

<p>DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO</p> <p>1777 Sixth Street Boulder, CO 80302</p> <hr/> <p>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.</p>	<p>DATE FILED: July 23, 2014 8:54 AM CASE NUMBER: 2014CV30833</p> <p>▲ COURT USE ONLY ▲</p> <p>Case Number: 2014CV30833</p> <p>Division: 5</p>
<p>ORDER: DENYING MOTION FOR STAY PENDING APPEAL/RECONSIDERATION</p>	

On July 21, 2014, two weeks after denial of its request for a preliminary injunction against Clerk Hall, the State filed a notice of appeal and has asked this Court for what it has styled “Forthwith Motion for Stay Pending Appeal.” In actuality, the State is asking this Court to reconsider its July 10, 2014 ruling and block Clerk Hall from issuing same sex marriage licenses. For the reasons set forth below, the Court DENIES the State’s request. The State has offered no actual support in favor of reconsideration, more cases have found same sex marriage bans unconstitutional since the Court issued its ruling and the State not met its burden to obtain a stay pending appeal under established Colorado law.

As mentioned in its ruling denying the State’s request for an order enjoining Clerk Hall from issuing same sex marriage licenses, “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.” *Colorado v. Hall*, 14CV30833 (District Court, Boulder County, Colorado, July 10, 2014) (Order Denying Motion for TRO).

Since the State filed its Complaint asking this Court to enjoin Clerk Hall from issuing marriage licenses to same sex couples, a Colorado District Court found the Colorado laws banning same sex marriage unconstitutional, *Brinkman v. Colorado*, 13CV32572 (District Court, Adams County, Colorado, July 9, 2014) (Summary Judgment Order); the Tenth Circuit issued an additional ruling finding Oklahoma’s bans unconstitutional, *Bishop v. Smith*, 14CV05003 & -5006 (Tenth Circuit,

July 18, 2014); a Florida court ruled that Florida's ban is unconstitutional, *Huntsman v. Heavilin*, 14-CA-305-K (16th Judicial Circuit, Monroe County, Florida, July 17, 2014) and U.S. Supreme Court Justice Alito denied a Pennsylvania state official's request to block same sex marriages in that state. *Theresa Santai-Gaffney v. Whitewood*, No. 14A19 (U.S. Supreme Court, July 9, 2014) (order denying application for stay).¹ For support, Justice Alito cited a decision by the full U.S. Supreme Court denying a stay of Oregon's same sex marriage implementation. *Nat'l Organization for Marriage v. Geiger*, 572 U.S. ____ (2014).

Meanwhile, in the *Brinkman v. Colorado* case the District Court denied on procedural grounds the State's request to enjoin the Denver and Adams county clerks from issuing same sex marriage licenses. 13CV32572 (District Court, Adams County, Colorado, July 14, 2014) (Order). On July 18, 2014, upon the State's emergency motion for injunction pending appeal, the Colorado Supreme Court held:

¹ Pennsylvania and Colorado present Alice in Wonderland plotlines that are instructive to this Court's denial of a stay. In Pennsylvania, a Federal District Court struck the ban on same sex marriage as unconstitutional. *Whitewood v. Wolf*, 13CV01861 (M.D. Penn, May 20, 2014) (Memorandum Opinion). Unlike the Colorado Attorney General, Pennsylvania Attorney General Kathleen Kane announced she would not defend the Pennsylvania ban stating the prohibition was "wholly unconstitutional" and she would "endorse equality and anti-discrimination laws." Eilperin, Juliet, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, Wash. Post, July 11, 2013. Attorney General Kane stated in an interview with the Washington Post, "If there is a law that I feel that does not conform with the Pennsylvania state constitution and the U.S. Constitution, then I ethically cannot do that as a lawyer." *Id.* After the *Whitewood* decision issued, Pennsylvania Republican Governor Tom Corbett announced he would not appeal the decision. *Pennsylvania Governor: I Won't Appeal Court's Gay Marriage Ruling*, Assoc. Press, May 21, 2014. In Colorado, Governor Hickenlooper asked Attorney General Suthers to stop his appeals. Parker, Ryan, *Colorado Attorney General Seeks End to 'Legal Chaos' Over Gay Marriage*, Los Angeles Times, June 14, 2014.

Schuylkill County Clerk Theresa Santai-Gaffney then asked the district court for permission to intervene and requested a stay to appeal the decision. The judge denied her request, calling it "specious", "disingenuous" and "a contrived legal argument". *Whitewood v. Wolf*, 13CV01861 (M.D. Penn, May 20, 2014) (Memorandum and Order) at 7, 9. The court continued its admonishment of Clerk Santai-Gaffney, "The Court respects Santai-Gaffney's evidently deep personal disagreement with our decision to strike down the Marriage Laws. That said, we lament that she has used her office as a platform to file the Motion we dispose of today." *Id.* at 9. Clerk Santai-Gaffney appealed arguing, *inter alia*, that the stay entered by the Tenth Circuit in *Herbert v. Kitchen* was precedent for a stay in the Pennsylvania case. See *Whitewood v. Secretary of Penn. Dep't of Health*, 14CV3048 (3d Cir. June 18, 2014) (Order). The Third Circuit Court of Appeals denied her motion stating, "For essentially the reasons set forth in the Opinion of the District Court, the order denying the motion to intervene is summarily affirmed and the appeal is dismissed. Appellant's motion for stay pending appeal is dismissed as moot." *Whitewood v. Secretary of Penn. Dep't of Health*, 14CV3048 (3d Cir. June 26, 2014) (Order) at 2. Clerk Santai-Gaffney then filed the Application to Stay Judgment Pending Appeal with the U.S. Supreme Court that Justice Alito denied. *Theresa Santai-Gaffney v. Whitewood*, No. 14A19 (U.S. Supreme Court, July 9, 2014).

IT IS FURTHER ORDERED that in light of the stay entered by the Trial Court, Defendants Karen Long, in her official capacity as Clerk and Recorder of Adams County and Debra Johnson, in her official capacity as Clerk and Recorder for the City and County of Denver, are hereby stayed under C.A.R. 8 from issuing marriage licenses to same-sex couples pending resolution of this appeal.

Brinkman v. Colorado, 2014SA212 (Colorado Supreme Court, July 18, 2014) (*en banc* Order of Court) at 3 (emphasis added). The Colorado Supreme Court based its ruling upon Colorado Rule of Appellate Procedure 8 which covers procedures when a trial court issues a stay of judgment pending appeal.

The State's assertion in the pending motion that the Supreme Court's July 18, 2014 *Brinkman* ruling is binding on this Court is an improper circular argument. The Supreme Court granted the State's emergency motion to enjoin the Denver Clerk in *Brinkman* premised solely upon the trial court's previous issuance a stay. *Id.* ("in light of the stay entered by the Trial Court . . ."). The order is thus inapposite to the procedural posture of this case and the State's reliance thereupon is misguided. In the instant case, this Court has not enjoined Clerk Hall's issuance of same sex marriage licenses, has not issued a stay and therefore we must analyze the State's request for a stay pending appeal utilizing established factors.

A four-factor test "when considering whether to stay an order denying or granting an injunction" was set forth in *Romero v. City of Fountain*, 307 P.3d 120, 122 (Colo. App. 2011). *Romero* indicated that it was recognizing and adopting federal standards for granting stays. *Romero* identified four factors to be considered by a court in determining whether to grant a stay. *Romero* does not, however, remove the discretion of a trial court to grant a stay. "Consequently, the trial court properly refused to dismiss his suit and acted within its discretion when it stayed the case pending resolution of the appeal." *Rantz v. Kaufman*, 109 P.3d 132, 133 (Colo. 2005). "[A grant of stay] is . . . 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.' ('[T]he traditional stay factors contemplate individualized judgments in each case')." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting, e.g., *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)).

The Court applies the four factor test below:

a. Likelihood of success on the merits

As stated in the Court's July 10, 2014 Order, under the *current* Colorado laws, the State may have a likelihood of prevailing on the merits. However, the States chances of prevailing are rapidly fading since two subsequent rulings (three if you reckon Justice Alito's denial of the Pennsylvania stay) have found same sex marriage bans unconstitutional. *Bishop v. Smith*, 14CV05003 & -5006 (Tenth Circuit, July 18, 2014) (Oklahoma); *Huntsman v. Heavilin*, 14-CA-305-K (16th Judicial Circuit, Monroe County, Florida, July 17, 2014) (Florida); *see also, Theresa Santai-Gaffney v. Whitewood*, No. 14A19 (U.S. Supreme Court, July 9, 2014) (order denying application for stay).

b. The threat of irreparable harm to the State if the stay is not granted

The State has offered no additional support since this Court’s ruling two weeks ago that the same sex marriage licenses issued in Boulder County (or Denver and Pueblo Counties for that matter) have caused any harm to the State whatsoever, let alone irreparable harm. The State claimed “chaos” would ensue if the Court did not bar Clerk Hall from issuing same sex marriage licenses. See Emergency Motion for Injunction Pending Appeal, *State Colorado v. Brinkman*, 14SA212 at 14 (“Each day that County Clerks continue to issue same-sex marriage licenses – and publicly declare those licenses’ validity, despite the State Marriage Laws and the Attorney General’s statements to the contrary – greater social and legal chaos ensues . . .”). “Chaos” means “complete confusion and disorder.” Merriam Webster, <http://www.merriam-webster.com/dictionary/chaos>. The State has simply offered no evidence of any confusion or disorder resulting from same sex couples obtaining marriage licenses in Boulder County.

c. Whether the stay will substantially injure the other parties interested in the proceeding

Clearly, the answer to this variant of the public interest argument discussed in the Court’s July 10, 2014 favors denial of the stay. “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). Thus, granting the stay requested by the State would abridge the Constitutional rights of all same sex couples who seek marriage licenses in Boulder County. See also, *Kitchen v. Herbert*, 2014 WL 2868044 (10th Cir, No. 13–4178, June 25, 2014) *25, 32. (“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. . .”)

d. The Public Interest in Granting the Stay

In the July 10, 2014 Order, this Court found that:

"[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. Ziriox*, 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).

Colorado v. Hall, 14CV30833 (District Court, Boulder County, Colorado, July 10, 2014) (Order Denying Motion for TRO) at 20.

Since July 10, 2014, two more decisions have found same sex marriage to be a fundamental constitutional right. *Bishop v. Smith*, 1405003 & 4-5006 (Tenth Circuit, July 18, 2014) (Oklahoma); *Huntsman v. Heavilin*, 14-CA-305-K (16th Judicial Circuit, Monroe County, Florida, July 17, 2014) (Florida). The State, however, has offered no additional evidence that the public interest would be served by denying same sex couples the right to receive marriage licenses in Boulder County.

All in all, the State has not met its burden for a stay and its request is DENIED.

SO ORDERED this 23d day of July, 2014.

BY THE COURT:



Andrew Hartman
District Court Judge