with other women, and that men should form such relationships with women, not with other men. *See* Brief of Amici Curiae National Women's Law Center et al. in Support of Respondent, *United States v. Windsor,* 133 S. Ct. 2675 (2013) (discussing sex stereotyping jurisprudence and ideas of "natural," "moral," or "traditional" sex roles or conduct and same-sex relationships).

Third, where the laws distinguish based on sexual orientation and thus harm those seeking to marry a person of the same sex, Amici agree with Plaintiffs' arguments that this Court should find that gay people and same-sex couples are a "sensitive class" entitled to heightened judicial review. *Breen*, 2005-NMSC-028, ¶ 17-21. Notably, government policy barring marriage for qualified same-sex couples conveys the official message that the relationships of same-sex couples are insignificant, inferior, and unworthy of marriage. *Cf. Windsor*, 133 S.Ct. at 2692 (Marriage gives gay people's "lawful conduct a lawful status. This status is a far-reaching legal acknowledgement of the intimate relationship between two people, a

relationship deemed by the State worthy of dignity in the community equal with all other marriages.").[6]

C. There is No Constitutionally Adequate Justification for the Denial of Marriage to Same-Sex Couples.

Even though strict and/or intermediate scrutiny applies and the State bears the burden of proof, Amici contend there is no rational basis for this exclusion, and *a fortiori*, no compelling or important interest either.

Under rational basis review, the challenger must prove that the classification is "not rationally related to a legitimate governmental purpose." *Breen*, 2005-NMSC-028, ¶ 11 (quoting *Wagner*, 2005-NMSC-016, ¶ 12) (internal quotation mark omitted). Stated otherwise, the challenger "must demonstrate that the classification created . . . is not supported by a 'firm legal rationale' or evidence in the record." *Wagner,* 2005-NMSC-016, ¶ 24 (citation omitted).

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[6] Other state high courts have found that sexual orientation classifications should be examined under heightened scrutiny under their state constitutions. *Kerrigan*, 957 A.2d at 432 ("[A]s a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling [gay persons] out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping."); *In re Marriage Cases,* 183 P.3d at 401; *Varnum*, 763 N.W.2d at 896.

Federal Courts of Appeal are clearly open to claims of heightened scrutiny for sexual orientation classifications. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012). The circuit decisions cited in BACL 10 n. 3 do not represent the current state of the law. Some of the cited decisions preceded *Lawrence* in 2003 and some also preceded *Romer*. In the more recent cases cited, the courts were neither presented with nor considered the factors relevant to heightened review.

1. Favoring Heterosexual Procreation.

The Amici Legislators try to argue that marriage is "inextricably linked" to the ability to procreate through sexual acts. **[BACL 18]**. This erroneous assertion cannot form the basis of any firm legal rationale. *See* Part I, C. Even if, *arguendo*, procreation is a reason to include different-sex couples in marriage, Amici Legislators have offered no justification for *excluding* Plaintiffs from marriage.

These Amici also claim that limiting marriage and its benefits to potentially procreating different-sex couples "steer[s] procreation into marriage" and "create[s] more stability and permanence in the relationships that cause children to be born." **[BACL 19-20]** (citation omitted). However, there can be no rational contention that discriminating against same-sex couples does anything to support parenting by different-sex couples. To the extent that *some* state-conferred marital rights and benefits support childrearing, they have that effect whether the government discriminates against same-sex couples or not. Nor is it rational to speculate that the purpose of *every* one of these laws is to encourage marriage by unwed future parents and thus steer their procreation into marriage.

If this argument is actually that the State wants to use marital benefits to encourage child bearing by heterosexual couples and deny these protections to same-sex couples to *discourage* them from raising children, then this purpose directly subjects the law to heightened scrutiny because it implicates the decision

of whether to "bear or beget a child"—a fundamental right. *See Eisenstadt,* 405 U.S. at 453; *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942). A hypothesized State desire to discourage same-sex couples from becoming parents is not a legitimate interest in any event, and the record contains no *evidence* for the hypothesis that gay men and lesbians make bad parents. This rationale also makes no sense from a child welfare standpoint: the material protections available to married couples would benefit their children (including the Plaintiffs' children) as well.

2. Excluding Same-Sex Couples From Marriage to Affect the Behavior of Heterosexuals Cannot Pass Constitutional Muster.

Amici Legislators claim that denying marriage to same-sex couples prevents "undermin[ing] the idea that children need both a mother and a father," **[BACL 20-21]**, and "weaken[ing] the social norms encouraging parents, especially fathers, to make the sacrifices necessary to marry, remain married, and play an active role in raising their children." **[BACL 21]**.

The animating theory appears to be that marriage offers an incentive for opposite-sex couples facing an unplanned pregnancy to raise the child in a marriage, and since same-sex couples can only have planned offspring, it is rational not to extend the institution to them. Amici Legislators appear to argue that barring same-sex couples from marrying will cause *different-sex* couples to marry, either after an accidental pregnancy or before an intended one.

Merely paraphrasing this argument exposes its irrationality. While it might be rational to think that marital rights and benefits might play *some* role in encouraging different-sex couples to marry, it does not follow that the exclusion of same-sex couples from marriage advances or even has anything to do with this goal. There can be no rational argument that depriving same-sex couples of equal marriage rights somehow makes other couples more likely to marry. *E.g.*, *Goodridge*, 798 N.E.2d at 963 (no evidence for such a claim).

Accepting these behavioral justifications, moreover, would again require accepting that the purpose of every single right, benefit, and burden of marriage under State law is to encourage expecting parents to marry. But "[t]he breadth of the [measure] is so far removed from th[is] particular justification[]" that it is "impossible to credit [it]." *Romer*, 517 U.S at 635.

3. Doomsday Speculation About Further Changes in Marriage Cannot Survive Constitutional Scrutiny.

Amici Legislators posit "deinstitutionalization" of marriage as a consequence of allowing same-sex couples to *join in* marriage and *assume* marital responsibilities and commitments. **[BACL 21-23]**. Amici's reliance on Professor Andrew Cherlin fails to note his description of decades-long changes in American society, including the rise of companionate marriage, changing divisions of labor in the home as women's workforce participation has grown, and increasing rates of cohabitation, divorce and remarriage, all of which have made "who does what" in a

marriage less "institutionalized," and more a product of negotiation. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage,* 66 J. of Marriage & Fam. 848, 848, 849, 852 (Nov. 2004).[7]

To Amici Legislators' fears of marriage fading away, Professor Cherlin observes that marriage remains an esteemed institution, with about 90% of people still marrying in their lifetimes. Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and the Family in America Today*, 4-5, 136-37 (Vintage 2010). *See also id.* at 183 (describing paradoxical views on marriage, divorce and cohabitation). *Cf. Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012) (no connection between DOMA's denial of federal marital protections to married same-sex couples and an "asserted goal of strengthening . . . heterosexual marriage").

If by "deinstitutionalization," Amici Legislators are advancing an argument about child welfare, many marriages are childless, by choice or otherwise. Even when a family raises children, whether conceived intentionally or accidentally, through unassisted biological procreation or through other means, those children can benefit from the supports provided by the State to their parents' marriages.

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[7] Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 25 (2004), cited by Amici Legislators, readily acknowledges "it may be possible to open marriage to same-sex couples without harming the institution," *id.* at 25, that disagreement about the role of marriage is "largely . . . unrelated" to the issue of marriage for same-sex couples, *id.* at 26.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court: issue its Writ of Superintending Control in this case; and Order that the limitation on marriage to opposite-sex couples is unconstitutional, and that the State must allow qualified same-sex couples to marry and must respect as valid the extant marriages of same-sex couples.

Respectfully Submitted,

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