DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO 1777 Sixth Street Boulder, CO 80302 PEOPLE OF THE STATE OF COLORADO ex rel. JOHN W. SUTHERS, in his official capacity as Colorado Attorney General, and THE STATE OF COLORADO, Plaintiffs, v. HILLARY HALL, in her official capacity as Boulder County Clerk and Recorder, Defendant.	▲ COURT USE ONLY ▲ Case Number: **2014CV30833** Division: 5

ORDER: DENYING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WITH FURTHER ORDERS TO PROTECT AFFECTED PARTIES

I. JURISDICTION AND HISTORY

Needless to say, this action is one part of a fast moving legal environment that has unfolded in Colorado and nationally on the issue of same-sex marriages. As such, the Court agrees with the oral argument of counsel for the State of Colorado that the safest approach is to treat this as a "procedural case." As a procedural case, the Court has little choice but to deny the motion and issue further orders as detailed herein.

As evidence of the ever shifting sands, on July 9, 2014, the same day as the hearing on this case, the District Court for Adams County, Colorado ruled that Colorado's laws banning same-sex marriage are unconstitutional, striking down the foundation of plaintiff's action in the

case at bar. The district judge stated, "[t]he Court holds that the Marriage Ban violates plaintiffs' due process and equal protection guarantees under the Fourteenth Amendment to the U.S. Constitution." *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order). The court stayed the judgment pending possible appeal. *Id*.

Plaintiffs, the People of the State of Colorado, by John W. Suthers, Colorado Attorney General, and the State of Colorado (collectively, the "State"), through its Verified Complaint and Motion for Temporary Restraining Order and Preliminary Injunction, has asserted it has shown by a preponderance of the evidence that Defendant, Hillary Hall, in her official capacity as Clerk and Recorder for Boulder County, Colorado, has violated Article II, section 31 of the Colorado Constitution ("Amendment 43"), which states, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state," and C.R.S. § 14-2-104(1)(b), which provides that a marriage is valid only if it is "between one man and one woman," by knowingly, intentionally, and willfully issuing marriage licenses to same-sex couples since June 25, 2014 and refusing orders from the State to cease.

In the instant proceeding, importantly, the State does not seek review of the underlying legality or Constitutionality of same-sex marriage in Colorado.[1] It only seeks a declaration

[1] There are two pending lawsuits in Colorado on this issue: the consolidated state cases of *Rebecca Brinkman & Margaret Burd v. Adams County, Colorado Clerk & Recorder Karen Long*, 2013CV32573 and *G. Kristian McDaniel-Miccio and Nan McDaniel-Miccio, et al, v. Colorado Governor John Hickenlooper*, et al., 2014CV30731 and *Catherine Burns et al. v. John w. Hickenlooper, Jr*., et al., 2014CV1817 pending in U.S. District Court for the District of Colorado, in addition to *Kitchen v. Herbert*, 2014 WL 2868044 (10th Cir, No. 13–4178, June 25, 2014).

On July 9, 2014 the judge granted summary judgment invalidating Colorado's ban on same-sex marriages in the state court proceeding. *Brinkman v. Long,* Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order).

whether Clerk Hall exceeded her authority and/or violated her duties as county clerk by issuing marriage licenses to same-sex couples in violation of state law and an order by the State to cease.

This Court has jurisdiction over the subject matter of this action under Article VI, §9(1) of the Colorado Constitution and C.R.C.P. 57 and 65. There is an actual controversy between the parties sufficient for declaratory judgment jurisdiction. Venue is proper in Boulder County. This Court is expressly authorized to issue a temporary restraining order to enjoin ongoing violations of state law under Rule 65(b).

The State is asking this Court for a temporary restraining order and preliminary injunction against the actions of an elected government official. As such, the State must meet a high burden at this early stage in the litigation. For the reasons set forth below, the State has not met its burden and the Court DENIES the motion for a temporary restraining order and preliminary injunction.

As a temporary measure to protect all those affected by this case, the Court adopts the Boulder County Clerk and Recorder's recommendation and ORDERS that the Boulder County Clerk and Recorder identify all same-sex marriages and convey the information as part of its routine monthly reporting of nuptials to the Colorado Department of Public Health and Welfare, Center for Health and Environmental Information and Services, as well as to the Boulder County Vital Records Office in order to reduce any risk of irreparable harm. The Boulder County Clerk and Recorder shall forward the information prospectively and has up to

and including July 17, 2014 to supply information on past same-sex marriages. These offices shall keep the information confidential.

In addition, as a temporary measure to protect same-sex couples, the Court further adopts the Boulder County Clerk and Recorder's recommendation and ORDERS that Clerk Hall provide reasonable notice to prospective and past recipients of same-sex marriage licenses that the validity of their marriages is dependent upon whether a court would find that Clerk Hall had authority to issue same-sex marriage licenses.

II. ANALYSIS

Although the grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court, injunctive relief is an "extraordinary remedy" and should not be indiscriminately granted. *Rathke v. MacFarlane*, 648 P.2d 648, 651, 653 (Colo. 1982). The trial court's power to award injunctive relief "should be exercised sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity." *Id.*

For temporary restraining order or preliminary injunction to issue the State as the moving party must demonstrate:

> (1) a reasonable probability of success on the merits,
>
> (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief,
>
> (3) that there is no plain, speedy, and adequate remedy at law,
>
> (4) that the granting of a preliminary injunction will not disserve the public interest,
>
> (5) that the balance of equities favors the injunction, and
>
> (6) that the injunction will preserve the status quo pending a trial on the merits.

Rathke, 648 P.2d at 653-54. As detailed below, the State has met its burden on the first and last prongs, but fails to meet its burden on the middle four.

(1) Arguably There Exists a Reasonable Probability of Success on the Merits under *Current* Colorado Law

The State seeks declaratory relief that Clerk Hall's issuance of same-sex marriage licenses is in contravention to *existing* state law. The legality or Constitutionality of same-sex marriage is NOT directly at issue at this stage in this case. This motion has a limited focus -- has Boulder County Clerk and Recorder Hillary Hall violated existing Colorado law by issuing same-sex marriage licenses in violation of *current* state law and an order by the State to cease?

As noted above, the District Court for Adams County, Colorado invalidated Colorado's laws banning same-sex marriage are unconstitutional. *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order). The court stayed the judgment pending possible appeal. *Id*. Even though this case provides a strong indication that the Colorado ban on same-sex marriages will ultimately fall, due to the stay pending possible appeal, the law is hanging on by a thread and the Court must presume it remains valid.

Even Clerk Hall acknowledges that there is "some lingering uncertainty in the law [and] the licenses she is issuing could turn out to be invalid." Letter from Ben Pearlman, Boulder County Attorney to Dan Domenico, Colorado Solicitor General (July 2, 2014) at Motion Exhibit F. At the hearing held on July 9, 2014, Clerk Hall's counsel conceded that if the Court does not consider the U.S. Constitutional issue, then Clerk Hall is non-compliant with current state law. There is little argument that Clerk Hall is engaging in a form of civil disobedience. She

apparently is taking the position posited by St. Augustine and followed notably by Marin Luther King, Jr. that, "an unjust law is no law at all." Augustine of Hippo, *On Free Choice Of The Will, Book 1, § 5* (354–430 CE); King, Jr., Martin Luther, *Letter from a Birmingham Jail* (1963). Clerk Hall testified credible and defiantly at the July 9, 2014 hearing that she is violating the State's order to cease issuing same-sex marriage licenses and, by extension, Colorado law as it is currently written. See also, Motion Exhibits A, F, G (letters in response to State's demand and media reports relating thereto).

A clerk's issuance of marriage licenses is undisputedly a ministerial act – if the requirements are met or not met, a clerk has no discretion. Same-sex marriage is prohibited under *current* Colorado law as written. Since it is undisputed that Clerk Hall has failed to cease issuing same-sex licenses after the State ordered her to stop, the State has at least a reasonable probability of success on the merits at this early stage in the litigation.[2] Whether Colorado's marriage limitations will survive Constitutional scrutiny is highly in doubt. However, the Court must review Clerk Hall's acts based on the current state of the law, not what it may be in the future. *See Beedle v. Wilson*, 422 F.3d 1059, 1069 (10th Cir. 2005) (right violated must be established at the time of the defendant's actions).

[2] If this case proceeds to a trial on the merits, the underlying legality of the Colorado ban on same-sex marriages will likely be ventilated, but this Court's review of the State's motion for a temporary restraining order need not resolve this issue. If *Brinkman* and *Kitchen* stays are lifted (or the cases affirmed), then Clerk Hall's actions would not be in violation of some future version of current Colorado law. However, that issue and those facts are currently not before the Court on the State's motion.

(2) Danger of Real, Immediate, and Irreparable Injury Which May be Prevented by Injunctive Relief is Lacking

The State asserts that Clerk Hall is causing irreparable injury by issuing same-sex marriage licenses, namely, that she is causing "legal chaos and confusion." However, when pressed, the State does not identify specific irreparable harm, offering only speculation. This is a fatal flaw to the extraordinary relief it seeks.

The Tenth Circuit has held that, "that '[t]he concept of irreparable harm ... 'does not readily lend itself to definition,' *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250 (citation omitted), nor is it 'an easy burden to fulfill.' *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir.2003)." *Dominion Video Sat., Inc. v. Echostar Sat. Corp*., 356 F.3d 1256, 1262 (10th Cir. 2004).

The Tenth Circuit ruled that, "In defining the contours of irreparable harm, case law indicates that the injury 'must be both certain and great, and that it must not be merely serious or substantial.' *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250 (internal citation and quotations omitted)." (emphasis added) *Dominion Video Sat., Inc.*, 356 F.3d at 1263.

While the State has not fully enumerated the irreparable harm, a fact that could by itself form the basis of a denial of its motion, there appear to be four possible classes of irreparable harm that the State intends to militate against with a preliminary injunction:

(a) Harm to the people of Colorado by the mere existence of same-sex marriages,

(b) Harm to the people of Colorado caused by Clerk Hall's disobedience of state law and orders by the State,

(c) The continued issuance of invalid same-sex marriage licenses harms the state by forcing other divisions of the state to determine the legal validity of the improperly issued licenses and/or

(d) Harm to the couples who received marriage licenses that the State claims are void *ab initio* and invalid and harm to third parties resulting therefrom.

(a) Harm to the people of Colorado by the mere existence of same-sex marriages is Meritless

This point is completely specious based on the ruling in *Brinkman* and *Kitchen*. The District Court for Adams County, Colorado ruled that Colorado's laws banning same-sex marriage are unconstitutional, "The Court holds that the Marriage Ban violates plaintiffs' due process and equal protection guarantees under the Fourteenth Amendment to the U.S. Constitution." *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order). The Tenth Circuit considered and emphatically dismissed any harm to the people of Utah that same-sex marriage might cause, finding objection to same-sex marriage the mere legacy of anti-gay animus. 2014 WL 2868044 *20-21. The court rejected the four justifications for the Utah ban[3] as "means-ends mismatches", and "a sleight of hand in which same-sex marriage is used as a proxy for a different characteristic shared by both same-sex and some opposite-sex couples." *Id.* at *23. The Tenth Circuit also deflected concerns about religious freedom. *Id.* at *30. The Colorado District Court reached nearly the identical conclusion. *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order).

[3] (1) "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children"; (2) "children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home"; (3) "ensuring adequate reproduction"; and (4) "accommodating religious freedom and reducing the potential for civic strife." *Id*. at *22.

(b) There is no tangible harm to the people of Colorado caused by Clerk Hall's disobedience of state law and orders by the State

The State makes assertions that Clerk Hall's disobedience irreparably harms the people by causing loss of faith in the rule of law. However, the State has made nothing but assertions. An alternate public response is that the people of Colorado laud Clerk Hall for her pluck and/or condemn the Attorney General for his tenaciousness. In any event, the State has not met its burden of proving irreparable harm via a loss of faith in the government due to Clerk Hall's actions.[4]

[4] At argument counsel for the State asserted that an injunction blocking state law constitutes irreparable harm. However, when asked by the Court counsel admitted that the Court's denial of the requested stay is not an injunction. Even though admittedly not directly on point since Clerk Hall is not asking to enjoin state law, but arguably analogous in outcome, the State argues that courts have found, "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (*citing New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")); *see also O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) (granting a stay of an injunction because the state suffers irreparable harm when its statutes are enjoined); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S.Ct. 506, 506 (U.S. 2013) (same).

However, Clerk Hall counters that in a factual situation similar to this one the Colorado Supreme Court affirmed an injunction against an enacted Colorado Constitutional Amendment discriminatory against gays. *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993). Plaintiffs requested a preliminary injunction enjoining enforcement of Amendment 2 by the State on the basis that the amendment was likely to be held unconstitutional. Like the instant case, the State, through the Attorney General, argued that it had a strong interest in the constitutional provision being enforced and fought against the injunction. *See Evans v. Romer*, No. 92 CV 7223, 1993 WL 19678 (Denver District Court, January 15, 1993). Denver District Court judge granted the preliminary injunction and the Colorado Supreme Court upheld the district court's decision, stating "[t]hat Amendment 2 was passed by a majority of voters through the initiative process as an expression of popular will mandates great deference. However, the facts remain that `[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Evans*, 854 P.2d at 1286 *quoting West Virginia State Bd. Of Educ. V. Barnette*, 319 U.S. 638 (1943). The Court further stated "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Id*. *quoting Lucas v. Forty-Fourth Gen. Assembly of Colo*., 377 U.S. 713, 736 (1964); s*ee also Dallman v. Ritter*, 225 P.3d 610, 640 (Colo. 2010) (affirming grant of preliminary injunction because Amendment 54 was unconstitutional); *Sanger v. Dennis*, 148 P.3d 404 (Colo. App. 2006) (upholding preliminary injunction of a Colorado administrative rule on the grounds that plaintiffs were likely to prove the rule was unconstitutional). Over three years after the injunction, the United States Supreme Court held that Amendment 2 was unconstitutional. *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996).

Even if the denial of a stay constitutes irreparable harm, the State has not met its burden on other factors.

Moreover, this dovetails into point (a). Since a Colorado District Court and the Tenth Circuit have dismissed as invalid Colorado's (and Utah's) rationale on their ban of same-sex marriage and found such marriage to be a fundamental right, the actual result of Clerk Hall's issuance of licenses causes no harm to the people of Colorado according to the holding in *Brinkman* and *Kitchen*.

(c) The State has failed to show the continued issuance of invalid same-sex marriage licenses harms the State by forcing other divisions of the State to determine the legal validity of the improperly issued licenses, in fact, evidence is to the contrary

Again, the State has offered only surmise on this issue. Even if true, the State offers its own remedy to the purported conundrum. As its only witness, the State offered the testimony of Mr. Hyman, Director of the Colorado Department of Public Health and Welfare, Center for Health and Environmental Information and Services. Mr. Ronald Hyman testified that he receives data on marriages from county clerks once a month for compilation in a state database along with other information on births, deaths and the like. Mr. Hyman offered credible testimony that the State currently does not identify marriages as same-sex but could given sufficient resources. Mr. Hyman also testified that the State can and does "seal" certain marriages if there is an issue such as fraud or identity theft. He testified that the seal is akin to a flag that there may be an issue with the marriage.

Mr. Hyman testified that the department could "seal" marriages after his office receives monthly marriage data from county clerks. Clerk Hall testified that the Boulder County Clerk and Recorder could and would prospectively and retroactively identify same-sex marriages and provide the data to the Colorado Department of Public Health and Welfare. Clerk Hall's lawyer confirmed this in closing arguments.

As such, the Court finds that even if there could be irreparable harm to other divisions of the State based on Clerk Hall's actions, this harm can be mitigated in the event of a court decision adverse to her position with her office's identification of same-sex marriages to the Colorado Department of Public Health and Welfare. Also, once Clerk Hall provides the information, the Colorado Department of Public Health and Welfare can take appropriate next steps.

Thus, as a matter of prudency, and as a temporary measure to protect all those affected by this ruling, Clerk Hall shall identify all same-sex marriages and convey the information as part of her monthly reporting to the Colorado Department of Public Health and Welfare, Center for Health and Environmental Information and Services, as well as to the Boulder County Vital Records Office in order to reduce any risk of irreparable harm. The Boulder County Clerk and Recorder shall forward the information prospectively and has up to and including July 17, 2014 to supply information on past same-sex marriages. These offices shall keep the information confidential.

(d) There is no evidence of harm to the couples who received marriage licenses that the State claims are void *ab initio* and invalid and no evidence of harm to third parties resulting therefrom

The final group of people who may face irreparable harm under the State's theory are the couples who freely and voluntarily obtained marriage licenses from Clerk Hall's office and those with whom they may have interactions. The State would paint the couples as victims based on their attempt to exercise what a Colorado District Court and the Tenth Circuit have deemed to be a fundamental liberty right. If the *Brinkman* and *Kitchen* decisions are found to be in error and the marriages solemnized as a result of Clerk Hall's acts are held invalid and

voided, Clerk Hall's identification procedures set forth above will protect same-sex couples. As an additional a temporary measure to protect same-sex couples, the Court further adopts the Boulder County Clerk and Recorder's recommendation and orders that Clerk Hall provide reasonable notice to prospective and past recipients of same-sex marriage licenses that the validity of their marriages is dependent upon whether a court would find that Clerk Hall had authority to allow same-sex marriages.

In sum, the state has made conclusory arguments and has offered speculation of irreparable harm to itself, the citizens of Colorado and the same-sex couples seeking marital status. These mere assertions, however, do not meet the high burden that the alleged injury, "must be both certain and great, and that it must not be merely serious or substantial." *Dominion Video Sat, Inc.*, 356 F.3d at 1263. Critically, the State's assertion of irreparable harm "must be both certain and great." Based on the unbroken post-*Windsor*[5] string of cases finding that same-sex marriage is a fundamental right, it seems far from "certain and great" that the marriages will be invalidated.[6] The State has thus failed to show there would be irreparable harmed if the Court does not grant the emergency relief.

[5] *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

[6] The State argues that "Spouses seeking a dissolution of marriage, disputing custody or parental rights, property rights, or otherwise seeking to enforce or challenge a marriage relationship would also be impacted by continued issuance of marriage licenses with a serious cloud of legal uncertainty." Reply at 17. Even if the marriages are invalidated, Colorado law gives "putative spouses" rights in marital assets, maintenance, child support and parental rights that could serve to protect these same-sex couples, depending on their factual circumstances. *See* C.R.S. § 14-2-111. (a putative spouse is "any person who has cohabitated with another to whom he is not legally married in the good faith belief that he was married to that person. . .").

(3) The State has a Plain, Speedy, and Adequate Remedy at Law

Could the State find an adequate remedy at law after a trial on the merits if the Court denies the motion for expedited relief but ultimately rules that Clerk Hall acted unlawfully? In addition to the identification procedures that Clerk Hall and Mr. Hyman credibly testified concerning and agreed are feasible, the Court finds guidance in the case oft-cited by the State and vilified by Clerk Hall -- *Lockyer v. City and County of San Francisco,* 33 Cal.4th 1055 (Cal. 2004). In *Lockyer*, the mayor of the City and County of San Francisco suggested that the county clerk adjust wording of marriage licenses to make them gender neutral, in effect legalizing same-sex marriages. *Id*. at 1070-71. The clerk revised the forms and began issuing marriage licenses that applied equally to both opposite sex and same-sex couples on February 12, 2004, a decade before the Tenth Circuit's ruling in *Kitchen*. *Id*.

Plaintiffs opposed to same-sex marriage in California filed two separate actions in San Francisco Superior Court seeking to halt the city's issuance of such offending marriage licenses. *Thomasson v. Newsom* (Super. Ct. S.F. City and County, 2004, No. CGC–04–428794)); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. 466 Ct. S.F. City and County, 2004, No. CPF–04–503943. In each case, like here, the trial judge denied the request for an immediate stay after a hearing.[7] Thereafter, California's Attorney General filed an original writ of mandate, prohibition, certiorari, and/or other relief, and a request for an immediate stay with the California Supreme Court, resulting in the *Lockyer* decision. *Lockyer,* 33 Cal.4th. at 1072.

[7] In the *Prop. 22* case, the judge ordered further proceedings. *Lockyer*, 33 Cal.4th at 1071 n.6.

On August 12, 2004, the California Supreme Court ruled that San Francisco exceeded its authority in granting the licenses. The court held that, "it is appropriate in this mandate proceeding not only to order the city officials to comply with the applicable statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correction of all relevant official records and notification of affected individuals of the invalidity of the officials' actions." (emphasis added) *Id.* at 1113.[8]

The Supreme Court of California issued the following order of relief "to remedy the continuing effect of [San Francisco's] past unlawful actions":

> The county clerk and the county recorder are directed to (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related

[8] There are two important aspects of *Lockler* that serve to distinguish the final holding on the merits of same-sex marriage from this case and the co-pending Colorado cases. First, Clerk Hall under Colorado law can contest the Constitutionality of statutes, unlike what may have been the case in California at the time. *Compare* Complaint ¶ 30, Motion ¶ 36 and C.R.S. § 30-11-105.1 *with* California Government Code § 820.6 and *Lockler,* 33 Cal.4th at 1097-87. Second, the California court decided *Lockyer* prior to *United States v. Windsor*, 133 S.Ct. 2675 (2013), and the court found at the time that the invalidity of state same-sex marriage bans:

> is not so patent or clearly established that no reasonable official could believe that the current California marriage statues are valid. Indeed, the City cannot point to any judicial decision that has held a statute limiting marriage to a man and a woman unconstitutional under the . . . federal constitution. Instead, the city relies on state court decisions from Massachusetts, Vermont, and Hawaii, that, in interpreting their own state constitutions, assertedly have found similar statutory restrictions to violate provisions of their state's own constitution. . . . A significant number of other state and federal courts, however, have reached a contrary conclusion. . . . In light of the . . . sharp division of judicial views . . . this is plainly not an instance in which the invalidity of the California marriage statues is . . . patent or clearly established.

Lockyer, 95 P.3d at 487 (citations omitted). Four years later the California Supreme Court found California's marriage ban unconstitutional. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.

Id. at 1118-19.

In *Lockyer*, "local public officials have purported to authorize, perform, and register literally thousands of marriages in direct violation of explicit state statutes." (emphasis added) *Lockyer*, 33 Cal.4th. at 1113. Since the uncontroverted testimony is that Clerk Hall has issued about a hundred licenses, in the event they are found invalid the logistics of remedy would involve significantly less effort than the San Francisco corrective action.

In fashioning its remedy the *Lockyer* Court also recognized that, "these couples clearly were on notice that the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages." *Id*. at 1118. In the instant case, the pleadings show that the State publically provided notice to Clerk Hall that the marriage licenses she issued were invalid and that such notice was widely reported. Motion at ¶¶ 11, 13-16; Motion Exhibits A—C. Clerk Hall acknowledged notice and this case has been widely reported in the media. In her Response Clerk Hall stated, "she would be able to provide notification to same-sex individuals regarding the change in status of their license in the unlikely event a court determined the licenses were unconstitutional." Response at 23. Based on this representation, the Court orders that Clerk Hall provide reasonable notice to prospective and past recipients of same-sex marriage licenses that the validity of their marriages is dependent upon whether a court would find that Clerk Hall had authority to allow same-sex marriages.

That Boulder same-sex couples were put on notice their marriages may be invalid and that the California Supreme Court was able to fashion an effective remedy in the San Francisco situation a decade ago, the Court is not convinced that the State has no adequate remedy at law if the temporary restraining order or injunction does not issue. The remedy could include the five elements mandated by the California Supreme Court in *Lockyer,* and others, given advances in communication technology since 2004. The testimony of Mr. Hyman on the topic of notification and the opportunity for further action by his office also shows there is an adequate remedy at law.

(4) Granting of a Preliminary Injunction would Disserve the Public Interest

This factor cuts both ways. On the one hand, the District Court for Adams County, Colorado ruled that Colorado's laws banning same-sex marriage are unconstitutional, "The Court holds that the Marriage Ban violates plaintiffs' due process and equal protection guarantees under the Fourteenth Amendment to the U.S. Constitution." *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order). Likewise, the Tenth Circuit has held that the Utah law, for all intents and purposes identical to Colorado law, prohibiting same-sex marriage violates the Fourteenth Amendment to the U.S. Constitution. *Kitchen v. Herbert*, 2014 WL 2868044 (10th Cir, No. 13–4178, June 25, 2014) *25, 32. The Tenth Circuit ruled:

> In summary, we hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same-sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that Amendment 3 and similar statutory enactments do not withstand constitutional scrutiny.

Id.

Thus, the Colorado District Court for Adams County and the Tenth Circuit, the Federal appeals court with jurisdiction over Colorado, have held that the right to same-sex marriage is protected by the U.S. Constitution. However, the Colorado court stayed the ruling pending possible appeal and the appellate court also stated, "In consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal to our circuit, we conclude it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari. [citations omitted]." *Id.*

Also, there is obviously a public interest in elected officials abiding by State law.[9] If a marriage applicant does not meet the requirements of the Uniform Marriage Act, C.R.C. 18-2-101, a clerk should refrain from issuing a license. In fact, the State contends that county clerks are forbidden from issuing false or invalid marriage licenses. *See* C.R.S. 18-8-406. The State, through the Attorney General, believes the licenses Clerk Hall issued are invalid and that she is violating state law, including the Colorado Constitution. Clerk Hall counters that she only has the duty to enforce only valid, Constitutional laws. Motion at Exhibit F. However, Clerk Hall even admits that the licenses she issued "could turn out to be invalid." *Id.*

The State has a valid argument that Clerk Hall is violating the current laws enacted by the legislature and by referendum, but that is not the end of the enquiry. Article VI, section 2 of the United States Constitution, which makes the federal Constitution and laws enacted pursuant thereto "the supreme law of the land", requires every state and local official and

[9] Clerk Hall took an oath of office, which states, in pertinent part, that, "I, Hillary Hall, do solemnly swear. . . .that I will support the Constitution of the United States of America and of the State of Colorado. . . ."

every judicial officer in every state must first look to federal statutory and Constitutional law before deciding whether a state law is valid when challenged. U.S. Constitution, Art. VI, §2; *M'Culloch v. State of Maryland*, 17 U.S. 316, 327 (1819).

The Court looks to the *Windsor* Defense of Marriage Act (DOMA) case and the post-*Windsor* cases to decide whether Clerk Hall's actions in disregard of Colorado law can nevertheless be warranted by the U.S. Constitution. As the Ninth Circuit explained, "*Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians." *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014). In *Windsor*, the Supreme Court considered the constitutionality of a Federal marriage recognition ban, and concluded that the ban "injure[d]," "stigma[tized]," "demean[ed]," and "degrade[d]" same-sex couples, treating their relationships as "second-class," "second-tier," and "unworthy of [] recognition." *Windsor*, 133 S. Ct. at 2692-94, 2695-96.

DOMA could not withstand Constitutional scrutiny because it instructed not only government officials but "indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Holding that this "discrimination[] of an unusual character . . . require[d] careful consideration," the Court found that the State could demonstrate no "legitimate purpose" that could overcome the discriminatory purpose and effect of the Federal marriage ban and, accordingly, struck it down. *Id.* at 2692, 2696.

The State contends that most, if not all, of the post-*Windsor* cases striking bans on same-sex marriage[10] are not final, just as *Kitchen* is not final. While this may be technically true, it misses the point. The U.S. Supreme Court in *Windsor* (and by allowing California Proposition 8 banning same-sex marriages to fall by denying standing to opponents in

[10] Since the Supreme Court issued its landmark opinion in *Windsor* on June 26, 2013, *every* court to evaluate marriage bans like Colorado's has found them unconstitutional, including decisions in the Tenth Circuit, nineteen federal district court cases, and two state supreme court cases. *See Love v. Beshear*, No. 3:13-CV-750-H, 2014 WL 2957671, at *10 (W.D. Ky. July 1, 2014) (holding Kentucky's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *32 (10th Cir. June 25, 2014) (holding Utah's ban on same-sex marriage unconstitutional under the Equal Protection Clause and the Due Process Clause); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 WL 2884868, at *15 (S.D. Ind. June 25, 2014) (holding Indiana's ban on same-sex marriage unconstitutional under the Equal Protection Clause and the Due Process Clause); *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 2558444, at *43 (W.D. Wis. June 6, 2014) (holding Wisconsin's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105, at *15 (M.D. Pa. May 20, 2014) (holding Pennsylvania's ban on same-sex marriage unconstitutional under the Equal Protection Clause and the Due Process Clause); *Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264, at *16 (D. Or. May 19, 2014) (holding Oregon's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *29 (D. Idaho May 13, 2014) (holding Idaho's ban on same-sex marriage unconstitutional under the Equal Protection Clause and the Due Process Clause); *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395, at *18 (S.D. Ohio Apr. 14, 2014) (permanently enjoining Ohio's recognition ban); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (holding Michigan's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, at *9 (M.D. Tenn. Mar. 14, 2014) (enjoining enforcement of Tennessee's recognition ban on equal protection grounds); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) (preliminarily enjoining Texas' same-sex marriage ban on equal protection and due process grounds); *Lee v. Orr*, No. 13-CV-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014) (holding Illinois' ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (holding Virginia's ban on same-sex marriage unconstitutional under the Equal Protection Clause and the Due Process Clause, and preliminarily enjoining enforcement); *Bourke v. Beshar*, No. 3:13-CV-750-H, 2014 WL 556729, at *1 (W.D. Ky. Feb. 12, 2014) (holding Kentucky's recognition ban unconstitutional under the Equal Protection Clause); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (permanently enjoining Oklahoma's same-sex marriage ban on equal protection grounds); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997–98 (S.D. Ohio 2013) (permanently enjoining, as to plaintiffs, enforcement of Ohio's recognition ban on due process and equal protection grounds); *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918, at *6 (N.D. Ill. Dec. 5, 2013) (granting temporary injunctive relief from Illinois' marriage ban as applied to plaintiffs, a same-sex couple); *Griego v. Oliver*, 316 P.3d 865, 888–89 (N.M. 2013) (holding New Mexico's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Garden State Equality v. Dow*, 82 A.3d 336, 369 (N.J. 2013) (requiring New Jersey to allow same-sex couples to marry); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (finding California's ban on same-sex marriage unconstitutional under the Equal Protection Clause and the Due Process Clause); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (holding Iowa's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481–82 (Conn. 2008) (holding Connecticut's ban on same-sex marriage unconstitutional under the Equal Protection Clause); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (holding Massachusetts' ban on same-sex marriage unconstitutional under the Equal Protection Clause).

Hollingsworth v. Perry, ___ U.S. ___, 133 S.Ct. 2652 (2013)), has set in swift motion a torrent of cases recognizing, "under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same-sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex." *Kitchen*, 2014 WL 2868044 at *32. This recognition migrated to Colorado with the recent *Brinkman* decision. *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order).

"[W]hile the public has an interest in the will of the voters being carried out, the public has a more profound long-term interest in upholding an individual's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012). To put it another way, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Even though this Court does not rule on whether Clerk Hall has issued invalid licenses, and while the public interest is clearly served by clerks only issuing clearly valid marriage licenses, the Court cannot find that the public interest is served by granting the TRO or preliminary injunction due to the overarching Constitutional rights at issue. *Kitchen*, 2014 WL 2868044 at *32; *Brinkman v. Long*, Civil Action No. 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order).

(5) The Balance of Equities Does not Favor an Injunction

The balance of the equities analysis viewed from Clerk Hall's legal compliance or non-compliance with the law is similar to the public interest discussion. The *Brinkman* court stayed

execution of its decision and the Tenth Circuit stayed execution of the *Kitchen* case that forms foundation of Clerk Hall's rationale to issue same-sex marriage licenses. Prior to the Tenth Circuit's decision, the U.S. Supreme Court stayed execution of the underlying district court decision. *Herbert v. Kitchen*, 134 S.Ct. 893 (2014).

In addition, unlike the Attorney General of the State of Illinois who granted discretion for county clerks to issue same-sex marriage licenses when the law in Illinois still forbade the practice but a change in law was forthcoming, the Colorado Attorney General has declared Clerk Hall's actions to be unlawful. *See* Letter from Att'y Gen. Lisa Madigan, Office of the Attorney General, State of Illinois to Hon. Stephen M. Bean, County Clerk, Macon County, Illinois (March 4, 2014) (Att'y Gen. did not bar county clerks from issuing marriage licenses after Illinois law found unconstitutional by district judge but prior to effective date of law's revision permitting same-sex marriages). Exhibit A hereto.[11]

The Court also finds historical guidance supporting the State's position in the legal result of Boulder County Clerk Clera Rorex's issuance of marriage licenses to same-sex couples in 1975. *See* Motion Exhibit A. Facing a similar demand as Clerk Hall, Clerk Rorex halted the practice of issuing same-sex marriage licenses after then Colorado Attorney General J.D. MacFarlane ordered her to do so. *Id.* The basis of Attorney General MacFarlane's directive to

[11] Additionally, the attorneys general in Oregon, Virginia, and Nevada have also declined to defend, or have abandoned their defense, of same gender marriage bans in their states. *See, e.g., Gieger v. Kitzhaber,* No. 6:13-cv-018340-MC (D. Oregon), *Geiger* docket No. 47 at paragraph 28 ("State Defendants will not defend the Oregon ban on same-sex marriage in this litigation. Rather, they will take the position in their summary judgment briefing that the ban cannot withstand a federal constitutional challenge under any standard of review); *Bostic, supra,* at 2014 WL 561978 at *2 (". . . .Defendant Rainey, in conjunction with the Office of the Attorney General, submitted a formal change in position, and relinquished her prior defense of Virginia's marriage laws."); *Sevcik at al. v. Sandoval et al,* No. 12-17668 (9th Cir.) (pending appeal), *Sevcik* Appellate Docket at 171 (the Governor and Attorney General of Nevada are withdrawing their brief in support of the appeal, because intervening case law indicated that "discrimination against same-sex couples is unconstitutional.").

Clerk Rorex that same-sex marriages were illegal in Colorado was adopted as a formal opinion of the Attorney General in 1975. Op. Att'y Gen. (April 24, 1975). Exhibit B hereto.

Basically, Clerk Hall grounded her decision on the Tenth Circuit's *Kitchen* ruling but declined to embrace its stay. Unlike her predecessor Clerk Rorex, Clerk Hall defied the directives of the State's chief law enforcement officer. As argued by counsel for the State at hearing, Clerk Hall did not follow established legal procedures and impugned the rule of law.

She has apparently been vindicated, at least for now, by the holding in *Brinkman*. Clerk Hall argues that the equities are in her favor since a stay would deprive same-sex couples of their fundamental right to marry. Response at 17. As discussed in the public interest section above, every post-*Windsor* case that has addressed this issue has found in favor of same-sex litigants, including the only Colorado case. *See* note 10 and accompanying text. Also, while the people of Colorado deserve compliance with the rule of law, they have "a more profound long-term interest in upholding an individual's constitutional rights." *Awad*, 670 F.3d at 1132. As such, the Court cannot find that the balance of the equities favors granting the State's request for expedited relief.

(6) The Injunction Will Preserve the Status Quo Pending a Trial on the Merits

A stay would certainly block Clerk Hall from further issuing marriage licenses to same-sex couples and would return the status quo to the condition pre-June 25, 2014 when Clerk Hall initiated the *new* policy. Motion ¶ 10; Exhibit A. This cannot be rationally disputed.

III. Summary

The State has asked this Court to issue a temporary restraining order and preliminary injunction against the actions of an elected government official. The State must meet a high burden at this early stage in the litigation. For the reasons set forth above, the Court rules that:

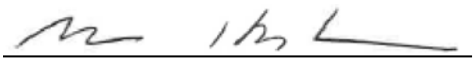
(1) The State has not met its burden and the Court DENIES the motion for a temporary restraining order and preliminary injunction;

(2) As a temporary measure to protect all those affected by this case, the Court adopts the Boulder County Clerk and Recorder's recommendation and ORDERS that Clerk Hall shall identify all same-sex marriages and convey the information as part of Boulder County's monthly reporting to the Colorado Department of Public Health and Welfare, Center for Health and Environmental Information and Services, as well as to the Boulder County Vital Records Office. Clerk Hall shall forward the information prospectively and has up to and including July 17, 2014 to supply information on past same-sex marriages. These offices shall keep the information confidential; and

(3) As a temporary measure to protect all those affected by this case, the Court adopts the Boulder County Clerk and Recorder's recommendation and ORDERS that Clerk Hall shall provide reasonable notice to prospective and past recipients of same-sex marriage licenses that the validity of their marriages is dependent upon whether a court would find that Clerk Hall had authority to allow same-sex marriages.

SO ORDERED this 10th day of July, 2014.

BY THE COURT:



Andrew Hartman
District Court Judge