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Brief for Professors at UNM School of Law, Griego v. Oliver, New Mexico Supreme Court No. 34,306

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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Supreme Court No. 34,306

STATE OF NEW MEXICO, *ex rel.*,
NEW MEXICO ASSOCIATION OF COUNTIES, *et al.*,
Intervenors – Petitioners,

v.

THE HONORABLE 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.

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY PROFESSORS AT UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

SUPREME COURT OF NEW MEXICO
FILED

SEP 23 2013

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COME NOW certain Professors of the University of New Mexico School of Law (hereinafter "the Law Professors"), through the undersigned counsel and pursuant to Rules 12-215 and 12-309 NMRA, and respectfully request the New Mexico Supreme Court to issue an order granting them leave to file a brief as *amici curiae* in the above-captioned matter. A list of the Law Professors is appended to the signature page of this motion. As grounds for this motion, the Law Professors respectfully submit:

1) the matter pending before Court implicates several important state constitutional matters;

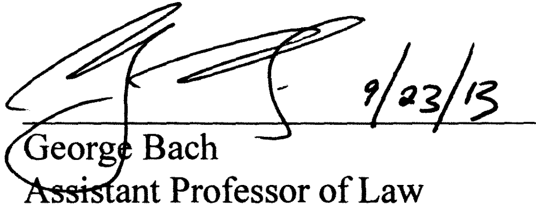
2) the Law Professors are concerned with the development of the state constitutional jurisprudence;

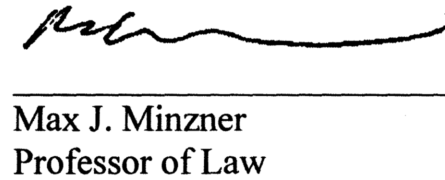
3) the Law Professors believe their brief as *amici curiae* will assist the Court in addressing the state constitutional issues raised, and accordingly ask the Court to find cause and to permit them to file their brief, which is being conditionally filed herewith; and

4) counsel for all parties have been contacted and do not oppose this motion.

WHEREFORE, the undersigned Professors of the University of New Mexico School of Law respectfully request that the New Mexico Supreme Court issue an order granting leave to file their brief as *amici curiae* in this matter.

Respectfully submitted,





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I hereby certify that on this 23rd day of September 2013, I served the foregoing pleading by electronic mail on the following counsel of record, and that electronic service was successful.

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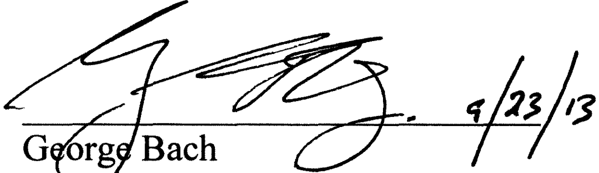

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BRIEF OF *AMICI CURIAE*
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Bd. of Trustees v. Montano, 1971-NMSC-025, 82 N.M. 340, 481 P.2d 702.......2

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California First Bank v. State, 1990-NMSC-106, 111 N.M. 64,
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Chatterjee v. King, 2012-NMSC-019, 280 P.3d 283................................17

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Elane Photography, LLC v. Willock, 2013-NMSC-__,
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Garcia v. Albuquerque Pub. Sch. Bd. of Educ., 1980-NMCA-081, 95 N.M. 391,
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In re Jacinta M., 1988-NMCA-100, 107 N.M. 769, 764 P.2d 1327................26

Maloof v. Prieskorn, 2004-NMCA-126, 136 N.M. 516, 101 P.3d 327............23

Montoya v. Ulibarri, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476...........4, 12

New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005,
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State v. Brooken, 1914-NMSC-075, 19 N.M. 404, 143 P. 479......................30

State v. Garcia, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032...............5, 19

State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1........................3

State v. Lopez, 2013-NMSC-__ (No. 33,736, Aug. 29, 2013).....................4, 5

State v. Ketelson, 2011-NMSC-023, 150 N.M. 137, 257 P.3d 957...................3

State v. Ochoa, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143......................9

State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942........................20

State v. Rivera, 2010-NMSC-046, 148 N.M. 659, 241 P.3d 1099....................3

State v. Rowell, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95....................8, 9

State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351.....................4

State v. Sutton, 1991-NMCA-073, 112 N.M. 449, 816 P.2d 518....................30

State v. Woodruff, 1997-NMSC-061, 124 N.M. 388, 951 P.2d 605..................4

Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721,
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Wagner v. AGW Consultants, 2005-NMSC-016, 137 N.M. 734,
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NEW MEXICO CONSTITUTIONAL PROVISIONS

N.M. Const. art. II, § 4..*passim*

N.M. Const. art. II, § 18..*passim*

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N.M. Const. art. XII, §10..20

NEW MEXICO STATUTES AND BILLS

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H.B. 9, 48th Leg., 2d Sess. (N.M. 2008)....27

H.B. 86, 47th Leg., 1st Sess. (N.M. 2005)....28

H.B. 603, N.M. 48th Leg., 1st Sess. (N.M. 2007)....28

S.B. 576, 47th Leg., 1st Sess. (N.M. 2005)....28

N.M.S.A. 1978, §28-1-7 (2004)....16, 17

OTHER NEW MEXICO AUTHORITY

Levitt & Dakota, et al., v. Bd. of N.M. Health Care Retiree Authority, D-202-CV-2007-1048, Defendant's Rule 1-068 Offer of Settlement, (2d Judicial District Court filed April 28, 2009)....16

Michael B. Browde, State v. Gomez and the Continuing Constitutional Conversation Over New Mexico's State Constitutional Rights Jurisprudence, 28 N.M. L. Rev. 387 (1998)....12

Kate Girard, Note, The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation that Denies Equal Protection to Members of the Gay Community, 36 N.M. L. Rev. 565 (2006)....18

Letter from Gary King, New Mexico Attorney General, to Eileen Garbagni, Sandoval County Clerk (August 28, 2013), available at http://www.nmag.gov/News....22

N.M. Att'y Gen. Op. 11-01 (2011)....15

N.M. Exec. Order 2003-010....16

Leo Kanowitz, The New Mexico Equal Rights Amendment: Introduction and Overview, 3 N. M. L. Rev. 1 (1973)....21

Dale R. Rugge, Comment, An Equal Protection Challenge to First Degree Depraved Mind Murder under the New Mexico Constitution, 19 N. M. L. Rev. 511(1989)....20

FEDERAL CASES

Bowers v. Hardwick, 478 U.S. 186 (1986)..6

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)...3, 9, 10, 11, 23

Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003)..........26

Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998)..26

Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004)....................................26

Lawrence v. Texas, 539 U.S. 558 (2003) 6, 7, 8, 9, 10, 18

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Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999)......26

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Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997)..........................26

United States v. Windsor, 133 S. Ct. 2675 (2013)...............................*passim*

Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998)..................26

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Doe v. District Attorney, 2007 ME 139 (2007) overruled on other grounds by State v. Letalien, 2009 ME 130 (2009)..30

Hoff v. Berg, 1999 ND 115...31

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 24, 28

Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008).....11, 28

Miguel v. Guess, 51 P.3d 89 (Wash. Ct. App. 2002), rev. denied, 64 P.3d 650 (Wash. 2003)..26

Simms v. Montana Eighteenth Judicial Dist. Court, 2003 MT 89 (2003)..........31

State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943)..............................31

Tanner v. Oregon Health Sci. Univ., 971 P.2d 435 (Or. Ct. App. 1998).......24, 25

OTHER AUTHORITY

Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1 (1997)................................30, 31

Nina A. Kohn, Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus, 44 U.C. Davis L. Rev. 213 (2010)..9, 10

Jane S. Schacter, Splitting the Difference: Reflections on Perry v. Brown, 125 Harv. L. Rev. F. 72, 76 (2012)..8

Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 Sup. Ct. Rev. 27...............................8

Laurence H. Tribe, American Constitutional Law § 16-33 (2d ed. 1988)..........10

INTEREST OF THE AMICUS CURIAE

Amici are Professors of Law at the University of New Mexico School of Law who are concerned with the development of the state constitutional jurisprudence. *Amici* have no personal stake in the outcome of this litigation and have not been paid by a client for their participation in this brief. A list of *Amici* is appended to the signature page. On September 11, 2013, counsel for all parties were notified of the intent of *Amici* to file this brief. Counsel for all parties have responded that they do not oppose the filing of this brief.

SUMMARY OF ARGUMENT

New Mexico's history reflects a deep commitment to equal treatment under the law and the protection of individual liberty. The framers of the New Mexico Constitution created substantial and unique provisions relating to minority rights and individual autonomy that are broader in scope than the corresponding federal law. These include an Equal Protection Clause interpreted more expansively than the Fourteenth Amendment and an Inherent Rights Clause with no federal counterpart. Our state courts have consistently exercised independence and pragmatism in applying these rights guaranteed by the New Mexico Constitution.

A prohibition on marriage for same-sex couples in New Mexico is inconsistent with our constitutional text, history, and traditions. Such a prohibition discriminates on the basis of sexual orientation and is thus subject to intermediate scrutiny under the Equal Protection Clause in Article II, Section 18. It also penalizes the exercise of the natural, inherent, and inalienable right to form an intimate relationship and receives strict scrutiny under Article II, Section 4. Under both provisions, the ban is unconstitutional.

ARGUMENT

I. The New Mexico Constitution Mandates Intermediate Scrutiny for Discrimination Based on Sexual Orientation.

The New Mexico State Constitution prohibits forms of discrimination that would be permitted under the more limited federal Equal Protection Clause. "[T]he Equal Protection Clause of the New Mexico Constitution affords 'rights and protections' independent of the United States Constitution." Breen v. Carlsbad Mun. Sch., 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413. In this case, these additional "rights and protections" require applying intermediate scrutiny under the state constitution to sexual orientation discrimination.

A. An Interstitial Analysis is Appropriate Under the State Constitution.

In an earlier era, New Mexico courts rigidly imposed an interpretation on the Equal Protection Clause in Article II, Section 18 of the New Mexico Constitution that was identical to the Fourteenth Amendment to the United States Constitution. See, e.g., Bd. of Trustees v. Montano, 1971-NMSC-025, ¶ 14, 82 N.M. 340, 481 P.2d 702; Garcia v. Albuquerque Pub. Sch. Bd. of Educ., 1980-NMCA-081, ¶ 4, 95 N.M. 391, 622 P.2d 699 ("The standards for violation of the equal protection clauses of the United States and New Mexican Constitutions are the same.").

That time has passed. This Court has since emphasized that the citizens of the State of New Mexico are entitled to greater protection from discrimination under the State Constitution than under the Fourteenth Amendment. For example, Breen recognized that classifications based on mental disabilities receive intermediate scrutiny under Article II, Section 18. Breen, 2005-NMSC-028, ¶ 15. The United States Supreme Court has explicitly rejected this level of constitutional protection. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985).

As a result, this Court must determine when Article II, Section 18 is broader than its federal counterpart. The New Mexico approach to this question is interstitial, analyzing the state constitutional issue only after deciding that federal law does not determine the result. State v. Gomez, 1997-NMSC-006, ¶ 19-20, 122 N.M. 777, 932 P.2d 1. This interstitial methodology originally developed in the context of motions to suppress under Article II, Section 10 of the New Mexico Constitution, Gomez, 1997-NMSC-006, ¶ 19-20, and a broad, deep body of precedent has confirmed the effectiveness of this analytic method in those cases. E.g., State v. Ketelson, 2011-NMSC-023, ¶ 20, 150 N.M. 137, 257 P.3d 957; State v. Rivera, 2010-NMSC-046, ¶ 27, 148 N.M. 659, 241 P.3d 1099.

Outside the search and seizure context, the interstitial analysis has now become the dominant approach used to interpret parallel provisions of the state and federal constitutions. This Court has already applied it to the portion of Section 18 adopted by the Equal Rights Amendment. See New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 28, 126 N.M. 788, 975 P.2d 841 (filed 1998). It also been used to interpret a diverse range of Clauses of the New Mexico Constitution. See State v. Lopez, 2013-NMSC-__, ¶ 8 (No. 33,736, Aug. 29, 2013) (interstitial approach applied to Confrontation Clause); Montoya v. Ulibarri, 2007-NMSC-035, ¶ 19-24, 142 N.M. 89, 163 P.3d 476 (habeas corpus claim based on actual innocence); State v. Woodruff, 1997-NMSC-061, ¶ 25, 124 N.M. 388, 951 P.2d 605 (right to counsel/due process); City of Albuquerque v. Pangea Cinema LLC, 2012-NMCA-075, ¶ 20, 284 P.3d 1090 (free speech), rev'd on other grounds 2013-NMSC-__, ¶ 26, (No. 33,693, Sept. 12, 2013); State v. Rueda, 1999-NMCA-033, ¶ 11, 126 N.M. 738, 975 P.2d 351 (Cruel and Unusual Punishment Clause).

The interstitial approach involves a multistep analysis. The Court must consider three issues. First, does the United States Constitution protect the right in question? Second, was the state constitutional claim preserved? Third, is divergence from the federal constitution appropriate based on

flawed federal precedent, structural differences between the state and federal government, or distinctive state characteristics? Lopez, 2013-NMSC-__, ¶ 8.

Only the last question is seriously at issue in this case. The United States Supreme Court has not yet applied heightened scrutiny to discrimination based on sexual orientation. Indeed, it has left ambiguous the level of scrutiny used in these cases. See, e.g., United States v. Windsor, 133 S. Ct. 2675 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996). In these cases where the scope of the federal right is unclear, the interstitial approach permits the state court to proceed to the state constitutional claim. State v. Garcia, 2009-NMSC-046, ¶ 25, 147 N.M. 134, 217 P.3d 1032, (reaching the state constitutional question where there was "serious uncertainty" about the federal law issue). Petitioners have also certainly preserved the state law claims. Indeed, the complaint in the district court only raised state constitutional claims. See Am. Comp. ¶ 1 (denial of the right to marry "violates Plaintiffs' fundamental rights and liberties under the New Mexico Constitution.").

All three grounds for diverging from the United States Supreme Court's interpretation of the Equal Protection Clause exist in this case. First, the Supreme Court's hesitancy in applying heightened scrutiny to

discrimination based on sexual orientation has led to flawed federal precedent. Heightened scrutiny is the only way to harmonize the federal cases. Second, significant structural differences exist between the state and federal governments in this case. The absence of federalism concerns and the repeated willingness of all branches of state government to recognize the inappropriateness of discrimination on sexual orientation support heightened scrutiny. Third, New Mexico's distinctive characteristics include an unusual experience with marriage of same-sex couples in practice and a long historical commitment to equality, both of which support heightened scrutiny.

1. The Federal Analysis Refusing To Apply Heightened Scrutiny Is Flawed.

Over the past twenty years, federal constitutional interpretation relating to the protection of sexual orientation has greatly expanded in scope. Romer v. Evans initiated this trend in 1996. Romer struck down on Equal Protection grounds Colorado's Amendment 2, which had prohibited the state and its subdivisions from banning discrimination based on sexual orientation. 517 U.S. at 635-36. Ten years ago, Lawrence v. Texas, 539 U.S. 558, 579 (2003) overruled Bowers v. Hardwick, 478 U.S. 186 (1986), and invalidated state bans on sodomy. Finally, just this summer, United States v. Windsor rejected Section 3 of the Defense of Marriage Act, 1

U.S.C. § 7 (1996), and required the federal government to recognize all marriages of same-sex couples otherwise valid under state law. 133 S.Ct. at 2684.

These decisions provide a floor for the state constitutional protections under Article II, Section 18. The New Mexico Constitution, of course, protects all of the rights covered by federal law. While the results of these cases are correct, their reasoning is flawed. The United States Supreme Court has been unable to resolve even the relevant constitutional clause for analyzing cases that discriminate on the basis of sexual orientation. Romer focused its analysis on the Equal Protection Clause while Lawrence used a substantive due process theory. Compare Romer, 517 U.S. at 632 with Lawrence, 539 U.S. at 579. In contrast, Windsor is unclear on the source of the constitutional violation and appears to rest on a blend of due process and equal protection theories. 133 S.Ct. at 2694 (DOMA "violates basic due process and equal protection principles applicable to the Federal Government").

More fundamentally, under either approach, the Supreme Court has never explicitly adopted a level of scrutiny greater than rational basis in these cases. In practice, though, the Supreme Court's analysis in these cases is widely recognized as a more searching inquiry than is usually conducted

on rational basis review. As then-Chief Justice Bosson recognized (prior to Windsor), Romer and Lawrence are among "a confusing array of cases" where "the Court professes to have only one rational basis test, but sometimes appears to apply heightened scrutiny." Wagner v. AGW Consultants, 2005-NMSC-016, ¶ 41, 137 N.M. 734, 114 P.3d 1050 (Bosson, C.J., concurring in part, dissenting in part). The academic literature supports Justice Bosson's conclusion about these cases. E.g., Jane S. Schacter, Splitting the Difference: Reflections on Perry v. Brown, 125 Harv. L. Rev. F. 72, 76 (2012) ("One animating characteristic of Justice Kennedy's opinions in Lawrence and Romer is the positively beclouded standard of review they employ."); Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 Sup. Ct. Rev. 27, 29 (describing the Supreme Court's opinion in Lawrence as "remarkably opaque").

Under the interstitial approach, this Court has "tried to make sure that our State constitutional jurisprudence remains true to its doctrinal foundations." State v. Rowell, 2008-NMSC-041, ¶ 23, 144 N.M. 371, 188 P.3d 95. When the type of divergence between reasons and results seen in Romer, Lawrence, and Windsor has occurred in other areas of federal constitutional law, the New Mexico courts have refused to repeat the error

when interpreting the state constitution. For instance, Rowell rejected a flawed line of federal search and seizure cases where a "widely criticized" federal rationale led to an insufficiently rights-protective outcome for automobile searches. Id. ¶ 21. See also State v. Ochoa, 2009-NMCA-002, ¶ 13, 146 N.M. 32, 206 P.3d 143 (providing more expansive state constitutional protection where the federal interpretation was subject to "widespread criticism").

This Court has already been down this path in its equal protection jurisprudence and reached the proper result. Like Romer and its progeny relating to discrimination based on sexual orientation, City of Cleburne created the same ambiguity in the federal case law when states discriminate against individuals with mental disabilities. Cleburne purported to apply rational basis review but in fact used "a different test than the type of minimal scrutiny we usually associate with the rational basis test." Wagner, 2005-NMSC-016, ¶ 39 (Bosson, C.J., concurring in part, dissenting in part). Scholars have recognized that Cleburne, Romer, and Lawrence are on an unusual list – cases where the normally deferential rational basis review transformed into a more aggressive inquiry leading to the invalidation of the law. See, e.g., Nina A. Kohn, Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus, 44 U.C. Davis L.

Rev. 213, 265 n.248 (2010) (stating that the understanding that these cases involve more than rational basis review "is so common that a footnote may seem unnecessary") (collecting sources); Laurence H. Tribe, American Constitutional Law § 16-33, at 1615 (2d ed. 1988) (providing Cleburne as example where the Court "decided to apply heightened scrutiny, despite ostensible application of the minimum rationality test.").

With respect to Cleburne, Breen resolved this ambiguity in the most natural possible fashion. Rather than claim to use rational basis review but in fact apply heightened scrutiny, Breen confronted the question directly. The Breen Court considered the standards for intermediate scrutiny and concluded that individuals with mental disability constituted a "sensitive class" based on a history of discrimination. 2005-NMSC-028, ¶ 28. This approach in Breen was correct and gives a clarity to the state equal protection doctrine that is absent at the federal level.

Breen's treatment of Cleburne should point the way in this case. Like Cleburne, Romer, Lawrence, and Windsor recognize that certain types of discriminatory legislation must fall on equal protection grounds. However, this Court need not be constrained by the United States Supreme Court's decision to disguise heightened scrutiny as rational basis review. Instead, heightened scrutiny based on the long history of discrimination against

individuals based on sexual orientation is the appropriate way to interpret Article II, Section 18. Cf. Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 461 (Conn. 2008) (citing Breen in support of conclusion that intermediate scrutiny applies in cases of sexual orientation discrimination).

2. Structural Differences Between the State and Federal Government Support Applying Heightened Scrutiny to Discrimination Based on Sexual Orientation.

a. The State Equal Protection Clause is Not Limited by the Structural Constraints of Federalism.

The State and Federal Constitutions reflect distinct structural arrangements. As a result, the governments they create stand in fundamentally different relationships to their citizens. First and foremost, equal protection under the United States Constitution operates in the context of a federalist background. The structural limitations of federalism have limited the expansion of heightened scrutiny and supported the use of rational basis review under the Fourteenth Amendment. Cleburne explicitly justified using rational basis on these grounds.

> [T]he courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

473 U.S. at 441-42.

State courts need not feel this same reluctance. The absence of federalism concerns under our State Constitution has already been recognized as a structural difference that supports reading the New Mexico Constitution more broadly than its federal counterpart. In Montoya v. Ulibarri, the New Mexico Supreme Court accepted that a freestanding actual innocence claim may support a state habeas corpus challenge despite conflicting precedent from the United States Supreme Court. 2007-NMSC-035, ¶ 19. The United States Supreme Court decision to deny the habeas petition "was informed by concerns of federalism," Id. ¶ 20, and those "principles of federalism" did not impose the same constraints on this Court. Id. ¶ 21.

The absence of a federalism constraint liberates the New Mexico Supreme Court to diverge from the restrictive federal reading of the Fourteenth Amendment. See Michael B. Browde, State v. Gomez and the Continuing Constitutional Conversation Over New Mexico's State Constitutional Rights Jurisprudence, 28 N.M. L. Rev. 387, 406 n.112 (1998) (recognizing reduced federalism concerns as one reason to read the state constitution more broadly). While the United States Supreme Court may need to consider the consequences of restricting state power through federal control under the Equal Protection Clause, Article II, Section 18 of the New

Mexico Constitution applies only in New Mexico. As a result, the narrow limitations under federal law should not govern.

b. The Structure of New Mexico State Government has Already Led State Officials to Closely Scrutinize Discrimination Based on Sexual Orientation.

Because of the nature of the legal issues involved, lines drawn based on sexual orientation have arisen primarily in substantive areas of law relating to marriage, family, and children. These are matters uniquely committed to state regulation. See, e.g., Windsor, 133 S.Ct. at 2691. Federal officials rarely encounter these matters and, when these issues do arise at the federal level, unelected federal judges resolve them.

The structure of state government means that New Mexico stands in a fundamentally different position with respect to these types of questions. All three branches – executive, legislative, judicial – have routinely confronted the question of discrimination based on sexual orientation. These issues have usually, but not exclusively, arisen in the context of domestic relations. In each branch, officials have closely scrutinized lines drawn on based on sexual orientation and repeatedly rejected these discriminatory distinctions.

County clerks have been the most visible members of the executive branch to reject sexual orientation discrimination. In February 2004, the

Sandoval County Clerk briefly issued marriage licenses to same-sex couples until prohibited by a district court order. More recently, eight county clerks in New Mexico, representing a majority of the citizens of the state, now issue licenses to same-sex couples. While five county clerks do so as a result of an order by a district court judge, clerks in three counties, Doña Ana, Valencia, and San Miguel, made an independent, uncompelled choice to license same-sex couples to marry. Even in the five counties subject to district court orders, the clerks have not vigorously contested the obligation to marry same-sex couples. No clerk has filed a notice of appeal; instead, the clerks have chosen to participate in this action by seeking a writ of supervisory control. Indeed, even in this writ petition, it appears that the clerks currently issuing marriage licenses accept the conclusion that a prohibition on marriage for same-sex couples is unconstitutional discrimination based on sexual orientation. See Petition for Writ of Superintending Control at ¶ 55 ("Intervenor Clerks who are not issuing marriage licenses to same-sex couples object to that part of the *Final Declaratory Judgment* which is rooted in an assumption that equality of rights based on sex extends to equality of rights based on sexual orientation.") (emphasis added); Id. ¶ 61 ("Intervenor Clerks who are not issuing marriage licenses to same-sex couples . . . object to assumed

constitutional interpretations for which there is no precedent.") (emphasis added).

This rejection of sexual orientation discrimination by the county clerks representing most New Mexicans is matched by actions of officers elected statewide. The New Mexico Attorney General, the primary statewide official charged with interpreting state law, has indicated that New Mexico would recognize valid out-of-state marriages of same-sex couples. See N.M. Att'y Gen. Op. 11-01 (2011). More to the point, the Attorney General has never accepted that a prohibition on marriage of same-sex couples is consistent with the New Mexico Constitution. In February 2004, then-Attorney General Patricia Madrid, in an advisory letter, expressed the view that the marriage statutes, as then written, only permitted opposite-sex unions, while recognizing the possibility of a constitutional challenge. See Petition for Writ of Superintending Control Ex. 2. More recently, Attorney General Gary King issued an opinion in June 2013 that concluded that prohibitions on marriage of same-sex couples are likely subject to intermediate scrutiny and are unconstitutional as a result. See Petition for Writ of Superintending Control Ex. 3.

Both the Governor of New Mexico and the Attorney General have taken comparable actions to closely scrutinize and reject discrimination

based on sexual orientation, even when such actions are costly to the state. A decade ago, the Governor extended benefits to the domestic partners of public employees. See N.M. Exec. Order 2003-010. These benefits were previously available only to legally married spouses. In April 2009, as a result of a settlement signed by representatives of the Attorney General and the New Mexico Retiree Health Care Association, retiree benefits were extended to the domestic partners of retired public employees. The settlement recognized that the exclusion "does not comport with the notion of equality under the law of New Mexico." Levitt & Dakota, et al., v. Bd. of N.M. Health Care Retiree Authority, D-202-CV-2007-1048, Defendant's Rule 1-068 Offer of Settlement, (2d Judicial District Court filed April 28, 2009). While opposite-sex domestic partners were covered by both of these expansions of benefits, the lack of marriage licenses for same-sex couples in New Mexico means that same-sex couples are perhaps the greatest beneficiaries of the executive order and settlement.

The New Mexico State Legislature, by adopting the New Mexico Human Rights Act, also expressed its desire to closely scrutinize and usually reject classifications based on sexual orientation. Section 28-1-7 prohibits consideration of sexual orientation in a wide range of contexts, including areas where discrimination remains permitted by federal law. For example,

no federal statute bars employment discrimination on the basis of sexual orientation but Section 28-1-7(A) prohibits it for large employers in New Mexico. As this Court has recognized, this statute, among others, demonstrates that "New Mexico has a strong state policy of promoting equality for its residents regardless of sexual orientation." Elane Photography, LLC v. Willock, 2013-NMSC-__, ¶ 18, (No. 33,687, Aug. 22, 2013).

Finally, the judicial branch has rejected sexual orientation discrimination in perhaps the most significant component of family law – the parent-child relationship. This Court has clearly recognized that children may have two parents of the same sex. In New Mexico, "it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents." Chatterjee v. King, 2012-NMSC-019, ¶ 37, 280 P.3d 283. See also A.C. v. C.B., 1992-NMCA-012, ¶ 19, 113 N.M. 581, 829 P.2d 660 ("Petitioner's sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation.). If the relationship between parents of the same sex collapses, New Mexico courts will resolve the custody issue. Barnae v. Barnae, 1997-NMCA-077, ¶ 10, 123 N.M. 583, 943 P.2d 1036. Like the other branches, New Mexico's judges have not been willing to accept lines drawn along sexual orientation.

This strong commitment to closely analyzing sexual orientation discrimination spans the government of the State of New Mexico. In addition to bring widespread, this commitment is firmly rooted. New Mexico has been an early leader in rejecting same sex discrimination. New Mexico repealed its prohibition on sodomy involving consenting adults in 1973, decades before the Supreme Court's decision in Lawrence v. Texas. See Kate Girard, Note, The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation that Denies Equal Protection to Members of the Gay Community, 36 N.M. L. Rev. 565, 591 (2006). New Mexico also was one of the first states to bar the use of sexual orientation as a consideration in adoption and to enact broad-based statutory prohibitions on discrimination based on sexual orientation. Id.

Notably, in each branch, unlike their federal counterparts, the officials rejecting sexual orientation discrimination after this careful scrutiny are elected representatives of the people of New Mexico. New Mexico's judges, legislators, and executive branch officials all stand for election. As a result, these choices reflect not just legal analysis, but the expression of the popular will. This close relationship between New Mexico's elected officials and the people reinforces the legitimacy of this rejection of discrimination and is

a recognized structural basis for reading the State Constitution expansively. See State v. Garcia, 2009-NMSC-046, ¶ 28 (noting "this Court's close acquaintance with the problems and traditions of our state") (internal quotation omitted); California First Bank v. State, 1990-NMSC-106, ¶ 44, 111 N.M. 64, 801 P.2d 646 ("In interpreting the more expansive language of Article II, Section 4, we are mindful of the more intimate relationship existing between a state government and its people."). Because New Mexico's elected officials at all levels already closely scrutinize sexual orientation discrimination, heightened scrutiny is appropriate under the Equal Protection Clause.

3. New Mexico's Distinctive State Characteristics Support Applying Heightened Scrutiny to Discrimination Based on Sexual Orientation.

a. Heightened Scrutiny is Appropriate Based on New Mexico's Distinctive Commitment to Equality in All Areas of Law.

Throughout the history of New Mexico, its citizens and judiciary have steadfastly defended individual liberties and the right of all people to equality under the law. This commitment to individual rights crosses substantive areas of law and dates back to the state's founding and beyond. This strong, historic dedication to equal protection provides the foundation for close scrutiny of any discriminatory provision.

New Mexico's first proposed constitution, written in 1850, firmly rejected slavery at a time when the federal government was still debating the desirability of that loathsome institution. Dale R. Rugge, Comment, An Equal Protection Challenge to First Degree Depraved Mind Murder under the New Mexico Constitution, 19 N. M. L. Rev. 511, 532 (1989). The state constitution, ultimately adopted in 1911, protected the equality of Spanish-speaking citizens and provided that children of Spanish descent would never be denied the right of admission to public schools or placed in schools separate from other children. N.M. Const. art. VII, §3 and art. XII, §10. The same provisions also provide some of the strongest protections for minority language rights in the country. State v. Rico, 2002-NMSC-022, ¶ 5, 132 N.M. 570, 52 P.3d 942 (right of juror to serve even though he primarily spoke Navajo).

More recently, New Mexico's Equal Rights Amendment, adopted in early 1970s, expanded Article II, Section 18 of the New Mexico Constitution to guarantee that "[e]quality of rights under law shall not be denied on account of the sex of any person." By explicitly promising equality under the law to all men and women, this amendment represents the continued growth in the proud history of anti-discrimination policy adopted by the lawmakers and people of New Mexico. Its ratification was

contemporaneously described by a New Mexico law professor as "an unequivocal commitment by ordinary men and women in our state to the ideal of equal treatment without regard to sex." Leo Kanowitz, The New Mexico Equal Rights Amendment: Introduction and Overview, 3 N. M. L. Rev. 1 (1973). As this Court itself has observed, the ERA was passed by an overwhelming margin in a popular vote and its adoption represents a step in the "evolving concept of gender equality in this state." New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶¶ 29-31.

This evolution has continued as this Court has focused on other notions of equality. New Mexico adopted the Equal Rights Amendment as an addition to the existing guarantees of equal protection in Article II, Section 18. Consistent with this history of equal treatment, the New Mexico Supreme Court has applied a version of rational basis review under the state Equal Protection Clause that is often more searching than the federal standard. Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 31, 125 N.M. 721, 965 P.2d 305 (noting that the "rational basis inquiry does not have to be largely toothless"). It has applied heightened scrutiny more broadly than federal law. Breen, 2005-NMSC-028, ¶ 15. The culmination of this history should be reflected in the Court's determination of the level of scrutiny to

apply on classifications based on sexual orientation. Heightened scrutiny is the natural next step in New Mexico's commitment to equality.

b. New Mexico's Unique History with Marriage of Same-Sex Couples Justifies Heightened Scrutiny.

New Mexico stands in an unprecedented position with respect to the debate over marriage of same-sex couples. No state supreme court has ever confronted the question of the constitutionality of marriage for same-sex couples with the wealth of experience this state possesses. In 2004, the Sandoval County Clerk issued marriage licenses to 64 same-sex couples. These licenses were and remain valid. As the Attorney General recognized in an August 28, 2013, letter relating to these licenses, "a marriage license issued by a county clerk in New Mexico is presumptively valid." Letter from Gary King, New Mexico Attorney General, to Eileen Garbagni, Sandoval County Clerk (August 28, 2013), available at http://www.nmag.gov/News. New Mexico is also unusual in the number of same-sex couples holding valid marriage licenses at the time the state's highest court hears the constitutional question. Almost 1,000 same-sex couples are currently validly married under New Mexico law. New Mexico has the unique benefit of nearly a decade of experience with married same-sex couples.

These distinctive state characteristics should call into question proposed justifications for discriminating on the basis of sexual orientation in marriage or in any other state regulation. New Mexico, alone among all states, confronts the question of marriage equality already having the benefit of strong empirical evidence of the long-term consequences of having married same-sex couples. Almost a decade of learning from New Mexico's unique experience confirms that marriages of same-sex couples pose no threat to heterosexual unions, the procreative goals of the state, or any of the other putative state interests sometimes presented to support discrimination based on sexual orientation.

Given this evidence, lines drawn based on sexual orientation should no longer receive the benefit of the doubt under our Constitution. Instead, this type of discrimination in New Mexico should receive heightened scrutiny because, given our unusual history, the state has learned that sexual orientation is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others." Cleburne, 473 U.S. at 440. At the very least, any claims about the justifications for discrimination based on sexual

orientation must be tested against the history and the scope of marriage of same-sex couples in New Mexico.

B. The Denial of the Right to Marry Same-Sex Couples is Subject to Intermediate Scrutiny.

In implementing the equal protection guarantee of Article II, Section 18, New Mexico uses the same three tiers of scrutiny applied under the United States Constitution. Breen, 2005-NMSC-028, ¶ 11 ("There are three levels of equal protection review based on the New Mexico Constitution: rational basis review, intermediate scrutiny and strict scrutiny.") In order to receive strict scrutiny, the legislation must affect a suspect class or the exercise of a fundamental right while intermediate scrutiny applies in cases where the legislation affects a *sensitive* class or an important liberty interest. Id. ¶¶ 12, 17. A denial of same-sex couples' right to marry indisputably classifies based on sexual orientation. Maloof v. Prieskorn, 2004-NMCA-126, ¶ 20, 136 N.M. 516, 101 P.3d 327 (recognizing that a classification that distinguishes between married opposite-sex couples and unmarried same-sex couples is a sexual orientation-based classification). Because it discriminates based on a sensitive class, it is therefore subject to intermediate scrutiny under Article II, Section 18 of the New Mexico Constitution.

In Breen, this Court defined a sensitive class as a discrete group that has been subjected to a history of discrimination and political powerlessness

based on a characteristic that is beyond its members' control. Breen, 2005-NMSC-028, ¶ 21.

> [W]e will apply intermediate scrutiny even though the darkest period of discrimination may have passed for a historically maligned group. Intermediate scrutiny should still be applied to protect against more subtle forms of unconstitutional discrimination created by unconscious or disguised prejudice. Thus, the courts should be sensitive to classes of people who are discriminated against not because of a characteristic that actually prevents them from functioning in society, but because of external and artificial barriers created by societal prejudice.

Id. ¶ 20. Lesbian and gay people constitute a sensitive class because they satisfy these criteria.

Other courts have recognized that sexual orientation is entitled to heightened scrutiny. E.g., In re Marriage Cases, 183 P.3d 384, 444 (Cal. 2008) ("Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification. The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation."); Tanner v. Oregon Health Sci. Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) ("[W]e have no difficulty concluding that [lesbian and gay

people] are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.").

No legitimate dispute exists over the fact that sexual orientation bears no relation to an individual's capacity to participate in or contribute to society. Courts have determined sexual orientation to be an irrelevant consideration in every context in which the government acts. See, e.g., Windsor 133 S.Ct. at 2695-96; Miguel v. Guess, 51 P.3d 89 (Wash. Ct. App. 2002), rev. denied, 64 P.3d 650 (Wash. 2003) (public employment); Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (same); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998) (same); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (same); Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) (law enforcement); Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997) (same); Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003) (public education); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (same); In re Jacinta M., 1988-NMCA-100, 107 N.M. 769, 764 P.2d 1327 (child custody and visitation disputes).

Moreover, there is no legitimate dispute over the fact that lesbian and gay people have experienced and continue to experience systemic discrimination on account of their sexual orientation. This historical pattern of prejudice directed against a disfavored class has so often proven to be invidious that it must be viewed with a high degree of suspicion.

Finally, a small minority within the general population, lesbian and gay people do not have political power sufficient to realize the constitutional guarantee of equal protection of the laws through majoritarian electoral processes. This is especially so given that many lesbian and gay people conceal their sexual orientation in order to avoid discrimination and therefore are not in a position to advocate for themselves in the political arena. Moreover, lesbian and gay people are vastly underrepresented in political office. Indeed, in New Mexico, there are few openly lesbian or gay legislators.

Furthermore, lesbian and gay people have yet to achieve anything close to comprehensive protections for themselves and their families – and indeed have achieved far less in this regard than other classes that have long been recognized as suspect. On the state level, the legislature has repeatedly rejected bills that would grant all state spousal benefits to lesbian and gay couples. See H.B. 9, 48th Leg., 2d Sess. (N.M. 2008); H.B. 4, 48th Leg., 1st

Spec. Sess. (N.M. 2007); H.B. 603, N.M. 48th Leg., 1st Sess. (N.M. 2007); S.B. 576, 47th Leg., 1st Sess. (N.M. 2005); H.B. 86, 47th Leg., 1st Sess. (N.M. 2005). Because the political powerlessness of lesbian and gay people renders them especially susceptible to invidious discrimination at the hands of their own government, there exists an independent reason for governmental classifications based on sexual orientation to be subject to heightened scrutiny. As the Supreme Court of Connecticut noted:

> The term "political powerlessness," therefore, is clearly a misnomer. We apply this facet of the suspectness inquiry not to ascertain whether a group that has suffered invidious discrimination borne of prejudice or bigotry is devoid of political power but, rather, for the purpose of determining whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means. Consequently, a group satisfies the political powerlessness factor if it demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process. Applying this standard, we have little difficulty in concluding that gay persons are entitled to heightened constitutional protection despite some recent political progress.

Kerrigan v. Commissioner of Pub. Health, 957 A.2d 407, 444 (Conn. 2008) (citation omitted); see also In re Marriage Cases, 183 P.3d at 842-43 ("[O]ur cases have not identified a group's *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class. . . . Instead, our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for

classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society.") (quotation, citation, and footnotes omitted) (emphases in original).

Classifications based on sexual orientation are subject to intermediate scrutiny.

II. Alternatively, Denial of the Right to Marriage to Same-Sex Couples Is Subject to Strict Scrutiny Because It Disparately and Significantly Penalizes the Exercise of the Natural, Inherent, and Inalienable Right to Seek and Obtain Safety and Happiness.

N.M. Const. art. II, § 4 provides:

> 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.

This provision is generally referred to as the "safety and happiness" clause. It is a state constitutional right that should be recognized as describing a fundamental right as that term is used to determine the level of scrutiny a court should employ under state law when assessing a penalty on the exercise of the right. This Court should give full meaning to this constitutional codification of basic human rights. This language is not

merely hortatory rhetoric from the nineteenth century. Indeed, New Mexico appellate courts have already indicated that the language is judicially enforceable. See State v. Sutton, 1991-NMCA-073, ¶ 23, 112 N.M. 449, 455, 816 P.2d 518, 524; State v. Brooken, 1914-NMSC-075, 19 N.M. 404, 143 P. 479, 481. Accordingly, Article II, Section 4 obligates this Court to enforce the basic human right of same-sex couples to marry.

Numerous other state constitutions contain some variation of this inherent rights provision.[1] These inherent rights clauses mandate independent barriers against government intrusion on the right to a secure and content existence. See Doe v. District Attorney, 2007 ME 139, ¶ 63 (2007) (Alexander & Silver, JJ., concurring) (the safety and happiness clause demonstrates the "State's commitment to providing citizens . . . the possibility of a secure and content existence") overruled on other grounds by State v. Letalien, 2009 ME 130, ¶ 63 (2009). Notably, the clauses provide protections for interests in personhood that are distinct from notions of "privacy" grounded in the federal penumbras. Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 27-28 (1997) ("[w]hereas 'privacy' connotes

[1] The same language that appears in New Mexico Constitution Article II, Section 4 also appears in the state constitutions of California, Colorado, Iowa, Nevada, New Jersey, North Dakota, Ohio, and Vermont. Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 3 & n.6 (1997).

bounded individual autonomy, 'happiness,' or 'happiness and safety' points more in the direction of an individual's relationship to others"); see also Simms v. Montana Eighteenth Judicial Dist. Court, 2003 MT 89, ¶ 32 (Mont. 2003) (holding that a request for an ordered independent medical examination must be weighed against "the right to privacy provided for at Article II, Section 10 of the Montana Constitution *and* the right to safety, health and happiness provided for at Article II, Section 3 of the Montana Constitution") (emphasis added). Accordingly, Article II, Section 4 should be construed as an independent, fundamental state constitutional right of New Mexicans to seek and obtain a secure and content existence, a right that includes the choice to marry one's life partner and to protect one's family.

Indeed, the very issue at stake here, protection of family (in this case, the families of same-sex couples), has been the focus of decisions interpreting inherent rights clauses. For example, in interpreting the North Dakota inherent rights clause, the North Dakota Supreme Court noted:

> The pursuit of happiness guaranteed by N.D. Const. art. I, § 1, includes "the right to *enjoy the domestic relations and the privileges of the family* and the home ... without restriction or obstruction ... except in so far as may be necessary to secure the equal rights of others," which is protected and insured by the due process clause of N.D. Const. art. I, § 12.

Hoff v. Berg, 1999 ND 115, ¶ 10 (emphasis added) (quoting State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914, 919 (1943)). This view of the

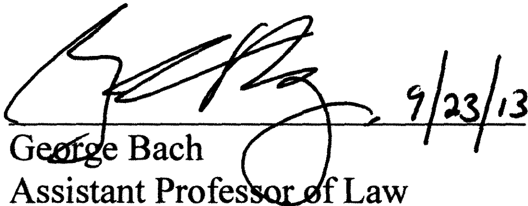
inherent rights clause – one that includes familial protection – aligns with plaintiffs' interest in escaping disparate treatment with respect to the ability to marry their life partners and otherwise form the families of their choice.

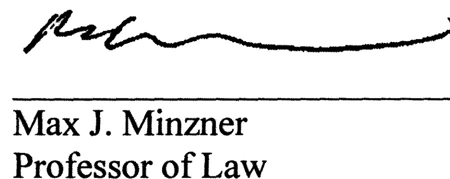
Thus, the inherent rights clause should be interpreted by this Court as providing more than mere privacy protections, but instead a constitutional mandate to protect against government intrusion into an individual's ability to obtain a secure and content existence by marrying one's life partner. *Amici* urge the Court to recognize that, because Article II, Section 4, extends constitutional protection to the most fundamental of rights – including the right of same-sex couples to marry their life partners – state actions that infringe upon those rights should be examined through the lens of strict scrutiny.

CONCLUSION

Prohibiting marriage of same-sex couples conflicts with New Mexico's long-standing commitment to equality and individual freedom. The limitation imposed on same-sex couples seeking to exercise their right to marry discriminates against members of a group with a history of marginalization and exclusion. These restrictions also prevent the members of that class from exercising their inherent and inalienable right to commit to an intimate relationship. Our constitutional text and history require the courts to closely scrutinize the justification for such a provision. In this case, the New Mexico ban on marriage of same-sex couples cannot survive such scrutiny and must be struck down.

Respectfully submitted,





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CERTIFICATE OF SERVICE

We hereby certify that on this 23rd day of September 2013, we served the foregoing pleading by electronic mail on the following counsel of record, and that electronic service was successful.

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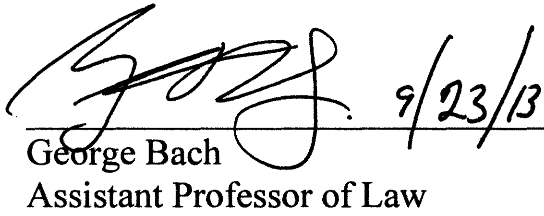

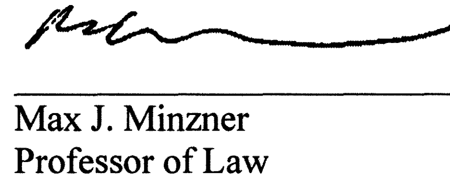

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