

2013 WL 5768197 (N.M. Dist.) (Trial Order)  
District Court of New Mexico.  
Second Judicial District Court  
Bernalillo County

Rose GRIEGO & Kimberly Kiel, et al., Plaintiffs,  
v.  
MAGGIE TOULOUSE OLIVER, et al., Defendants,  
and  
NEW MEXICO ASSOCIATION OF COUNTIES, et al. Intervenors.

No. D 202 CV 2013 2757.  
September 3, 2013.

**Final Declaratory Judgment**

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**Griego v. Maggie Toulouse Oliver, 2013 WL 5768197 (2013)**

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\*1 THIS MATTER having come before the Court upon the Second Amended Complaint for Declaratory and Injunctive Relief; the Court having reviewed the entire file; the Court having convened a hearing in open Court on August 26, 2013; the Court having granted on August 29, 2013 the Unopposed Motion to Intervene of the New Mexico Association of Counties and the remaining thirty-one (31) Clerks of New Mexico's counties who were not already parties to this action, and the Court being sufficiently advised:

THE COURT FINDS:

1. There is jurisdiction over the parties and the subject matter.
2. The Court adopts the Plaintiffs' and Defendants' stipulated facts as set forth in open court.
3. The material issues of fact herein are not in dispute. Plaintiffs are same sex couples who have shared lengthy committed relationships. Having made these deep personal and social commitments, they wish to enter into the state-sanctioned contract of marriage. Defendant Clerks and Intervenor Clerks are the individual County Clerks of New Mexico in their official capacities.
4. In order to enter into the state-sanctioned contract of marriage, any couple must obtain a Marriage License from a county clerk. Sec. 40-1-1, *et seq.*, NMSA. Defendants are charged with the clear and unambiguous duty to provide Marriage Licenses to qualified couples upon application. Sec. 40-1-10, NMSA. Plaintiffs, and those similarly situated throughout New Mexico, are otherwise qualified to obtain a marriage license and to enter into the contract of marriage [Section 40-1-1, 40-1-6, and 40-1-7, NMSA] and have either already been denied a Marriage License by a Defendant Clerk or who will, to a certainty, be denied a Marriage License by some of the Defendant Clerks or Intervenor Clerks on the basis of their same sex orientation.
5. An "actual controversy" exists between the parties. Section 44-6-1, *et seq.*, NMSA.
6. A specific prohibition of same sex marriage does not exist in Section 40-1-1 through 40-1-20, NMSA, although the statutory scheme does specifically prohibit marriage between minors without consent of their parents or court order, incestuous marriage, and marriage between those lacking contractual capacity.
7. Section 40-1-10, NMSA, establishes the necessity for a marriage license and states:

Each *couple* desiring to marry pursuant to the laws of New Mexico shall first obtain a license from a county clerk of this state... (emphasis added)

but these statutes do not define or limit the definition of "couple" to a heterosexual pair of contractually capable people nor exclude those of same sex orientation from that term.

8. It is arguable that the use of both gender neutral and gender specific terms in our laws on "Domestic Affairs," Section 40-1-1 through 40-15-4 NMSA supports the conclusion that New Mexico statutes do not allow same sex marriages; *e.g.*,

*Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Lewis v. Harris*, 908 A.2d 196 (NJ 2006); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). And it is also arguable that our Territorial Legislature did not even consider same sex marriage when it established the statutory scheme in 1862. From this, some might argue that Defendants are prohibited from issuing Marriage Licenses to same sex couples or, at least, that there is no clear, non-discretionary duty to do so. See, *State of New Mexico's Response to Verified Petition for Writ of Mandamus 8/12/13 Supreme Court # 34227*.

\*2 9. It is, however, beyond argument that the People of the State of New Mexico considered, and spoke clearly to ensure "equality of rights under the law" in 1972 by adoption of *Article II, Section 18, Constitution of New Mexico*. Article II, Section 18 provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. *Equality of rights under the law shall not be denied on account of the sex of any person*, (emphasis added)

10. Accordingly, whether or not our statutory scheme in Section 40-1-1, *et seq.*, does, or does not, allow same sex marriage is of little consequence to the outcome of this litigation because the voice of New Mexicans in adopting Art. II, Section 18 in 1972 clearly prohibits such discrimination against same sex applicants and the Defendants' clear, non-discretionary duty to issue a license to "each couple" otherwise qualified stands clearly and inexorably through all the rhetoric.

11. Implying conditions of sexual orientation on one's right to enter civil contracts such as marriage is a violation of Article II, Section 18's mandate that "equality of rights shall not be denied on account of the sex of any person."

12. Implying conditions of sexual orientation on one's right to enter civil contracts such as marriage is a violation of Article II, Sections 18's mandate that "no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."

13. Whether based in statute, or Constitutional protections, Defendants have a non- discretionary duty to issue a Marriage License to "each couple" otherwise qualified upon application for same and no valid excuse for not performing that duty has been asserted.

14. Gay and Lesbian citizens of New Mexico have endured a long history of discrimination. See, *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028. Denial of the right to marry continues this unfortunate, intolerable pattern and establishes irreparable injury on Plaintiffs' part. *Loving v. Virginia*, 388 U.S. 1 (1967) *U.S. v. Windsor*, (U.S. Supreme Court June 26 2013; see, [www.supremecourt.gov/opinions/12pdf/12-307\\_6j37pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37pdf).)

15. There is a substantial public interest in vindicating the rights of all citizens under the law and in preventing the ongoing violation of our constitutional rights. *Awad v. Ziriox*, 670 F.3d 1111 (10<sup>th</sup> Cir. 2012); *Herrera v. Santa Fe Public Schools*, 792 F. Supp.2d 11744 (DC N.M. 2011). There is no benefit to the parties or the public interest in having this matter progress through a lengthy path of litigation while basic constitutional rights are compromised or denied on a daily basis.

WHEREFORE, it is Ordered:

1. Section 40-1-1, *et seq.*, NMSA does not preclude nor prohibit issuance of a Marriage License to otherwise qualified couples on the basis of sexual orientation or the gender of its members.

2. To the extent Section 40-1-1, NMSA, may be read to prohibit issuance of a Marriage License to otherwise qualified same sex couples, those prohibitions are unconstitutional and unenforceable under Article II, Section 18, Constitution of New Mexico.

3. The Writ of Mandamus and Permanent Injunction issued against the Clerks of Bernalillo and Sandoval Counties on August 26, 2013 remain in full force and effect. By stipulation of the parties, no Writ of Mandamus or Injunction is entered against the Interveners.

\*3 4. This Declaratory Judgment constitutes a final judgment as to the claims between Plaintiffs and the New Mexico Association of Counties, and the individual County Clerks. There is no just reason for delay of an immediate review of this Declaratory Judgment as to those claims.

5. This Final Declaratory Judgment is stayed as to Intervenors pending appellate review.

6. The parties shall bear their own fees and costs.

Dated: 9/3/13

<<signature>>

HON. ALAN M. MALOTT

**Submitted by:**

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