

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

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.

**MEMORANDUM OF PLAINTIFFS ROPER AND NEUMAN IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE,
AN EXPEDITED HEARING FOR PRELIMINARY INJUNCTION**

INTRODUCTION

New Mexico’s refusal to allow Plaintiffs Jen Roper (“Jen”) and Angelique Neuman (“Angelique”) to marry violates multiple provisions of the New Mexico Constitution. They are entitled a temporary restraining order or preliminary injunction to permit them to marry—before it is too late. A federal district court recently entered a temporary restraining order requiring the State of Ohio to respect the marriage of a same-sex couple who face similarly serious health circumstances, and to designate them as married on the death certificate in the event of death of a spouse. *See Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013). Jen’s and Angelique’s circumstances are equally compelling, and they seek similar relief. For the reasons stated below, Plaintiffs respectfully request the Court to enter a temporary restraining order requiring Defendants to permit Jen and Angelique to marry immediately, or in the alternative, to set an expedited hearing on a motion for preliminary injunction.

ARGUMENT

To obtain a temporary restraining order and/or a preliminary injunction, Plaintiffs must show that: (1) they will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any harm the injunction might cause the defendants; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiffs will prevail on the merits. *See Labaldo v. Hymes*, 1993-NMCA-010, 314 N.M. 314, 318. As discussed in the accompanying Motion, Plaintiffs meet the first three of these requirements, and as discussed below, Plaintiffs meet the fourth as well.

I. Plaintiffs Have a Substantial Likelihood of Prevailing on the Merits

For the reasons stated below, Plaintiffs will prevail on the merits because the New Mexico marriage statutes contain no gender-based limitation on who may marry and because Defendant Santa Fe County Clerk Geraldine Salazar's denial of a marriage license to Jen and Angelique violates the New Mexico Constitution's guarantees of equality and due process.

II. New Mexico's Marriage Statutes Contain No Prohibition on Marriage by Same-Sex Couples

On their face, New Mexico's marriage statutes do not prohibit same-sex couples from marrying. Marriage is defined as "a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential." NMSA 1978, § 40-1-1 (1862). The statutes place various limitations on who can marry, including limitations based on age and degree of familial relationship between the contracting parties. *See* NMSA 1978, §§ 40-1-6, 40-1-7. The statutes contain no similar limitation based on the sex or sexual orientation of the parties.

"Under the plain meaning rule of statutory construction, '[w]hen a statute contains language which is clear and unambiguous, [courts] must give effect to that language and refrain from further statutory interpretation.'" *State v. Rivera*, 2004-NMSC-001, ¶ 10, 134 N.M. 768 (quoting *State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990)). Courts "will not

read into a statute any words that are not there, particularly when the statute is complete and makes sense as written.” *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14 (citing *Burroughs v. Bd. of County Comm’rs of Bernalillo County*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975)).

Under these well-established canons of construction, the Santa Fe County Clerk had a clear duty to issue a marriage license to Jen and Angelique. Given that specific limitations on who is eligible to marry are expressly set forth in the statute, it would be inappropriate for the Court to write into the statute an additional requirement that marriage is limited to different-sex couples when no such language appears in the text. “The doctrine of *expressio unius est exclusio alterius*—the expression or inclusion of one thing indicates exclusion of the other—is applicable here.” *Vives v. Verzino*, 2009-NMCA-083, ¶ 17, 146 N.M. 673 (citing *Fernandez v. Española Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 6, 138 N.M. 283).

Moreover, Defendants’ duty to permit Jen and Angelique to marry arises not merely as a consequence of New Mexico statutes and public policy, but is required under the New Mexico Constitution. For the reasons stated below, denying Jen and Angelique the freedom to enter into a civil marriage in this State deprives them of liberties guaranteed under the state constitution.

III. Prohibiting Same-Sex Couples from Marrying Discriminates on the Basis of Sexual Orientation in Violation of the New Mexico Constitution’s Guarantee of Equal Protection of the Laws

“Equal protection, both federal and state, guarantees that the government will treat individuals similarly situated in an equal manner.” *Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 333. If the New Mexico marriage statutes are interpreted to prohibit Jen and Angelique from marrying, then these statutes unconstitutionally discriminate against them on the basis of their sexual orientation.

Same-sex couples are similarly situated to different-sex couples with respect to the purpose of the marriage laws. In deciding whether two groups of people are similarly situated, New Mexico courts have looked “beyond the classification to the purpose of the law.” *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 40, 126 N.M. 788 (“*NARAL*”). Here, like different-sex couples who wish to marry, Jen and Angelique are a long-term, committed couple who are raising children together, and who seek the recognition and legal protections the state’s marriage laws provide. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 882-84 (Iowa 2009) (“for purposes of Iowa’s marriage laws, which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation.”); *Kerrigan v. Commissioner of Public Health*, 257 A.2d 407, 423-24 (Conn. 2008); *see also In re Marriage Cases*, 183 P.3d 384, 435 n.54 (Cal. 2008).

Discrimination based on sexual orientation warrants strict scrutiny, or at a minimum, intermediate scrutiny, under the New Mexico Constitution. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (applying intermediate scrutiny and striking down DOMA section 3). The New Mexico Supreme Court has held that intermediate scrutiny applies where “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 majoritarian political process.” *Breen*, 2005-NMSC-028, ¶ 21, 138 N.M. 331. All of these factors apply to lesbian, gay, and bisexual New Mexicans. Plainly, gay, lesbian, and bisexual New Mexicans have suffered a history of pervasive discrimination, including criminal laws that punished their very existence. Until 1975, New Mexico criminalized consensual sexual intimacy between persons of the same sex. *See State v. Elliott*, 89 N.M. 305, 305, 551 P.2d 1352, 1352 (1976). New Mexico did not

enact any statewide laws protecting lesbian, gay, and bisexual people against discrimination until 2003. *See* 2003 N.M. Laws Ch. 383. And with few exceptions, New Mexico still treats same-sex couples—no matter how committed or how long they have been together—as legal strangers, rendering them unable to fully protect one another or to require third parties to respect their relationship. Despite recent progress in eliminating anti-gay discrimination, lesbian, gay, and bisexual people remain a small, politically vulnerable minority group.

Additionally, sexual orientation is an integral part of a person’s identity that has no impact on the person’s ability to contribute to society and is not readily subject to change.¹ *See Windsor*, 699 F.3d at 182-83 (“The aversion homosexuals experience has nothing to do with aptitude or performance.”). Indeed, New Mexico law already recognizes that sexual orientation is not relevant to a person’s ability to work, raise children, or otherwise participate in or contribute to society.² Yet lesbian, gay, and bisexual New Mexicans continue to face discrimination in employment, public accommodation, and other areas, including state employees who have suffered adverse employment actions on the basis of their sexual

¹ “[S]exual orientation is so integral an aspect of one’s identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.” *Kerrigan*, 957 A.2d at 384, 442; *accord In re Marriage Cases*, 183 P.3d at 384, 442; *Varnum*, 763 N.W.2d at 893. The United States Supreme Court has also made clear that gay men and lesbians cannot be required—any more than heterosexual people—to sacrifice this central part of their identity. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”); *Windsor*, 133 S. Ct. at 2695 (“DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

² *See, e.g.*, the Human Rights Act, NMSA 1978 § 28-1-1 *et seq.* (2000) (prohibiting sexual orientation discrimination in employment and public accommodation); NMSA 1978 § 29-1-2 (1921) (prohibiting certain discrimination by law enforcement officers based on sexual orientation); and NMSA 1978 § 31-18(B) 2 and 3 (2007) (providing enhanced penalties for crimes motivated by prejudice against the victim’s sexual orientation). In addition, same-sex couples are permitted by law in New Mexico to adopt children, including the children of their partner. *See* NMSA 1978 § 32A-5-11 (1993). And a partner may seek a declaration that she is the legal parent of a child she has been raising together with a same-sex partner, based on her having held out the child as her own, even if she has not adopted the child. *See Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283.

orientation. See Williams Institute, *New Mexico—Sexual Orientation and Gender Identity Law and Documentation of Discrimination* (Sept. 2009).³

Nor have lesbian, gay, and bisexual people in New Mexico been able 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. As a small group that continues to face deeply entrenched social and political stigma, lesbian, gay, and bisexual New Mexicans are “limited in [their] political power or ability to advocate within the political system,” and their “effective advocacy is seriously hindered by the need to overcome this already deep-rooted prejudice against their integration in society.” *Breen*, 2005-NMSC-028, ¶¶ 18, 21, 138 N.M. 331, 120 P.3d 413.

While official discrimination against this vulnerable minority warrants heightened review, New Mexico’s exclusion of same-sex couples from marriage cannot withstand any level of constitutional scrutiny. Defendants have no legitimate interest, much less an important or compelling one, in denying same-sex couples the freedom to marry, thereby depriving them not only of equal dignity and respect, but of critical protections under both state and federal law. *Cf. Obergefell*, 2013 WL 3814262, at *6 (“Even if there were proffered some attendant governmental purpose to discriminate against gay couples, other than to effect pure animus, it is difficult to imagine how it could outweigh the severe burden imposed by the ban . . .”). Indeed, the State of New Mexico agrees that the exclusion of same-sex couples from marriage cannot withstand constitutional scrutiny, and recently acknowledged to the New Mexico Supreme Court that “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.” See State of New

³ Available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/NewMexico.pdf>.

Mexico's Resp. to Verified Petition for Writ of Mandamus at 17, *Griego v. Oliver*, No. 34,227 (N.M. Aug. 12, 2013), attached to Motion filed contemporaneously herewith as Exhibit D.

IV. Prohibiting Same-Sex Couples from Marrying Discriminates on the Basis of Sex in Violation of the New Mexico Constitution's Equal Rights Amendment

"New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination . . ." *NARAL*, 1999-NMSC-005, ¶ 36. It provides greater protection than the New Mexico Constitution's general requirement of equal protection. *See id.* ¶ 30. "New Mexico's state constitution requires the State to provide a *compelling* justification for using such [gender-based] classifications to the disadvantage of the persons they classify." *Id.* ¶ 43 (emphasis added). New Mexico's exclusion of Jen and Angelique from marriage discriminates on the basis of sex, and cannot withstand this searching review.

A law discriminates on the basis of sex when it restricts marriage to different-sex couples or otherwise denies legal rights and benefits based on the fact that an individual seeks to marry a person of the same sex rather than a person of a different sex. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010; *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (administrative decision); *cf. Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). In *Perry*, the court explained that sex and sexual orientation "are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." *Perry*, 704 F. Supp. 2d at 996. To the extent the New Mexico marriage statutes prohibit same-sex couples from marrying, they target lesbians and gay men "in a manner specific to their sexual orientation and, because of their relationship to one another . . . specifically due to sex." *Id.*

Here, Jen would be permitted to marry Angelique if she were a man, but is prohibited from doing so because she is a woman, and the same is true for Angelique marrying Jen. This is

sex discrimination. See *Loving v. Virginia*, 388 U.S. 1, 8, 11 & n.11 (1967) (holding that a classification prohibiting marriage between individuals of different races discriminated based on race, even though the prohibition applied to white and African-American partners alike); see also *McLaughlin v. Florida*, 379 U.S. 184, 195-96 (1964) (striking down statute that prohibited an individual from cohabiting with a partner of another race). Because there is no legitimate, let alone compelling, justification for this sex-based discrimination, the exclusion of same-sex couples from marriage cannot survive the strict scrutiny required under the New Mexico Equal Rights Amendment, and Plaintiffs are therefore substantially likely to prevail on their claim.

V. Prohibiting Same-Sex Couples from Marrying Deprives Them of Fundamental Liberties in Violation of the New Mexico Constitution's Due Process Clause

Barring same-sex couples from marriage also violates New Mexico's due process guarantee by depriving them of the fundamental right to marry. N.M. Const. art. II, § 18. In determining whether a right is fundamental under the New Mexico Constitution, courts generally consider: (1) whether the United States Supreme Court has recognized the right as fundamental; (2) the degree to which the class of persons seeking to assert the right is similar or dissimilar to those asserting similar interests in previous cases recognizing fundamental rights; and (3) the degree of abridgment of the right. See *State v. Druktenis*, 2004-NMCA-032, ¶¶ 89-96, 135 N.M. 223. All of these factors show that permitting the state to exclude Jen and Angelique from marriage would violate their right to due process.

First, the U.S. Supreme Court has repeatedly held that the freedom to marry is a fundamental right that is deeply rooted in privacy, liberty, and freedom of intimate association.⁴

⁴ See, e.g., *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 (the federal due process clause protects the right to marry); *Loving*, 388 U.S. at 12 (marriage is a "fundamental freedom" under due process and "one of the vital personal rights essential to the orderly pursuit of happiness by free men"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is a "right of privacy older than the Bill of Rights"); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . ."); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (marriage is an aspect of the "fundamental 'right of privacy' implicit in the . . . Due Process Clause");

Second, partners in same-sex relationships have the same stake as others in the underlying autonomy, privacy, and associational interests protected by the fundamental freedom to marry. Without deciding whether the state must permit same-sex couples to marry, the United States Supreme Court has held that individuals in same-sex relationships have the same protected liberty and privacy interests in their intimate relationships as heterosexual people. *See Lawrence*, 539 U.S. at 577-78 ; *cf. Windsor*, 133 S. Ct. at 2693 (holding that laws that discriminate against married same-sex couples violate federal due process and equal protection because of their “interference with the equal dignity of same-sex marriages”). As New Mexico law already recognizes, same-sex couples are just as capable as others of entering committed relationships, raising children, and forming stable families that contribute both to their own welfare and to that of the larger society. *See supra* n.2.

Third, excluding all same-sex couples from marriage would severely infringe their rights to privacy, autonomy, and liberty. Without having access to marriage, same-sex couples in New Mexico have no way to enter into an officially recognized and protected family relationship, leaving them with no way to assume full responsibility for one another and no meaningful protection against being treated as legal strangers by third parties and the state.

In sum, Jen and Angelique are substantially likely to prevail on the claim that they have the same fundamental right to marry as other couples, and any law excluding them from that violates New Mexico’s due process guarantee unless the State can show that it is necessary to achieve a compelling state interest, which it cannot do. *See ACLU of N.M. v. City of Albuquerque*, 2006–NMCA–078, ¶ 19, 139 N.M. 761 (holding that heightened scrutiny applies when a law violates a fundamental right).

Turner v. Safley, 482 U.S. 78, 95 (1987) (“the decision to marry is a fundamental right”); *see also Wachocki v. Bernalillo County Sheriff’s Dep’t*, 2010–NMCA–021, ¶ 36, 147 N.M. 720 (recognizing that marriage is a fundamental right under the federal constitution), *aff’d*, 2011–NMSC–039, 150 N.M. 650, 265 P.3d 701.

