IN THE NEW MEXICO SUPREME COURT

No. 28,730

VICTORIA DUNLAP,
SANDOVAL COUNTY CLERK,

Petitioner,

vs.

PATRICIA MADRID, N.M.
ATTORNEY GENERAL,

And

HON. LOUIS P. MCDONALD,
DISTRICT COURT JUDGE,
13TH JUDICIAL DISTRICT,

Respondents.

BRIEF OF *AMICUS CURIEA* FAMILY RESEARCH COUNCIL

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TABLE OF CONTENTS

Table of Authorities………………………………………………………………… iv

Argument……………………………………………………………………………… 1

I. THE PROCEDURAL QUESTIONS RAISED BY THE PETITIONER ARE NOT SUFFICIENT TO WARRANT INTERVENTION BY THE SUPREME COURT……………………………………………………………… 1

A. The Petitioner should have filed a motion for re-hearing regarding this Court's extension of the TRO………………………….. 2

B. The course that the case has taken is in accordance with the procedural rules, and therefore there is no reason for the Supreme Court to intervene………………………………………... 3

1. There was a complaint filed in this case……………………….. 3

2. The TRO was correctly obtained………………………………. 4

3. The Petitioner Was Heard On The Issue Of A TRO…………... 6

4. The District Court Properly Exercised its Discretion in Issuing the Scheduling Order………………………………... 6

II. THE COUNTY CLERK HAS NO AUTHORITY TO SUA SPONTE REDEFINE MARRIAGE……………………………………………………… 5

A. Petitioner's Actions Are *Ultra Vires* of Her Authority as County Clerk…………………………………………………………… 8

1. Petitioner's Actions Violated State Law………………………. 8

2. The County Clerk's Actions Intrude into an Area of Law that the County Does Not Have the Authority to Regulate…………………………………………………... 11

a. The Legislature Has Not Granted the County the Authority to Regulate Marriage……………………. 11

b. Marriage Is an Issue of Statewide Concern……………. 11

B. The County Clerk Has Violated Article III § 1 of the State Constitution by Choosing Which Laws to Enforce Based on Her Interpretation of the Statutes and the Constitution…………….. 13

III. NEW MEXICO HAS A COMPELLING INTEREST IN PRESERVING TRADITIONAL MARRIAGE………………………………………………… 15

A. The Equal Rights Amendment - Article II, § 18 - Does not Require Same-sex Marriage……………………………………………. 15

1. Men and Women are Similarly Situated with Respect to New Mexico Marriage……………………………... 16

2. Traditional Marriage is Based on Unique Characteristics of Men and Women, and is not a disadvantage to either sex……………………………………… 17

B. Traditional Marriage Does not Violate Art. II, § 4…………………….. 19

C. The Public and State have a Strong Interest in Protecting Traditional Marriage…………………………………………………… 20

D. Same-Sex Marriage Would Undermine Traditional Marriage………………………………………………………………... 26

E. The State's Human Rights Laws Do Not Require Same-Sex Marriage…………………………………………………….. 29

Conclusion…………………………………………………………………….. 34

TABLE OF AUTHORITIES

NEW MEXICO CASES Page #

Bd. Of County Comm'rs v. Padilla,
111 N.M. 278, 804 P.2d 1097 (N.M. 1990)………………………………………. 14

City of Albuquerque v. Sachs,
2004 WL 1418399 (N.M. App. March 23, 2004)………………………………. 18

Delgado v. Costello,
91 N.M. 732, 580 P.2d 500 (N.M. Ct. App., 1978)……………….……………… 3

District Court of the Second Judicial Dist. v. McKenna,
118 N.M. 402, 881 P.2d 1387 (N.M. 1994)……………………………………. 3

El Dorado at Santa Fe, Inc. v. Bd. Of County Comm'rs,
89 N.M. 313, 551 P.2d 1360 (N.M. 1976)……………………………………… 11

Futrell v. Ahrens,
88 N.M. 284, 540 P.2d 214 (N.M. 1975)………………………………………. 17, 20

In re Estate of Lord,
93 N.M. 543, 602 P.2d 1030 (N.M. 1979)……………………………………… 21

Insure N.M., LLC v. McGonigle,
128 N.M. 611, 995 P.2d 1053 (N.M.Ct. App., 2000)………………………...... 5

Merrill v. Davis,
100 N.M. 552, 673 P.2d 1285 (N.M. 1983)……………………………………. 12, 13, 21

Moody v. Stribling,
127 N.M. 630, 985 P.2d 1210 (N.M. 1999)……………………………………. 5

Mowrer v. Rusk,
95 N.M. 48, 618 P.2d 886 (N.M. 1980)………………………………………… 14

N.M. Right to Choose/NARL v. Johnson,
126 N.M. 788, 975 P.2d 841 (N.M. 1999)……………………………………... 16, 18, 19

Seasons, Inc. v. Atwell,
86 N.M. 751, 527 P.2d 792 (N.M. 1974)………………………………………. 3

Sims v. Sims,
122 N.M. 618, 930 P.2d 153 (N.M. 1996)……………………………………… 5

State ex rel. Haynes v. Bonem,
114 N.M. 627, 845 P.2d 150 (N.M. 1992)……………………………………… 12

State v. Fifth Judicial Dist. Court,
36 N.M. 151, 9 P.2d 691 (N.M. 1932)…………………………………………. 14

State v. Roy,
40 N.M. 397, 60 P.2d 646 (N.M. 1936)………..………………………………. 3

Temple Babtist Church v. Albuquerque,
98 N.M. 138, 646 P.2d 565 (N.M. 1982)………………………………………. 4

Tobeck v. United Nuclear—Homestake Partners,
85 N.M. 431, 512 P.2d 1267 (N.M. Ct. App., 1973)…………………………… 7

Trujillo v. City of Albuquerque,
110 N.M. 621, 798 P.2d 571 (1990), *overruled on other grnds.*,
125 N.M. 721, 965 P.2d 305 (1998)……………………………………………. 20

OTHER CASES

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993)…………………………………………………….. 17

Baker v. Nelson,
191 N.W.2d 185 (Minn. 1971)……………………………………………….. 19

Baker v. Vermont,
744 A.2d 864 (Vt. 1999)……………………………………………………... 17

Burns v. Burns,
253 Ga. App. 600, 560 S.E. 2d 47 (Ga. App. 2002)……………………………. 17

Church of Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993)………………………………………………………….. 21

City of Albuquerque v. New Mexico Pub. Serv. Comm'n,
115 N.M. 521, 854 P.2d 348 (N.M. 1993)……………………………………… 12

Clark v. Pennsylvania R.R.,
328 F.2d 591 (2nd. Cir. 1964)………………………………………………... 7

Dean v. Dist. of Columbia,
653 A.2d 307 (D.C. Ct. App. 1995)…………………………………………….. 17, 19

Griswold v. Connecticut,
381 U.S. 479 (1965)………………………………………………………….. 22

Hewitt v. Hewitt,
77 Ill.2d 49, 21 Ill.Dec. 827, 394 N.E.2d 1204 (1979)…………………………. 13, 21

Jones v. Hallahan,
501 S.W.2d 588 (Ky. Ct. App. 1973)…………………………………………... 19

Lawrence v. Texas,
539 U.S. __, 123 S. Ct. 2472 (2003)……………………………………………. 22, 26

Loving v. Virginia,
388 U.S. 1 (1967)……………………………………………………………….. 22

Maynard v. Hill,
125 U.S. 190, 205 (1888)……………………………………………………….. 22, 28

Nieto v. City of Lows Angeles,
138 Cal. App.3d 464 (1982)…………………………………………………….. 25

Reynolds v. United States,
98 U.S. 145 (1878)……………………………………………………………… 21, 22

Singer v. Hara,
522 P.2d 1187 (Wash. Ct. App. 1974)………………………………………….. 17, 19

Tolbert v. City of Memphis,
568 F. Supp. 1285 (W.D. Tenn.1983)…………………………………………... 18

STATUTES

N.M. Const. art. II. §4……………………………………………………... 19, 20

N.M. Const. art. II. §18…………………………………………………… 15, 20

N.M. Const. art. III. §1……………………………………………………. 14, 15

N.M. Const. art. IV. §1…………………………………………………… 14

N.M. Const. art. V. §13……………………………………………………. 15

N.M. Const. art. VI. §3……………………………………………………. 3

N.M. Const. art. VI. §22…………………………………………………... 15

N.M. Const. art. X. §§5-6………………………………………………………. 12

N.M. Dist. Ct. R.C.P. 1-008A…………………………………………………... 3, 4

N.M. Dist. Ct. R.C.P. 1-066…………………………………………………….. 3

N.M. Dist. Ct. R.C.P. 1-006…………………………………………………….. 6

N.M. Dist. Ct. R.C.P. 1-016…………………………………………………….. 7

NMRA 12-404…………………………………………………………………….. 2

NMSA 1978, §40-1-10 ……………………………………………………… 8

NMSA 1978, §40-1-17 ……………………………………………………… 8, 9

NMSA 1978, §40-1-18 ……………………………………………………… 8, 11

NMSA 1978, §§40-1-1 – 40-4-20………………………………………………. 12,

NMSA 1978, §§28-1-1 - 20-1-7. ………………………………………………. 9, 29

MISCELLANEOUS

A.E. HOEBEL, THE LAW OF PRIMITIVE MAN, 3-45 (1945)……………………… 22

Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983)…………………………………………………………………… 23

George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 JOURNAL OF LAW & POLITICS 581 (1999). …………………………………………………….. 23, 24, 26, 27, 28, 29

Lynn D. Wardle, "*Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation* 24 HARV. J. L. & PUB. POL'Y. (2001)…………………………………………………………………….. 23, 28

Marcel T. Saghir, M.D. and Eli Robins, M.D., MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION 57 (1973)……………… 24

Matthew D. Bramlett et al., *First Marriage Dissolution, Divorce, and Remarriage: United States*, Advance Data No. 323 (Nat'l Center For Health Statistics) (May 31, 2001)………………………………………………………. 24

Paul J. Bohannan, *The Differing Realms of the Law*,

67 AM. ANTHROPOL. 33-42 (1965)…………………………………………….. 22

Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 89 (1994)…. 24

The Ramsey Colloquium, *The Homosexual Movement*, 41 FIRST THINGS 15 (1994)…………………………………………………………………….... 23, 24, 25, 26

INTEREST OF *AMICUS*

FAMILY RESEARCH COUNCIL is a nonprofit research and educational corporation headquartered in Washington, D.C. It exists to affirm and promote the traditional family and the Judeo-Christian principles upon which this country is built. Family Research Council provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

ARGUMENT

Petitioner is asking this Court to lift an injunction so she can single handedly change New Mexico law regarding marriage. If the Court grants the writ, Petitioner is on record as stating that she will again begin to issue marriage licenses to same sex couples in clear violation of New Mexico law. Allowing a county clerk to completely disregard state law and policy would violate the State's requirement of separation of powers. More importantly, it would place the foundation of New Mexico families in jeopardy by undermining traditional marriage. The relief sought by Petitioner should be denied.

I. THE PROCEDURAL QUESTIONS RAISED BY THE PETITIONER ARE NOT SUFFICIENT TO WARRANT INTERVENTION BY THE SUPREME COURT.

Petitioner raises a number of arguments with regards to the procedural matters in this case. The issue that they raise regarding a Temporary Restraining Order ("TRO") has already been addressed by this Court in its March 31, 2004 Order in the case of *State of New Mexico v. Dunlap*, No 28,574. (V. Pet. for an Extraordinary Writ (V. Pet.) Ex. 2.) Petitioner also raises a number of other procedural issues, all of which are without merit. Contrary to Petitioner's claims the TRO was properly granted by the district court judge, that TRO was properly extended by this Court, there was a complaint filed in the form of

a request for Permanent Injunction, and there was a Scheduling Conference held regarding that complaint. Finally, District Court Judge Louis P. McDonald is moving ahead with a trial on the merits, despite the Petitioner's incessant arguments that there are no merits.

A. Petitioner Should Have Filed a Motion for Re-hearing Regarding This Court's Extension of the TRO.

The issue of the extension of the TRO, and the district court's refusal to disobey this Court's ruling that the TRO be extended until a trial on the merits, has already been addressed by this Court. Petitioner had the option of filing a motion for rehearing under NMRA, Rule 12-404 to seek redress of her concerns regarding the TRO. She failed to do so and must therefore accept the ruling of this Court.

NMRA, Rule 12-404 states that "[a] motion for rehearing may be filed within fifteen (15) days after filing of the appellate court's disposition . . . ." This would have given Petitioner until April 15, 2004 to petition this court to reconsider the question of extending the TRO. Petitioner should not be here now asking this Court to issue an Extraordinary Writ on an already decided issue.

Furthermore, the district court did nothing more than follow this Court's March 31, 2004 Order by leaving the TRO in place. That Order extended the TRO prohibiting Petitioner from issuing marriage licenses to same-sex couples "until such time as the matter can be heard on the merits by the district court." This Court clearly had the authority to take issue this Order. The Supreme Court of the State of New Mexico has "superintending control over all inferior courts . . . it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine

the same" under article VI §3 of the Constitution. According to this Court "[t]he power of superintending control is the power to control the course of ordinary litigation in inferior courts." *District Court of the Second Judicial Dist. v. McKenna*, 118 N.M. 402, 405, 881 P.2d 1387, 1390 (N.M. 1994) (quoting *State v. Roy*, 40 N.M. 397, 421, 60 P.2d 646, 661 (N.M. 1936)). The power invested in this Court by the Constitution clearly allows this Court to extend the TRO until a trial on the merits.

B. The Course That The Case Has Taken Is In Accordance With The Procedural Rules, And Therefore There Is No Reason For The Supreme Court To Intervene.

Petitioner claims the injunction issued by the District Court should be lifted because there was no complaint filed in this case, the district court failed to hear the issue of the TRO, and there was no Rule 1-016 conference. (V. Pet. ¶¶22-24, 33). The record shows that these allegations are completely unsupported.

1. There was a complaint filed in this case.

Petitioner states in ¶34 of the Verified Petition that the attorney general wished to amend the motion for TRO. To the contrary, Respondent filed a Petition for Permanent Injunction which was clearly a complaint. New Mexico District Court Rules of Civil Procedure (N.M. Dist. Ct. R.C.P.) 1-008A states that a claim for relief in a proper complaint must contain (1) proper allegations of venue, (2) a short and plain statement of the claim, and (d) a demand for judgment for relief. The court of appeals and this court have stated that "the office of the pleadings is to give the parties fair notice of both claims and defenses and the grounds upon which they rest." *Delgado v. Costello*, 91 N.M. 732, 736, 580 P.2d 500, 504 (N.M. Ct. App. 1978) (citing *Seasons, Inc. v. Atwell*, 86 N.M. 751, 527 P.2d 792 (N.M. 1974)). "Although proper pleading is important, its importance

inheres in its effectiveness as a means of accomplishing substantial justice." *Temple Baptist Church v. Albuquerque*, 98 N.M. 138, 142, 946 P.2d 565, 569 (N.M. 1982).

In the case at hand, Respondent's Petition for Permanent Injunction clearly meets each of the requirements of a pleading. It is not necessary to state the venue in the body of the complaint "provided the name of the county stated in the complaint shall be taken to be the venue intended by the plaintiff . . . ." N.M. Dist. Ct. R.C.P. 1-008A(1). This is satisfied by the heading which includes "State of New Mexico[,] County of Sandoval[,] Thirteenth Judicial District Court." (V. Pet. Ex. 7). The second requirement is met by the allegations set forth in ¶¶ 1-15 of the Petition, which clearly state the case, and the third requirement is met in ¶¶ 1-2 of the wherefore clause.

The requirements of a proper complaint were met in Respondent's Petition for a Permanent Injunction, and this is clearly what was being referred to when the request was made to amend the complaint. Petitioner admits that this petition "could even be amended." (V. Pet. Ex. 8 (Tr. Status Conf.) at 9). Therefore there is a complaint in this case and the matter should be allowed to move forward on the merits.

2. The TRO Was Correctly Obtained

Judge Brown acted within his discretion in granting the TRO enjoining Petitioner from continuing to issue marriage licenses to same-sex couples. Immediate action was needed to prevent irreparable injury and reasons were given why direct notice was not provided to Petitioner. Petitioner's comment that "[w]ithout any public meeting, discussion, or vote . . . the Sandoval County Commissioners, joined by Attorney General Madrid asked for a Temporary Restraining Order ("TRO")" (V. Pet. at ¶4) is not relevant to whether or not a district court judge may grant a TRO.

As quoted in the Petitioner's verified petition, N.M. Dist. Ct. R.C.P. 1-066 states that:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury…will result to the applicant before the adverse party or his attorney can be heard in opposition; and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required.

(V. Pet. ¶32). As stated by the New Mexico Court of Appeals "[t]he granting of an injunction is an equitable remedy, and whether to grant equitable relief lies within the sound discretion of the trial court." *Insure N.M., LLC v. McGonigle*, 128 N.M. 611, 614, 995 P.2d 1053, 1056 (N.M. Ct. App. 2000) (quoting *Moody v. Stribling*, 127 N.M. 630, 639, 985 P.2d 1210, 1219 (N.M. 1999)). The standard of review of an injunction is abuse of discretion which "occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Id.* (quoting *Sims v. Sims*, 122 N.M. 618, 631, 930 P.2d 153, 166 (N.M. 1996)).

Petitioner had herself publicly announced her intentions to continue issuing marriage licenses that day, leading the Attorney General to move for a TRO. She saw the harm resulting from these acts as imminent; there was no time to wait for the Petitioner to carry through with her intentions. (V. Pet. Ex. 6 (Mot. for TRO) ¶8). Judge Brown found that the actions of Petitioner were "creating a safety hazard to persons in the Courthouse," as well as finding "that the legality of such marriages should be determined on a state wide basis . . . ." (V. Pet. Ex. 10). Although notice was not given directly to Petitioner of the TRO, she was aware of the TRO proceeding due to a front page article in the Albuquerque Journal. (V. Pet. Ex. 6 at ¶8). The evidence does not indicate the trial

judge abused his discretion; to the contrary it supports the district court's decision to grant the TRO.

The Attorney General clearly stated in her request for TRO the harm that needed to be avoided and why notice was unnecessary. According to N.M. Dist. Ct. R.C.P 1-066 this is what is required for a TRO to be granted. The judgment of whether the harm was sufficient for a TRO was in the discretion of the judge.

3. Petitioner Was Heard on the Issue of a TRO

Petitioner argues that she was never heard on the issue of the TRO; however this is contrary to the facts. Petitioner's attorney stated at the status conference that "[w]e have fully briefed the issue of the Temporary Restraining Order . . . . [W]e've moved to dismiss it, the State and County answered, we responded to that." (V. Pet. Ex. 8 (Tr. Status Conf.) at 10). The judge commented that he had "read all those things." *Id.* at 7. Petitioner's attorney proceeded to present argument on whether the TRO was properly granted. *Id.* The judge then ruled on Petitioner's motion to dismiss the Temporary Restraining Order: "I am going to deny your request to dismiss the restraining order. It is clear from the Supreme Court's Order that the restraining order was continued until the matter could be heard on the merits. That's what will happen in this case." *Id.* at 12.

The granting of a TRO does not require a hearing and therefore was properly granted. N.M. Dist. Ct. R.C.P. 1-006. Moreover, Petitioner concedes that she was subsequently able to fully brief the TRO. Her attorney then presented oral argument on the matter at the status conference. (V. Pet. Ex. 8 (Tr. Status. Conf.) at 10). Petitioner's claim that she was never allowed to be heard on the TRO is not supported by the facts.

4. The District Court Properly Exercised its Discretion in Issuing the Scheduling Order.

Petitioner claims that there was no Rule 1-016 conference and therefore there was no basis for the Scheduling Order handed down by Judge McDonald. (V. Pet. ¶23). N.M. Dist. Ct. R.C.P. 1-016A says "[i]n any action the court *may* in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial," (emphasis added) and then lists a number of reasons why such a conference may be held. Section B of the same rule says "the judge may, after consulting with the attorneys for the parties . . . , by scheduling conference, telephone, mail or other suitable means, enter a scheduling order . . . ." *Id.* This order is to state what action is to be taken, and the order will control the course of the trial unless subsequently modified. *Id.* at §E. "[I]t is a fundamental principle of pretrial that this procedure be flexible, with power reserved to the trial judge to amend the order or permit a departure from strict adherence to the pre-trial statements of either party, when the interests of justice make such a course desirable." *Tobeck v. United Nuclear--Homestake Partners*, 85 N.M. 431, 436, 512 P.2d 1267, 1272 (N.M. Ct. App. 1973) (quoting *Clark v. Pennsylvania R. R.*, 328 F.2d 591 (2d Cir. 1964)). It is clear from the rules that there is discretion whether to have a Rule 1-016 conference and discretion as to what issues are addressed. The judge acted within his discretion in having a conference at which time they discussed how the case was to progress. He gave leave to Respondent to amend the petition and issued a scheduling order that would control. All of these actions are within the court's discretion, and clearly fulfill the purpose of a rule 1-016 conference.

The procedural problems alleged by Petitioner all fail because they either misstate the law or the facts. Petitioner's request for a writ should therefore be denied.

II. THE COUNTY CLERK HAS NO AUTHORITY TO SUA SPONTE REDEFINE MARRIAGE.

Petitioner argues that state law requires her to issue marriage licenses to same-sex couples; therefore the injunction restraining her from doing so should be lifted. However, New Mexico law clearly prohibits same-sex marriage and Petitioner acted outside the scope of her authority by issuing such licenses.

A. Petitioner's Actions Are *Ultra Vires* of Her Authority as County Clerk.

The County Clerk has acted *ultra vires* in two ways: (1) she violated state law, and (2) she attempted to regulate an area of law governed by the state.

1. Petitioner's Actions Violated State Law Which Only Provides for Opposite-Sex Marriage.

New Mexico state law calls for a marriage license as a prerequisite for a valid marriage, and further places the duty of issuing such licenses on the clerk of each county. NMSA 1978, § 40-1-10. State law requires that all applications for marriage licenses be substantially the same as the uniform marriage license application form enacted by the state legislature. NMSA 1978, § 40-1-17. The uniform marriage license application form refers to a "Bride" and a "Groom," and requires both a "Male Applicant" and a "Female Applicant." NMSA 1978, § 40-1-18. The uniform application form does not allow for two male applicants or two female applicants. The Marriage Certificate also requires the signature of a "Bride" and "Groom." *Id.* Thus, a same-sex couple is not eligible for a marriage license in the state of New Mexico, and county clerks are not authorized to issue such licenses. By issuing marriage licenses to same-sex couples, Petitioner violated § 40-1-17 and § 40-1-18.

The Attorney General of the state of New Mexico, in her advisory letter, stated that the New Mexico statutes "contemplate that marriage will be between a man and a woman . . . . [T]he present policy of New Mexico is to limit marriage to a man and a woman." (V. Pet. for Extraordinary Writ Ex. 5 at 1.) The Attorney General lays out several bases for her conclusion that New Mexico state law does not permit same-sex marriage.

> The rights of married persons are set forth as applicable to a husband and a wife. *See* NMSA 1978, Sections 40-2-1 through 40-2-9. The property rights of married persons are expressed as existing between a husband and a wife. *See* NMSA 1978, Sections 40-3-1 through 40-3-17. The evidentiary privilege, as established by the New Mexico Supreme Court, is limited to communications that occur while the parties are husband and wife. *See* Rule 11-505 (B) NMRA. The generally accepted definition of "husband" is a married man. Black's Law Dictionary, Sixth Edition. "Wife" is defined as a woman united to a man by marriage. *Id.*

(V. Pet. Ex. 5 at 1.)[1] The Attorney General summarized her conclusions as follows:

> Thus, it appears that the present policy of New Mexico is to limit marriage to a man and a woman . . . . Until the laws are changed through the legislative process or declared unconstitutional by the judicial process, the statutes limit marriage in New Mexico to a man and a woman . . . . [N]o county clerk should issue a marriage license to same-sex couples because those licenses would be invalid under current law.

Id. at 2. Petitioner was aware of the Attorney General's advisory letter and chose to act contrary to the opinion expressed in it.

Petitioner claims that she received a letter from County Attorney David Matthews "suggesting that she was required to issue same-sex marriage licenses upon request." (V. Pet. ¶10.) However, the letter from Matthews does not make any such suggestion. The letter details the state law regarding marriage licenses, including the prohibition on issuing licenses to minors without the consent of their parents. (V. Pet. Ex. 9 at 1.) The

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[1] These statutes' use of the gender specific language "husband" and "wife" demonstrate the incredibility of Petitioner's allegation that New Mexico marriage statutes are "consisitent[ly] gender neutral."

letter also states that a county clerk may be removed from office for refusing to issue a marriage license. *Id.* Matthews discusses the uniform marriage license application form—and the columns designated "male applicant" and "female applicant"—and states that the terms "male" and "female" do not appear anywhere else in the statutes on marriage licenses. *Id.*

Matthews concludes his letter with the following: "Our duty is to follow the statutes as written. This is a state issue, not a county issue and should be resolved consistently on a state level. Therefore I agree with your suggestion to seek an Opinion from the Attorney General." *Id.* at 2. The only suggestion Matthews made to Petitioner was that she consult the Attorney General.

Petitioner rejected Mathews's advice and announced that she would issue same-sex licenses the following day (February 20, 2004), and did so until she became aware of the Attorney General's advisory letter. (V. Pet. Ex. 1 ¶5.) Then, one month later, after promising the Board of County Commissioners that she would honor the Attorney General's advisory letter and not issue any more same-sex marriage licenses (V. Pet. Ex. 7 at 3, 6), Petitioner "publicly stated that she would break her pledge . . . and again issue same-sex marriage licenses unless stopped by a court order." (First Am. Compl. ¶ 33.)

Petitioner's actions are completely unjustified. The letter from Matthews did not provide a basis for issuing same-sex marriage licenses. That letter recommended that she consult the Attorney General and implied that she should then follow the Attorney General's opinion. Instead, Petitioner acted contrary to the Attorney General's advisory letter (and thus contrary to Matthews's letter as well), contrary to the laws of the state of New Mexico, and contrary to her own promise. Petitioner's actions violated state law.

2. Petitioner's Actions Intrude into an Area of Law That the County Does Not Have the Authority to Regulate.

Petitioner, by redefining marriage, intruded into an area of law governed by the State. Marriage is a matter of statewide concern, and neither counties, nor their clerks, may attempt to regulate it.

a. The Legislature Has Not Granted the County the Authority to Regulate Marriage.

"A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (N.M. 1976). The power to regulate marriage has not been granted to New Mexico counties.

The only authority regarding marriage that has been granted to counties is the issuance of marriage licenses. "When the Legislature confers an express power or imposes a duty upon a county and prescribes the method for exercising the power or discharging the duty, that method is exclusive." *Id.* The state legislature is explicit in its prescription of the method of issuing marriage licenses: applicants must fill out an application that is substantially the same as the uniform marriage license application form, a form that requires both a male and female applicant. NMSA 1978, § 40-1-18.

The county has been granted the authority to issue marriage licenses per those specific instructions. It has not been granted the authority to issue marriage licenses in any manner that does not correspond to those instructions. Petitioner, as an officer of the county, does not have the authority to do what the county itself lacks the power to do.

b. Marriage Is an Issue of Statewide Concern

Counties are prohibited from regulating matters of statewide concern.[2] The definition and regulation of marriage is a statewide concern. "It is the policy of the state to foster and protect the institution of marriage; the state's interest in marriage is recognized by 40-1-2, which prescribes that the contract of marriage be solemnized." *Merrill v. Davis*, 100 N.M. 552, 554, 673 P.2d 1285, 1287 (N.M. 1983). The letter from County Attorney David Matthews, which Petitioner claims justified her issuance of same-sex marriage licenses, explicitly states that "this is a state issue, not a county issue, and should be resolved consistently on a state level." (V. Pet. Ex. 9 at 2.) The state legislature has enacted statutes on marriage, the rights of married people, property rights in marriage, premarital agreements, and the dissolution of marriage. NMSA 1978, §§ 40-1-1 through 40-4-20.

Marriage is also a statewide concern for practical reasons. If marriage can be defined and regulated on a county-by-county basis, the result will be a patchwork system wherein a marriage in one county is not recognized in another. A child born of a married couple in one county may be illegitimate in another county. Furthermore, the determination of the definition of marriage at a county level—particularly by a single elected official—raises several questions:

> [I]s a same-sex couple entitled to use of family transfer provisions of the Sandoval County Subdivision Act; should same-sex couples in Sandoval

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[2] Counties have the same powers and limitations as municipalities. N.M. Const. art. X, § 5. Home rule municipalities are designed to provide "maximum self-government," N.M. Const. art. X, § 6(E), and are given more authority than counties and other municipalities. *See State ex rel. Haynes v. Bonem*, 114 N.M. 627, 631, 845 P.2d 150, 154 (N.M. 1992) (home rule municipalities may act unless expressly limited by the legislature, while other municipalities may act only if expressly authorized by the legislature). But even home rule municipalities are prohibited from regulating marriage because they only may "perform all functions not expressly denied by general law." N.M. Const. art X, § 6(D). This Court has defined the term "general law" as a "law that relates to a matter of statewide, as opposed to local, concern." *City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 521, 530, 854 P.2d 348, 357 (N.M. 1993) (citing *Haynes*, 114 N.M. at 632, 845 P.2d at 155). Since marriage is a matter of statewide concern, neither home rule municipalities, nor counties may regulate them.

> County be given "head of household" property tax status? Will other government entities in New Mexico and other states have to honor these marriages for insurance benefit purposes, retirement purposes, and other benefits accruing to married couples?

(V. Pet. Ex. 7 ¶12.) The implications of same-sex marriage should be carefully considered before it is recognized by the state. Requiring that such a statewide issue be decided at the state level allows the state government to thoroughly examine all the issues surrounding same-sex marriage.

In *Merrill v. Davis,* 100 N.M. 552, 554, 673 P.2d 1285, 1287 (N.M. 1983), this Court cited with approval the Illinois case of *Hewitt v. Hewitt,* 77 Ill.2d 49, 31 Ill.Dec. 827, 394 N.E.2d 1204 (1979). *Hewitt* rejected a plaintiff's attempt to change the marriage law of Illinois to recognize common law marriage, stating:

> The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State. The question whether change is needed in the law governing the rights of parties in this delicate area of marriage-like relationships involves evaluations of sociological data and alternatives we believe best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field.

77 Ill.2d at 61, 31 Ill.Dec. at 832, 394 N.E.2d at 1209. The same rationale applies to Petitioner's attempt to change marriage law in New Mexico - that matter should be left to the legislature. The state can then decide on a policy and that policy can be implemented uniformly throughout the state. The state should have uniform marriage laws, rather than laws that change from county to county. Marriage is a statewide concern that should be regulated at the state—and not the county—level.

Petitioner's actions intruded into an area of law that only the state government has the authority to regulate. She acted beyond the scope of her authority.

B. The County Clerk Has Violated Article III, § 1 of the State Constitution by Choosing Which Laws to Enforce Based on Her Interpretation of the Statutes and the Constitution.

The Constitution of the State of New Mexico divides the government into three branches: the legislative branch, the executive branch, and the judicial branch. N.M. Const. art. III, § 1. Each branch has its own powers and responsibilities. "[T]he legislature makes, the executive executes, and the judiciary construes, the laws." *State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153, 9 P.2d 691, 692 (N.M. 1932). Each branch is prohibited from exercising the powers granted to the other branches. N.M. Const. art. III, § 1.

The doctrine of separation of powers does not function as a limit on governmental entities at the state level alone. Local governments and their officers are also prohibited from "infringing on the powers and the authority of the judiciary." *Mowrer v. Rusk*, 95 N.M. 48, 52, 618 P.2d 886, 890 (N.M. 1980). Thus, while the separation of powers doctrine does not apply to the division of powers within a local government, *Bd. of County Comm'rs v. Padilla*, 111 N.M. 278, 283, 804 P.2d 1097, 1102 (N.M. 1990), it does prevent local governments from interfering with the judicial branch of the state governments.

The state constitution vests the judicial power of the state in "a supreme court, a court of appeals, district courts, probate courts, magistrate courts, and such other courts inferior to the district courts as may be established from time to time in any district, county, or municipality, of the state." N.M. Const. art. IV, § 1. It does not mention county clerks. No other entity is granted the authority to exercise the judicial powers of the state. No other entity has the power to rule on the constitutionality of state statutes.

The state constitution lists municipal officers, such as county clerks, under the Executive Branch. N.M. Const. art. V, § 13. The clerk's duties are executive in nature. County clerks do not possess legislative or judicial authority.[3]

Petitioner does not have the authority to interpret state statutes or determine their constitutionality. She does not have the authority to make laws. She does not have the authority to ignore the laws already enacted by the legislature. However, by choosing to ignore state law and the Attorney General's interpretation thereof, deciding whether the state law conformed to the state constitution, and implementing her own version of the law, Petitioner attempted to claim that authority in violation of Art. III, § 1.

Petitioner's request for lifting the injunction prohibiting her from continuing to violate the separation of powers built into the state Constitution must be denied.

III. NEW MEXICO HAS A COMPELLING INTEREST IN PRESERVING TRADITIONAL MARRIAGE.

Petitioner summarily claims that New Mexico law requires marriage licenses to be issued to same-sex couples, therefore the injunction prohibiting their issuance must be lifted. Petitioner cites to one case and several statutes with no analysis. None of this authority provides support for Petitioner's claims.

A. The Equal Rights Amendment - Article II, § 18 - Does not Require Same-sex Marriage.

Petitioner first contends that failure to issue marriage licenses to same-sex couples violates the Equal Rights Amendment of the New Mexico Constitution: "Equality of rights under law shall not be denied on account of the sex of any person." Article II, §18 ("ERA").

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[3] County clerks are also mentioned under the Judicial Department; they are assigned specific administrative duties relating to the court, but no judicial authority. N.M. Const. art. VI, § 22.

In *N.M. Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841 (N.M. 1999), this Court applied the ERA to strike down a state law restricting state funding of abortion. This Court catalogued numerous incidents of discrimination against women before observing: "Based on our review of the text and history of our state constitution, we conclude that New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it." 975 P.2d at 853. Not once did the Court mention any incidents of discrimination based upon sexual orientation that were remedied by the ERA. Petitioner's claim that this case "firmly supports" issuing marriage licenses to same-sex couples is baseless.

The *N.M. Right to Choose* decision found that "not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination. A flat prohibition of such classifications may lead to 'absurd results.'" *Id.* at 854. This Court then set forth a two part analysis for determining if there is an ERA violation as follows:

> [1] To determine whether men and women are similarly situated with respect to a classification, we must look beyond the classification to the purpose of the law. Further, [2] to determine whether a classification based on a physical characteristic unique to one sex results in the denial of equality of rights under law within the meaning of New Mexico's Equal Rights Amendment, we must ascertain whether the classification operates to the disadvantage of persons so classified.

Id. (citations and quotation marks omitted).

1. Men and Women are Similarly Situated with Respect to New Mexico Marriage.

In the case at hand, both men and women are similarly situated and treated equally by New Mexico's prohibition on same-sex marriage. Neither sex is

disadvantaged by the limitation of marriage to opposite-sex couples since both are prohibited from marrying someone of their own sex. For example, in *Futrell v. Ahrens*, 88 N.M. 284, 540 P.2d 214 (N.M. 1975), this Court found no violation of the ERA when a school prohibited both male and female students from having members of the opposite sex visit their dormitory bedrooms at New Mexico State University.

Courts in other jurisdictions have come to the same conclusion in rejecting claims that traditional marriage discriminates based upon sex. A Washington case noted that neither men nor women were allowed by its marriage statute to marry a person of the same-sex. *Singer v. Hara*, 522 P.2d 1187, 1190-1191 (Wash. Ct. App. 1974). Likewise in a D.C. case, Judge Steadman noted that "[t]he marriage statute applies equally to men and women." *Dean v. District of Columbia*, 653 A.2d 307, 363, n.2 (D.C. Ct. App. 1995) (Steadman, J., concurring). Even the Vermont case which led to the enactment of civil unions for same-sex couples in that state notes that, "marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex . . . each sex is equally prohibited from precisely the same conduct." *Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999). *See also Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (Ga. App. 2002) (affirming trial court's holding that a prohibition on child visitation while cohabiting with an unmarried adult did not discriminate against a homosexual couple based on sex); *Baehr v. Lewin*, 852 P.2d 44, 71 (Haw. 1993) (Heen, J., dissenting). Both men and women are treated equally by New Mexico's preservation of traditional marriage since both have equal opportunity to contract a marriage and neither sex is disadvantaged.

2. Traditional Marriage is Based on Unique Characteristics of Men and Women, and is Not a Disadvantage to Either Sex.

This Court wisely recognized in *N.M. Right to Choose* that the unique physical characteristics of men and women sometimes justify classifications based on these characteristics. 972 P.2d at 854. Recently, the New Mexico Court of Appeals applied this principle when considering whether a public nudity ordinance violated the ERA by prohibiting exposure of a female breast, but not a male breast in *City of Albuquerque v. Sachs,* 2004 WL 1418399 (N.M.App. March 23, 2004). The court first determined that the ordinance "distinguish[ed] between males and females on the basis of unique physical characteristics attributable to each." *Id.* at *3. Pursuant to the rule in *N.M. Right to Choose,* the issue then became whether the ordinance operated to the disadvantage of women. The *Sachs* court found that it did not, citing numerous cases from other jurisdictions that have come to a similar conclusion. *Id.* at *4. Generally, these cases held that our culture's recognition of the obvious differences between the female and male breasts justify gender based classifications when regulating their exposure. *See, e.g., Tolbert v. City of Memphis*, 568 F.Supp. 1285, 1290 (W.D. Tenn. 1983).

Our culture's recognition of the unique physical characteristics of men and women also justifies New Mexico's laws limiting marriage to a man and a woman. Courts and judges have affirmed the nature of marriage as a male-female community that results from these sex differences and that makes same-sex marriage an impossibility. A Washington court, in rejecting a claim for a constitutional right to same-sex marriage, said that the plaintiffs were "not being denied entry into marriage because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two

persons who are members of the opposite sex." *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974).

Other states have similarly concluded that marriage is premised on the differences between the sexes. The Minnesota Supreme Court in *Baker v. Nelson* held that the limitation of marriage to a man and a woman was "based upon the fundamental difference in sex." *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *app. dism. for want of a sub. fed. quest.*, 409 U.S. 810 (1972). A Kentucky case that also rejected same-sex marriage held that the same-sex couple was "prevented from marrying, not by the statutes of Kentucky . . . but rather by their own incapability of entering into a marriage as that term is defined." *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973). The incapability was based upon the fact that both plaintiffs were female. Finally, a judge in the D.C. Court of Appeals noted that "same-sex 'marriages' are legally and factually–i.e., definitionally– impossible." *Dean v. District of Columbia*, 653 A.2d 307, 361 (D.C. Ct. App. 1995) (Terry, J., concurring).

In sum, limiting marriage to a man and a woman does not "operate[] to the disadvantage" of either sex. *N.M. Right to Choose,* 972 P.2d at 854. Petitioner's claim of sex discrimination is completely unfounded.

B. Traditional Marriage Does not Violate Art. II, § 4.

Petitioner also claims that traditional marriage violates Article II, § 4 of the New Mexico Constitution. This provision states:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

However, this provision provides no more protection than the rights analyzed above under Art. II, § 18. *See Trujillo v. City of Albuquerque*, 110 N.M. 621, 628, 798 P.2d 571, 578 (N.M. 1990), *overruled on other grnds.*, 125 N.M. 721, 965 P.2d 305 (N.M. 1998). Moreover, claims under this provision are not subjected to heightened levels of scrutiny. *Id.*

It is unclear exactly what portion of Article II, § 4 Petitioner contends is violated by traditional marriage. It has already been shown that limiting marriage to a man and woman is not discriminatory. This Court specifically found that New Mexico State University's prohibition on opposite sex visitation in dorm rooms did not violate Article II, § 4 in *Futrell v. Ahrens*, 88 N.M. 284, 540 P.2d 214 (N.M. 1975). *Futrell* held that rule was "reasonable . . . for the conduct of the University . . . ." 88 N.M. at 88, 540 P.2d at 218. As demonstrated in the next section, limiting marriage to a man and woman clearly meets this reasonableness standard. Petitioner's claim that traditional marriage violates Article II, § 4 is meritless.

C. The Public and State Have a Strong Interest in Protecting Traditional Marriage.

Petitioner baldly proclaims that the public has no interest in preserving traditional marriage, and issuing marriage licenses to same-sex couples would result in no harm, hardship or inequity. No cases are cited to support this assertion for good reason. New Mexico courts as well as the vast majority of other jurisdictions have determined on numerous occasions that government has a strong interest in preserving opposite-sex marriage.

This Court has observed that "[i]t is the policy of this state to foster and protect the institution of marriage. The state's interest in marriage is recognized by statute which

prescribes that the contract of matrimony be solemnized." *Merrill v. Davis*, 100 N.M. 552, 554, 673 P.2d 1285, 1287 (N.M. 1983) (citing *In re Estate of Lord*, 93 N.M. 543, 602 P.2d 1030 (N.M. 1979)). This Court agreed with the rationale in *Hewitt v. Hewitt,* 77 Ill.2d 49, 31 Ill.Dec. 827, 394 N.E.2d 1204 (1979), which states:

> [M]arriage is a civil contract between three parties--the husband, the wife, and the State. (Citations omitted.) . . . . [T]he State [has] a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will. 77 Ill.2d at 63-64, 31 Ill.Dec. at 833, 394 N.E.2d at 1210.

Id. *Hewitt* found that Illinois (like New Mexico) does not recognize common law marriage because "[i]t tends to weaken the public estimate of the sanctity of the marriage relation." 77 Ill. 2d at 64, 31 Ill.Dec. at 834, 394 N.E.2d at 1211. This Court has therefore determined that both the people of New Mexico, and her governmental institutions have a strong interest in preserving the institution of marriage.

Other courts have come to the same conclusion, including the United States Supreme Court. *Reynolds v. United States*, 98 U.S. 145 (1878), involved a First Amendment Free Exercise of Religion Clause challenge to a federal law banning bigamy, in what was then the Territory of Utah. The Court found the statute constitutional because the legislature had a compelling interest in preserving conventional marriage consisting of one man and one woman. *Id.* at 165. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citing *Reynolds*).

Justice O'Connor recently recognized that this same interest justifies preservation of traditional marriage against attacks by same-sex couples:

> Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this

> case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence v. Texas, 539 U.S. 558, ___, 123 S. Ct. 2472, 2487-88 (2003) (O'Connor, J., concurring). The following analysis demonstrates some of the many reasons why New Mexico has not only a reasonable, but a compelling interest in preserving traditional, opposite-sex marriage.

The public interest in marriage and family originates in the belief that the foundation for political society is in family organization. *See* A.E. HOEBEL, THE LAW OF PRIMITIVE MAN, 3-45 (1945). *See also* Paul J. Bohannan, *The Differing Realms of the Law*, 67 AM. ANTHROPOL. 33-42 (1965). That is, the state evolves out of and depends for its stability upon stable families. Both historically and structurally, marriage is the foundation of society. This truth has been recognized by the United States Supreme Court, which has observed that marriage is a relationship that is "older than the Bill of Rights – older than our political parties, older than our school system," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and "fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Indeed the Court regards "[m]arriage, as creating the most important relations in life, as having more to do with the morals and civilization of a people than any other institution. . . ." *Maynard v. Hill,* 125 U.S. 190, 205 (1888).

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.

Reynolds, 98 U.S. at 165-66.

Traditional, opposite-sex marriage is particularly important to democratic society because it is the "seedground for democracy." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation* 24 HARV. J. L. & PUB. POL'Y. 771, 780 (2001). *See also* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472-484 (1983) ("it is primarily through family bonds that both children and parents learn the attitudes and skills that sustain an open society").

Traditional marriage has proven to be the safest repository of democratic values including tolerance, respect for others, and the balanced values of responsible individualism and commitment to the community. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 JOURNAL OF LAW & POLITICS 581, 596 (1999). Opposite-sex marriage is a mediating institution that nurtures the values of unselfishness and liberty.

> [R]eflection on the heterosexual norm directs our attention to certain social necessities: the continuation of human life, the place of difference within community, the redirection of our tendency to place our own desires first. These necessities cannot be supported by rational calculations of self interest alone; they require commitments that go well beyond calculations of personal satisfaction. Having and rearing children is among the most difficult of human projects. Men and women need all the support they can get to maintain stable marriages in which the next generation can flourish. Even marriages that do not give rise to children exist in accord with, rather than in opposition to, this heterosexual norm.

The Ramsey Colloquium, *The Homosexual Movement*, 41 First Things 15, 17-18 (1994).

Opposite-sex marriage is a uniquely beneficial arrangement, providing equity and security for individuals, family, and society. The security and stability of marriage as

compared to same-sex relationships is indisputable.[4] Opposite-sex marriage also fosters the value of equality. This is due in large part to the way in which the different sexes compliment one another.

> Human society requires that we learn to value difference within community. In the complementarity of male and female we find the paradigmatic instance of this truth. . . . [It] invites us to learn to accept and affirm the natural world from which we are too often alienated. Moreover, in the creative complementarity of male and female we are directed toward community with those unlike us. In the community between male and female, we do not and cannot see in each other mere reflections of ourselves. In learning to appreciate this most basic difference, and in forming a marital bond, we take both difference and community seriously.

The Ramsey Colloquium, 41 First Things at 17-18.

Marriages between one man and one woman are more likely than other types of families to have limited amounts of strife, the maximum amount of nurturing, the maximum amount of support, guidance, and leadership, and a very strong, intimate bond between parents and child. "Traditional marriage enriches the individuals who enter into it as well as their children and society generally. This effect satisfies even a strict test of liberal legitimacy because many benefits of marriage are not metaphysical but empirically verifiable. Married people live longer and enjoy better physical and psychological health and greater wealth." Dent, 15 JOURNAL OF LAW & POLITICS at 605.

These unique, invaluable contributions made to society by opposite-sex marriage necessitate and even compel the State to take steps to preserve it.

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[4] An extensive survey of sexual practices found that for married couples, "a vast majority are faithful while the marriage is intact." Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 89 (1994). "Among married people, 94 percent had one partner in the past year." *Id.* at 101. And the average marriage is long lasting. Sixty-seven percent of marriages last ten years, and 50 percent last more than twenty years. Matthew D. Bramlett et al., *First Marriage Dissolution, Divorce, and Remarriage: United States*, Advance Data No. 323 (Nat'l Center for Health Statistics) (May 31, 2001). However, investigators discovered that only 15 percent of homosexual men and 17.3 percent of homosexual women had ever had relationships that lasted more than 3 years. Only a few had stayed together for more than 10 years (4 out of 252 men and 1 out of 138 women). Marcel T. Saghir, M.D. and Eli Robins, M.D., MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION 57, Table 4.13; 225, Table 12.10 (1973)

> Spouses receive special consideration from the state, for marriage is a civil contract "of so solemn and binding a nature ... that the consent of the parties alone will not constitute marriage...; but one to which the consent of the state is also required." (*Mott v. Mott* (1889) 82 Cal. 413, 416.) Marriage is accorded this degree of dignity in recognition that "[the] joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Marvin v. Marvin,* supra, 18 Cal.3d 660, 684).

Nieto v. City of Los Angeles, 138 Cal. App. 3d 464, 471 (1982).

Support of families that require unselfishness from its members is an absolute necessity in a society where the focus on self is forever increasing. "[M]arriage and the family are institutions necessary for our continued social well-being and, in an individualistic society that tends to liberation from all constraint, they are fragile institutions in need of careful and continuing support." The Ramsey Colloquium, 41 First Things at 17. Same-sex couples simply do not perform the same functions or provide the same benefits for society as conventional opposite-sex marriages. In view of the unique contributions that opposite-sex marriage makes to society, the State has a compelling interest in endorsing and preserving it to the exclusion of same-sex marriage which, as is demonstrated below, actually undermines opposite-sex marriage.

The fact that traditional heterosexual marriage has in recent years been ravaged by divorce does not detract from the many benefits it provides our society and the need for government to promote it.

> Marriage and the family - Husband, wife, and children, joined by public recognition and legal bond - are the most effective institutions for rearing of children, the directing of sexual passion, and human flourishing in community. Not all marriages and families "work," but it is unwise to let pathology and failure, rather than a vision of what is normative and ideal, guide us in the development of social policy.

The Ramsey Colloquium, 41 First Things at 17. Recent attacks on conventional marriage only serve to underscore the State's compelling interest in protecting it.

D. Same-Sex Marriage Would Undermine Traditional Marriage.

Allowing same-sex couples to marry will denigrate and undermine traditional, opposite-sex marriage in New Mexico. Such an attack on traditional marriage is precisely the type of "injury to a person or abuse of an institution the law protects" that the Supreme Court held government is authorized to avoid in *Lawrence v. Texas,* 123 S. Ct. at 2478. The acceptance of a philosophy that marriage is no longer relevant, that all "intimate" relationships are fungible, not only distorts the perception of reality, but threatens to warp the reality of marriage and family life for millions of adults and children. "To depict marriage as simply one of several alternative 'lifestyles' is seriously to undermine the normative vision required for social well-being." The Ramsey Colloquium, 41 First Things at 18.

> In every society some people do not or cannot marry and bear and raise children. If they are viewed as unfortunate exceptions, the norm is not impaired. Recognition of gay marriages would mutilate the norm by granting, for the first time in history, equal honor to partnerships that inherently exclude the creation of life. The impact would be greater if, as seems likely, few gays elected to marry, stay married, and adopted children. Like legalizing bestiality, cloning, and baby-selling, validation of gay marriage would not cause direct, proximate harm, but it would damage society by degrading the way we see and relate to others. Traditional marriage is a public good. That is, it benefits not only married couples and their children but also generates positive externalities, or benefits to others. Men and women who marry and stay married encourage others to do likewise, to the profit of society.

Dent, 15 JOURNAL OF LAW & POLITICS at 598-99. *See also id.,* at 615-639 (cataloguing numerous ways same-sex "marriage" would damage traditional marriage).

Advocates of same-sex marriage freely admit they want to radically change the institution of marriage.

> Many advocates of same-sex marriage seek not to expand traditional marriage to gays but revolutionize the institution. [*citing* Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage,* 1 Law & Sexuality 31 (1991)]. William Eskridge hopes gay marriage will dethrone the traditional family based on blood-relationships in favor of "families we choose." [*citing* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE at 81; KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 116 (1991)]. Michaelangelo Signorile urges activists "to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, . . . to debunk a myth and radically alter an archaic institution . . . . The most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely." [Michelangelo Signorile, *Bridal Wave,* OUT, Dec.-Jan., 1994, at 161. See also Franklin Kameny, *Deconstructing the Traditional Family,* THE WORLD & I, Oct. 1993, at 393-95.] Urvashi Vaid wants to "assimilate the straight world to the gay world." [URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 208 (1995)].

Dent, 15 JOURNAL OF LAW & POLITICS at 616-17.

The State of New Mexico and its citizens have a compelling interest in preserving the integrity of the marital union by making opposite-sex marriage the exclusive form of family relationship endorsed by the government. Loss of this exclusive endorsement will de-emphasize the importance of traditional opposite-sex marriage to society, weakening this vital institution, and placing our entire democratic system in jeopardy by eroding its foundation. "[T]he main consequence of recognizing same-sex marriage would not be a shift of some people to homosexual conduct, but the change in heterosexuals' no longer seeing traditional marriage as something special." Dent, 15 JOURNAL OF LAW & POLITICS at 614.

Even more troubling is the prospect that same-sex marriage would actually reduce some of the benefits, like an optimal parenting environment, provided by traditional marriage.

> The further separation of procreation from marriage implicit in legalization of same-sex marriage would send a cultural message of parental disconnection from family duties that could further diminish the level of responsibility of absent parents. . . . The potential for increased social disorder if same-sex marriage is legalized is profound.

Wardle, 24 HARV. J. L. & PUB. POL'Y. at 798. *See also* Dent, 15 JOURNAL OF LAW & POLITICS at 601 ("As social esteem for marriage and parenting declines, so does citizens' willingness to assume these roles. Validation of same-sex marriages would accelerate this decline").

Proponents of same-sex "marriage" also make the more subtle argument that they simply want the same governmental benefits that heterosexual couples have access to through marriage. However, the deleterious effect on marriage is the same. Allowing same-sex couples to marry just for the benefits reduces marriage to an entity formed by persons wishing to exploit its advantages. The concept of marriage being the building block of society and the seed-ground of democracy will give way to an entity that is no more than a corporation, limited partnership, or other business organization formed for purely economic or liability reasons. This is completely contrary to the Supreme Court's description of marriage as "more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." *Maynard v. Hill,* 120 U.S. at 213.

New Mexico has a compelling interest in protecting traditional marriage. It furthers this interest by refusing to endorse relationships like same-sex "marriage" that undermine it.

E. The State's Human Rights Laws Do Not Require Same-Sex Marriage.

New Mexico has enacted a civil rights statute that prohibits discrimination in employment, housing, and public accommodations. *See* NMSA 1978, § 28-1-1, *et seq.* Petitioner cites to this statute as support for its claim that limiting marriage to a man and woman violates state law. However, Petitioner has not explained how the State's preservation of traditional marriage discriminates against same-sex couples in employment, housing, or public accommodation as those terms are defined by the statute. NMSA 1978, § 28-1-2. No cases have expanded this law to cover marriage or any other governmentally recognized institution.

Even if the civil rights statute did apply to marriage, New Mexico marriage law does not discriminate based upon any of the prohibited characteristics in NMSA 1978, § 28-1-7, including sexual orientation. Any person, homosexual or heterosexual, may marry a person of the opposite sex. No person, homosexual or heterosexual, may marry a person of the same-sex. The distinction is based on the definition of marriage itself, as a unique male-female sexual community.

Furthermore, if support of traditional marriage creates inequities for same-sex couples, the same problem arises when other groups are excluded, like polygamists, endogamists, pedophiles, and even single individuals who do not want to marry. "Complete equality would require eliminating any legal preference for marriage and treating all individuals alike, regardless of whether they are married." Dent, 15 JOURNAL

OF LAW & POLITICS at 616. If New Mexico requires that marriage be redefined to include same-sex couples, then it must include other types of relationships - effectively mandating that marriage cannot be protected at all.

CONCLUSION

Petitioner is asking this Court to allow her to issue marriage licenses to same-sex couples by lifting the injunction currently in place. This request must be denied. Otherwise, Petitioner will once again begin violating state law as set forth above. Petitioner's writ itself demonstrates her intent to continue to issue such licenses, and the need for the injunction to remain in place.

New Mexico law and policy clearly state that marriage is limited to a man and a woman. Any change to this law should be made by the legislature, not a county clerk acting on her own subjective interpretation of the law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July ____, 2004, I mailed, by first class mail, postage prepaid, copies of the above Application for Permission to File Brief of Amicus Curiae to Mr. Paul Livingston, counsel for Victoria Dunlap, and to Mr. Christopher D. Coppin, Assistant Attorney General, at the following addresses:

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