<table>
<tr><td>DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO
Adams County Justice Center
1100 Judicial Center Dr.
Brighton, CO 80601

REBECCA BRINKMAN and MARGARET BURD
Plaintiffs,

v.

KAREN LONG and THE STATE OF COLORADO
Defendants.

And

G. KRISTIAN MCDANEIL-MICCIO, et. al.
Plaintiffs

v.

STATE OF COLORADO, et. al.
Defendants</td><td>COURT USE ONLY

Case No. 13 -CV-32572

Division: C
Courtroom: 506
And
Denver District Ct.
Case No. 14-CV-30731

MDL Case No. 14MD4</td></tr>
<tr><td colspan="2">SUMMARY JUDGMENT ORDER</td></tr>
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Plaintiffs Rebecca Brinkman (Brinkman) and Margaret Burd (Burd) (collectively Adco Plaintiffs) filed a Motion for Summary Judgment (Adco Motion) on May 2, 2014. The State of Colorado (the State) filed a Cross-Motion for Summary Judgment (State Adco Motion) on May 2, 2014. Adams County Plaintiffs filed a Reply (Adco Response) on May 30, 2014. The State filed a Combined Response on May 30, 2014. Plaintiffs Kristian McDaniel-Miccio and Nan McDaniel-Miccio, Sandra Abbott and Amy Smart, Wendy Alfredsen and Michelle Alfredsen, Kevin Bemis and Kyle Bemis, Tommy Craig and Joshua Wells, James Davis and Christopher Massey, Sara Knickerbocker and Jessica

Ryann Peyton, Jodi Lupien and Kathleen Porter and Tracey MacDermott and Heather Shockey (Denver Plaintiffs) filed a Motion for Summary Judgment (Denver Motion) in Denver County on May 2, 2014. The State filed its Motion for Summary Judgment (Denver State Motion) in Denver County on May 2, 2014. Denver Plaintiffs filed a Response on May 30, 2014. The State filed a Combined Response on May 30, 2014. An Amicus Brief was filed by the Alliance Defending Freedom on May 7, 2014. Governor Hickenlooper filed a Response (Hickenlooper Response) on May 30, 2014. The Court heard oral arguments of the parties on June 16, 2014. The Court, being fully informed finds and orders as follows:

Procedural History

Adams County

Adco Plaintiffs filed their complaint on October 9, 2013. Karen Long, Adams Clerk and Recorder (Long), filed an answer on January 2, 2014. On December 13, 2014 the State filed an Unopposed Motion to Intervene which was granted on December 23, 2013. The State filed an answer on January 6, 2014. Long filed a motion to be excused from the proceedings on January 29, 2014, which was denied on February 27, 2014. On February 13, 2014 the parties filed a stipulation for a proposed case management order which was granted February 14, 2014. The Order provided for a briefing schedule for cross-motions for summary judgment and an opportunity for oral argument. The stipulation provided for the filing of affidavits to be responded to, if appropriate. On April 1, 2014 the parties filed a stipulation to amend the case management order to extend the briefing schedule. Oral argument was set for June 2, 2014. On March 31, 2014 the State filed a Notice of Motion to Consolidate Multidistrict Litigation. The briefing proceeded in accordance with the agreed upon schedule and as set forth above. On May 2, 2014 the MDL Panel made a recommendation to the Chief Justice of the Colorado Supreme Court to consolidate the Denver and Adams County cases and that venue

was proper in Adams County to be assigned to the undersigned District Court Judge. The Order also stayed further proceedings in the respective courts pending the assignment by the Chief Justice. On May 7, 2013 the Alliance Defending Freedom filed a Motion to Intervene and an Amicus Brief. On May 8, 2014 the Order from the Chief Justice consolidating the two cases into Adams County was filed. After motions practice, on May 16, 2014, the Court denied the motion to intervene, but permitted the amicus brief to be filed. By separate Order the Court indicated that it would not consider portions of the amicus brief. By agreement, the date for oral argument was changed to June 16, 2014.

Denver County

Denver plaintiffs filed their complaint on February 19, 2014. Defendant Debra Johnson, Denver County Clerk and Recorder (Johnson), filed an answer on March 12, 2014. The State filed an Answer on April 2, 2014. Governor Hickenlooper filed an answer on April 2, 2014. The State also filed a Notice of Filing of Motion to Consolidate Multidistrict Litigation in Denver and Adams counties on April 2, 2014. As previously noted, the cases were ordered consolidated by the Chief Justice on May 8, 2014 and oral argument was set for June 16, 2014.

The Parties

Adco Plaintiffs

Brinkman is a female and a resident of Adams County, Colorado. She wishes to marry her long-time partner, Burd, whom she loves and has lived with continuously since 1986. She and Burd are not related to each other and have not previously been married.[1] Burd is a female and a resident of Adams County, Colorado. She wishes to marry her long-time partner, Brinkman, whom she loves and has lived with continuously since 1986.[2] On October 30, 2013 Brinkman and

[1] Brinkman affidavit.
[2] Burd affidavit.

Burd went to the marriage license desk at the office of the Adams County Clerk and Recorder and asked for a marriage license application. They were prepared to present the clerk with proof of their names, gender, address, social security numbers and dates and places of birth. They each presented their driver's license when requested and had sufficient funds to pay the fee for the marriage license. The deputy clerk advised them that they could not get married to each other because they were both female. She said they could only apply for and get a license for a civil union. They declined to obtain the civil union because it was not the same as marriage.[3]

Denver Plaintiffs

Denver Plaintiffs, Tracey MacDermott and Heather Shockey; Wendy and Michelle Alfredsen; Tommy Craig and Joshua Wells; Jodi Lupien and Kathleen Porter; and Christopher Massey and James Davis (Unmarried Plaintiffs), are each in a committed same-sex relationship and reside in Colorado. Each couple desires to enter into a marriage that is recognized as valid under Colorado law. They have each completed and signed an application for a marriage license and have attained the age of 18 years old, and have the ability to pay any applicable fees for a marriage license. The Unmarried Plaintiffs meet all of the statutory requirements for marriage, except they are same-sex couples.

In February 2014 the Unmarried Plaintiffs appeared at the Denver Office of the Clerk and Recorder to apply for marriage licenses. A deputy of the Denver Clerk and Recorder declined to issue marriage licenses to the Unmarried Couples because they are same-sex couples and their licenses would not be valid because Colorado law does not recognize same-sex marriages.[4]

Denver Plaintiffs Amy Smart and Sandra Abbott; Kevin and Kyle Bemis; Kris

[3] Brinkman and Burd affidavits.
[4] Parties' Stipulated Facts for Summary Judgment, ¶¶1, 3, 6 and 7.

and Nan McDaniel-Miccio; and Sara Knickerbocker and Ryann Peyton (Married Plaintiffs) were each married in a state that permits same-sex marriage, are in committed same-sex relationships and reside in Colorado. They have marriage certificates in the states where they were married. Each couple that was married out of state desires their marriage to be recognized as valid under Colorado law.[5]

Denver Plaintiffs Amy Smart and Sandra Abbott; Wendy and Michelle Alfredsen; Jodi Lupien and Kathleen Porter; and Sara Knickerbocker and Ryann Peyton are raising children together. Denver Plaintiffs Christopher Massey and James Davis are expecting the birth of their first child in July 2014.[6]

Karen Long

Long is the Adams County Clerk and Recorder. In her answer to the complaint she stated:

> Defendant, Adams County Clerk and Recorder, is a constitutional and statutory officer and has no authority to disregard Colorado law. Defendant takes no position on any substantive issue raised in this matter and will follow any order that this court deems proper. Since the Clerk and Recorder does not plan to actively defend this case, she does not plan to participate in any discovery or briefing and asks that she be excused from the requirements of Rule 16 and Rule 26 and be excused from attending future court dates that may be set in this case. The Clerk and Recorder will cooperate with any other party or the Court to the extent that she has relevant information that may be helpful to resolution of this case.[7]

Debra Johnson

Johnson is the Clerk and Recorder for the City and County of Denver. As the Clerk and Recorder she is responsible for complying with Colorado law and acts under color of state law when issuing marriage licenses.

State of Colorado

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[5] Parties' Stipulated Facts for Summary Judgment, ¶8.
[6] Parties' Stipulated Facts for Summary Judgment, ¶¶11 and 12.
[7] Karen Long Answer, p. 3, Disclaimer.

The State of Colorado is a state with its capital in Denver, Colorado. The State has enacted ordinances and policies that extend protections and benefits based upon, or otherwise recognize, marital status; however, relying on art. II, § 31 of the Colorado Constitution and C.R.S. §§ 14-2-104(1)(b), and 14-2-104(2), the State does not allow same-sex couples to marry or recognize the marriages of same-sex couples.

John Hickenlooper

Defendant John W. Hickenlooper, Jr., is Governor of the State of Colorado. He is responsible for upholding and ensuring compliance with the state constitution and statutes prescribed by the legislature, including Colorado's laws barring same-sex couples from marriage and refusing to recognize the valid out-of-state marriages of same-sex couples. Governor Hickenlooper also bears the authority and responsibility for the formulation and implementation of policies of the executive branch. [8]

The Complaints

Adco Plaintiffs

The Adco Plaintiffs' complaint alleges that the first claim for relief is brought pursuant to 42 U.S.C. § 1983, asserting that the Colorado statute and constitutional amendment prohibiting same-sex marriages constitute a form of gender discrimination. Further, the laws violate the Equal Protection and Due Process provisions of the Fourteenth Amendment to the United States Constitution. The second claim for relief seeks a declaration pursuant to the Colorado Uniform Declaratory Judgments Act that C.R.S. §14-2-104(1)(b) and (2) and art. II, §31 of the Colorado Constitution arbitrarily, capriciously and intentionally discriminate against the Adco Plaintiffs. The Adco Plaintiffs sought a preliminary and permanent injunction mandating the Adams County Clerk and Recorder to issue a

[8] Answer of John W. Hickenlooper, Jr.

marriage license to the Adco Plaintiffs.

Denver Plaintiffs

The Denver Plaintiffs' first claim for relief alleged that Colorado's ban on marriage by same-sex couples deprives the Unmarried Plaintiffs their rights to due process. The second claim for relief alleged that Colorado's failure to recognize the marriage of the Married Plaintiffs violates their right to due process. The third claim for relief alleged that Colorado's ban on marriage by same-sex couples deprives the Unmarried Plaintiffs their rights to equal protection of the laws. The fourth claim for relief alleged that Colorado's failure to recognize the marriage of the Married Plaintiffs violates their right to equal protection of the laws. The fifth claim for relief sought a declaration that Colorado's laws violate the Denver Plaintiffs' constitutional rights. The Denver Plaintiffs sought an injunction precluding enforcement of the laws.

The Challenged Laws

Colorado's Statute

In 2000, the Colorado legislature amended the Uniform Marriage Act, C.R.S. §§ 14-2-101 *et seq.*, by adding paragraph (1)(b) to section 14-2-104. C.R.S. §14-2-104 reads as follows:

> (1) Except as otherwise provided in subsection (3) of this section, a marriage is valid in this state if:
> (a) It is licensed, solemnized, and registered as provided in this part 1; and
> (b) It is only between one man and one woman.
> (2) Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state.
> (3) Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman:
> (a) Entered into prior to September 1, 2006; or
> (b) Entered into on or after September 1, 2006, that complies with section 14-2-109.5.

The Colorado Constitutional Amendment

At a general election on November 7, 2006 Colorado voters approved Amendment 43. By proclamation of the Governor on December 31, 2006, the proposal became art. II, §31 of the Colorado Constitution. It reads as follows:

> Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

Brief Summary of the Parties' Positions

Adco Motion

The right to marry the person of your own choosing is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment. U.S. CONST. amend. XIV. The United States Constitution states that, "The constitution and laws of the United States…shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, § 2. Any state law which infringes on rights guaranteed by the United States Constitution is invalid under the Supremacy Clause of Article VI. U.S. CONST. art. VI, cl. 2. The Supreme Court of the United States in *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) held that our federal constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse."

A long and uninterrupted line of Supreme Court decisions recognizes that the right to marry is a "fundamental" right protected by both the substantive provisions of the Due Process Clause and by the Equal Protection Clause of the Fourteenth Amendment. *See, e.g. Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., Brennan, J. and Warren, C.J., concurring) ("The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.").

Laws which abridge fundamental rights are subject to strict scrutiny analysis under the Due Process Clause. Such laws can only survive if the government demonstrates that they are "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). No state since *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) has been able to justify its ban under even the rational basis test, much less under the strict scrutiny test.

The Enabling Act which authorized Colorado's admission to the Union empowered the citizens of Colorado to adopt a constitution and form a state government. Section 4 states, in part, that, "provided that the constitution shall be republican in form … and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." The statute in question and the Constitutional Amendment violate the principles of the U.S. Constitution. The mandate that the Constitution "neither knows nor tolerates classes among citizens" is the starting point for any Equal Protection analysis. Same gender couples are similarly situated to opposite gender couples for purposes of Equal Protection analysis.

A class-based Equal Protection challenge such as the one raised here generally requires a two-step analysis. The Court must first determine whether the challenged state action intentionally discriminates between groups of persons. Secondly, the Court must determine whether the state's intentional decision to discriminate can be justified by reference so some upright government purpose. *SECYS, L.L.C. v. Vigil*, 666 F.3d 678, 685-86 (10th Cir. 2012).

Somewhere between the "strict scrutiny" test, which applies to suspect classifications such as race, alienage and religion, and the rational basis test, lies intermediate or heightened scrutiny, which applies to "quasi-suspect" classes. The intermediate level of scrutiny upholds state laws only if they are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461

(1988). "Substantially related" means that the explanation must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Two primary factors must be satisfied for heightened scrutiny to apply: First, the group must have suffered a history of invidious discrimination. Second, the characteristics which distinguish the group's members must bear no relation to their ability to perform or contribute to society. A third consideration, used less often, is whether the law discriminates on the basis of "immutable…or distinguishing characteristics that define persons as a discrete group." A fourth consideration, also used less often, is whether the group is "a minority or politically powerless." Adco Plaintiffs analyzed each of the four factors.

The Adco Plaintiffs are members of a quasi-suspect class and the heightened scrutiny analysis must be applied. Even though *Windsor* did not specify that it had applied such a test, it did not apply a true rational basis review. *See Windsor*, 133 S. Ct. at 2718. Adco Plaintiffs noted several other decisions issued post-*Windsor* where the heightened scrutiny test had been adopted. It is entirely proper under this standard of review to consider the purpose behind any law which discriminates against a politically unpopular minority. Even if this Court declines to find that homosexual persons are a quasi-suspect class and applies intermediate scrutiny, it must still "carefully consider" not only the relationship between the marriage bans and the proffered reasons, but the legislative and political histories which led to their enactments as well as their actual purpose and effect.

Like DOMA, the expressed purpose of the amendment is to discriminate against an unpopular minority by denying members of the minority access to a right which the United States Supreme Court has repeatedly said is "fundamental." Under any reading of *Romer v. Evans*, 517 U.S. 620 (1996) and *Windsor*, these laws cannot stand constitutional scrutiny and must be stricken.

The State's post-hoc attempt to justify its discrimination is implausible. As enunciated in the State's amicus brief in *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. 2014), the State claims that "[T]he exclusive capacity and tendency of heterosexual intercourse to produce children, and the State's need to ensure that those children are cared for, provides that rational basis." Brief of the State of Indiana, Alabama, Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, Oklahoma and South Carolina as *Amici Curiae* in Support of Reversal at 13, *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. 2014) (hereinafter, State's Amicus Brief). Such an argument ignores that many heterosexual couples who marry without the intent or ability to naturally procreate children are nonetheless allowed to marry. This "responsible procreation" justification has been raised by many other states in defending their similar bans on same gender marriages and has failed in every case. Colorado law is devoid of any proscription on parenting by same gender couples and the Uniform Parentage Act, C.R.S. §19-4-101, expressly allows for two parents of the same gender. The State allows same gender couples to adopt children, to beget or give birth to children through artificial means or surrogacy and to retain custody after a failed heterosexual marriage.

The fact that the State has created two classes of legally recognized relationships, marriages and civil unions, is compelling evidence they are not the same. If civil unions were truly the same as marriages, they would be called marriages and not civil unions. If they were the same, there would be no need for both of them. In *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 412 (Conn. 2008), the Court stated, "[W]e conclude that in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and

homosexual couples into separate institutions constituted cognizable harm." The fact that Colorado denies same gender couples the same right to apply for federal benefits that it grants to opposite gender couples is a violation of the Equal Protection Clause.

Denver Motion

Colorado bans same-sex marriages in two ways. First, Colorado law prevents county clerks from issuing marriage licenses to same-sex couples (the Celebration Ban). Second, Colorado refuses to recognize same-sex marriages legally entered in other jurisdictions (the Recognition Ban) (collectively, the Marriage Bans).

The Marriage Bans harm Denver Plaintiffs and other same-sex couples and their children. The inability of Unmarried Plaintiffs to be legally married in Colorado denies them certain rights and benefits that validly married opposite-sex couples enjoy. Children of same-sex couples are stigmatized and humiliated for being raised by the targeted same-sex couples.

Colorado's Marriage Bans are unconstitutional under *Windsor* because they are based on prejudice. Therein the Supreme 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. Voters considering Amendment 43 were told the amendment was "necessary to avoid court rulings that expand marriage beyond one man and one woman in Colorado." COLO. CONST. art. II, § 31. This constitutional amendment was adopted even though the legislature had already enacted a statutory provision with the identical effect. This historic fact evidences a clear intent to ensure that gay and lesbian Coloradans be preemptively denied rights under the Constitution. The Recognition Ban is invalid under *Windsor* because Colorado dramatically altered its inter-state relationships to discriminate only against same-sex couples.

Same-sex couples legally married in the other states have their marriages dissolved and replaced with civil unions upon entry into the state. By operation of law alone, Colorado strips them of certain legal rights and protections as well as the "dignity and status of immense import" conferred upon them by marriage. *Windsor*, 133 S. Ct. at 2675.

Since *Windsor*, every single court to evaluate same-sex marriage bans has found them unconstitutional, either under the federal or relevant state constitutions. The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. CONST. amend. XIV, § 1. The Supreme Court's instruction in *Windsor* that the states can no longer single out gay and lesbian relationships for second-class status makes it unnecessary to apply traditional heightened scrutiny under the Equal Protection Clause. Nevertheless, Supreme Court precedent requires this Court to apply that test to classifications like the Marriage Ban and the Celebration Ban, because they discriminate on the basis of both sexual orientation and gender. This heightened standard shifts the burden to the state to demonstrate that the ban is "substantially related to an important government objective." *Jeter*, 486 U.S. at 461. In a footnote it was noted that the State has admitted that its justification cannot meet strict scrutiny.[9] When the four traditional criteria used by the Supreme Court to determine whether a particular group qualifies as a quasi-suspect class are applied to homosexuals, the conclusion is that classification based on sexual orientation requires at least heightened scrutiny. Denver Plaintiffs identified a plethora of courts which have now reached that same conclusion. The Denver Motion analyzed those four criteria and concluded that gays and lesbians are a suspect or semi-suspect class entitled to protection of heightened scrutiny.

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[9] Denver Motion, p. 15, fn. 2.

The State cannot meet its burden under heightened scrutiny given that the Marriage Ban bears no rational relationship to any conceivable government interest. Although the Court should apply the heightened scrutiny test, the Marriage Ban lacks even a rational basis. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. A state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Every court to consider whether nearly identical marriage bans pass rational basis review following the *Windsor* decision has concluded that they do not.

Tradition alone cannot form a rational basis for upholding the marriage ban. *Heller v. Doe*, 509 U.S. 312, 327 (1993). "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence v. Texas*, 539 U.S. 558, 577-78 (citing *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., Brennan, J., Marshall, J., and Stevens, J., dissenting)).

There can be no doubt that same-sex couples are equally equipped to raise healthy, happy children as opposite-sex couples. It is the State's policy to encourage same sex couples to foster and adopt children in the government's custody.

The State's second conceivable rationale for the Marriage Bans related to children is that restricting the institution of marriage to opposite-gender couples will "encourage potentially procreative couples to raise children produced by their

sexual union together." State's Amicus Brief at 15. There is no logical reason to believe extending the marriage right to all couples would have this effect. As the *Kitchen* court explained, "It defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts." *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1211 (D. Utah 2013).

The State's Celebration Ban denies plaintiffs their fundamental right to marry. Denver Plaintiffs addressed a long line of cases declaring that the right to marry is a fundamental right. Marriage is also a fundamental right to marry the person of your choosing. "Same-sex marriage is included within the fundamental right to marry." *De Leon v. Perry*, 975 F.Supp.2d 632, 660 (W.D. Tex. 2014). The history of *Loving* confirms that the fundamental right to marry cannot be defined "in so narrow a fashion that the basic protections afforded by the right are withheld from a class of persons … who historically have been denied the benefit of such rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008).

Colorado's Recognition Ban denies plaintiffs their right to remain married. "[O]nce you get married lawfully in one state, another state cannot summarily take your marriage away, because the right to remain married is properly recognized as a fundamental liberty interest protected by the Due Process Clause of the United States Constitution." *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 973 (S.D. Ohio 2013). The Recognition Ban denies same-sex couples their fundamental right to travel. Like voting, the right to marry is a fundamental right and the Recognition Ban unconstitutionally penalizes the exercise of the right to travel by forcing married couples to choose between moving to Colorado and remaining married. Defendants must show that the Marriage Bans are "necessary to promote a compelling state interest and do[]so in the least restrictive manner possible." *Romer*, 882 P.2d at 1341.

Civil unions are a separate, second-class institution which does not confer the same benefits and protections as marriage. "The history of our nation has demonstrated that separate is seldom, if ever, equal." *Opinions of the Justices to the Senate,* 802 N.E.2d 565, 569 (Mass. 2004).

State Adco and Denver Motions[10]

The State opened its Motion by declaring that what is at stake is marriage, not homosexuality. Individuals' commitment to love one another is the central purpose of marriage as a personal institution, but that is not the purpose of marriage as a governmental institution. "Government marriage" is important, but its purposes are more limited than the overall concept of marriage. Government's role in marriage is not about recognizing parties' love or conferring approval on an individual's choice of a companion. Government marriage is an attempt to deal with a problem, and one that has become worse in recent years: the creation of children by parents who are not committed to raising them. This case is not about homosexuality, and it is not even about marriage in general. It is about the narrower issue of governmental marriage, and the problem caused by uncommitted opposite-sex couples that it seeks to address. It is also about the courts' historic and wise recognition of two important principles: the danger of upsetting settled understandings and historical practices and the limited role the judiciary must play in a democratic society.

Plaintiffs must convince the court not only that Colorado's marriage laws may be or even probably are unconstitutional they must prove it "beyond any reasonable doubt," citing *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). Plaintiffs will argue that heightened scrutiny should apply to the question of same sex-marriage. Most

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[10] In a footnote on the first page of the State's Motions it was reflected that the Motions were identical. The Court will refer to the motions in the singular.

laws do not trigger heightened scrutiny and are reviewed by courts only under the limited rational basis. All laws draw lines and treat people differently—the question is which lines or classifications are permissible and which are not. That means plaintiffs can prevail if they establish beyond a reasonable doubt that either sexual orientation is a suspect classification, or that the right to marry anyone of one's choosing is a fundamental right. As with most laws, Colorado's marriage laws could not survive if strict scrutiny were applied. This case turns on the level of scrutiny the Court decides to apply.

The trilogy of cases, *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003) and *United States v. Windsor*, 133 S. Ct. 2675 (2013) gave the Supreme Court the opportunity to declare either that sexual orientation is a suspect classification, or same-sex marriage is a fundamental right, or both, but it flatly did not. At most these cases reaffirm the states' sovereign power to define and regulate marriage. Colorado's marriage laws memorialize its citizens' traditional perspective on marriage and the historically unquestioned principle that marriage is a one-man, one-woman institution.

Windsor did not expand the scope of fundamental rights and it did not declare sexual orientation a suspect class. The Supreme Court's decision does not require states to repeal their own similar definitions of marriage and did not expand the scope of constitutionally protected fundamental rights.

It is well established that the only suspect classifications demanding heightened scrutiny under the Equal Protection Clause are race and related proxies such as national origin, religion and gender, often called a quasi-suspect class. Before *Windsor* every Federal Circuit rejected the argument that sexual orientation should receive heightened scrutiny. The Supreme Court's own cases, including *Windsor*, have never applied heightened scrutiny to this classification, instead applying rational basis review.

Plaintiffs are simply not similar to opposite sex couples in all relevant respects when it comes to the governmental institution of marriage. The reason for the government to recognize marriage is not to recognize the love between the participants, but to encourage two people who might create and bring into society a child to remain committed to one another even if their personal commitment cools. The argument that Colorado's marriage laws discriminate on the basis of gender fails. Federal and many state courts have rejected the argument that traditional marriage laws discriminate on the basis of gender, as opposed to sexual orientation. Defining marriage as the union of a man and a woman does not discriminate on the basis of sex because it treats men and women equally—each man or woman may marry one person of the opposite sex and each man or woman is prohibited from any other marital arrangement.

If a statute does not abridge a fundamental right, it will withstand judicial scrutiny if it bears a "reasonable relation to a legitimate state interest." *Washington v. Glucksberg*, 521 U.S. 702 , 722 (1997). *Loving* does not open the door to same-sex marriage, but affirms that marriage is a traditional institution subject to the State's police powers. Instead, plaintiffs must rely on the *Loving* court's statement that Virginia's law also violates the Due Process Clause because marriage is a fundamental civil right. The one paragraph devoted to Due Process recognized only that race cannot be used as a basis for infringing on the fundamental right to marry.

Colorado's marriage laws were not borne of hatred, animus or supremacy; rather they stem from the traditional view that marriage is linked to procreation and biological kinship. Throughout Colorado's existence, marriage as a one-man, one-woman institution has been a foregone conclusion. Although same-sex relationships are a basic and intimate exercise of personal autonomy, same-sex governmental marriage is not deeply rooted in Colorado's history and traditions, or

the Nation's for that matter. The right to marry someone of the same sex is not a liberty interest "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Colorado, like many other states, has placed restrictions on those who may marry by adopting laws proscribing certain people from marrying despite their love and commitment.

Legal precedent requires the application of the rational basis test. Rational basis is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). The laws must be given a "strong presumption of validity." *Heller*, 509 U.S. at 320. The law must be upheld "so long as there is a plausible policy reason for the classification." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Laws should not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [classifications] were irrational." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000).

Colorado has a rational basis in seeking to encourage social institutions that help avoid the social problems of children being born and raised without both parents around to raise them. The traditional institution of marriage serves the state's important governmental interest in discouraging the creation of children through those relationships outside the optimal environment for children to be born into and raised to adulthood. Colorado has numerous laws based on the interest of encouraging mothers and fathers to be responsible parents to their children whenever possible. But how to help raised children whose biological parents have failed to take care of them is not the problem that government marriage aims to mitigate. The problem is, again, that opposite-sex couples are apt to create such children, and left to their own devices they are not always as committed to long-

term parenting as society wants and needs. Government marriage is meant to try to fight the instinct to create children without remaining committed to their upbringing into adulthood.

Colorado has many other rational bases for continuing to adhere to the traditional marriage structure. The value of gender diversity in parenting; encouraging adequate reproduction for society to support itself; and promoting stability and responsibility in marriages between mothers and fathers for their children's sake.

Amicus Brief of Alliance Defending Freedom

The Amicus Brief tracked many of the same arguments and legal authority cited by and relied upon by the State. As previously noted in the Court's Order of May 30, 2014:

> There were approximately 35 separate publications, treatises, articles, books and other materials referenced within the Amici brief. The full text of these materials was not attached and only snippets or paraphrases were provided. The Court has no intention of retrieving any of the articles, books or materials for reading. Inasmuch as only select phrases were referenced, there is no way to determine for certain that any of the materials were addressed to the interpretation of the law or the lawmaking process. The titles of most of the publications, however, clearly suggest that they are addressed to sociological and moral issues involved in marriage, divorce and adolescents.
> The Court finds that the publications, studies and articles cited in the Amici brief are not legislative facts and will not be considered in ruling on the cross-motions for summary judgment.

Adco Response

The State argued that the standard for review for plaintiffs' Equal Protection claims is the rational basis test.[11] Plaintiffs believe that heightened Equal Protection scrutiny is appropriate. The State's claims that no Circuit Court of

[11] The State's argument regarding proving unconstitutionality beyond a reasonable doubt only applies to challenges under the state constitution. Adco Plaintiffs' claims are brought under the federal constitution and the reasonable doubt standard does not apply.

Appeals has applied heightened scrutiny to classification based on sexual origination, was based on cases handed down before the *Windsor* decision. In the *Windsor* opinion in the Second Circuit, the court held that "our conclusion [is] that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect … [.]" *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012). When the Supreme Court affirmed the judgment of the Second Circuit, it did not comment on this holding, much less disapprove of it. Adco Plaintiffs addressed the line of cases addressing the heightened scrutiny standard. Although *Windsor* did not identify the appropriate level of scrutiny, its discussion is manifestly not representative of deferential review. Far from affording the statute the presumption of validity, *Windsor* found DOMA unconstitutional because "no legitimate purpose overcomes the purpose and effect to disparage and to injure." *Windsor*, 133 S. Ct. at 2696.

Even if this Court declines to find that homosexual persons are a quasi-suspect class and applies true intermediate scrutiny, it must still carefully consider not only the relationship between the marriage bans and the proffered reasons, but the legislative and political histories which led up to their enactment as well as their actual purpose and effect.

The legislative record is now on file and demonstrates that the purpose and intent of Colorado's ban on same gender marriage was solely intended to ban same gender marriage and thus to deny same gender couples the same right to marry the legislature gave to heterosexual couples. No other purpose appears anywhere in the legislative records. It was not enacted to protect children or foster an ideal child-rearing environment. In *Windsor*, the Supreme Court noted, "[T]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group can' justify disparate treatment of that group … In determining whether a law is motivated by an

improper purpose or animus, '[d]iscrimination of an unusual character' especially requires careful consideration." *Id*. at 2693.

A fundamental requirement of the Equal Protection Clause is that all laws must be enacted to further a legitimate governmental purpose and not to disadvantage a particular group. "When the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally service some other neutral governmental interest cannot save it from unconstitutionality." *Obergefell*, 962 F.Supp.2d at 995. When a law has the purpose and effect of imposing legal disabilities on same gender couples, courts may not uncritically defer to the state's proffered justification, but must determine whether any justification exists that is sufficiently strong to justify the harms imposed on same gender couples and their children. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 482-83 (9th Cir. 2014).

Under the rational basis test, a state law does not violate the Equal Protection Clause if the statutory classification is rationally related to a legitimate governmental purpose. *Heller,* 509 U.S. at 320. The State cannot show that the marriage ban is rationally related to its justification. The State cannot "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 447. Every state and federal court which has applied the rational basis test to marriage exclusion laws post-*Windsor* has found that the laws do not satisfy even the deferential test because there is no logical connection between the stated purpose and the effect of the laws.

The State has pronounced that this case is about the narrower issue of government marriage, and the problem caused by uncommitted opposite-sex couples that it seeks to address. The State fails to explain how excluding same gender couples from "government" marriage will encourage opposite gender,

procreative couples to marry each other before having children. This argument is the legal equivalent of grasping at straws. The State's argument ignores the fact under its definition of "government" marriage, it still allows, and always has allowed, couples to marry who have neither the intent nor the ability to procreate. Unwed couples are as free to procreate after the Marriage Bans were enacted as they were before. The State's definition of marriage flies in the face of Supreme Court decisions defining the real meaning of marriage. Every case since *Windsor* to address the question of same gender marriage has held that marriage is not a child-centric institution, since infertile men and women and couples who choose not to procreate are allowed to marry.

Denver Response

The State has offered no support for its *post hoc* definition of marriage. The State has attempted to create a new definition of marriage, untethered to history or common sense. Civil marriage is far broader than the State's narrow definition. As held in *Griswold*:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486.

The Marriage Bans cannot withstand Equal Protection scrutiny under any standard of review. As the Ninth Circuit has now recognized, the Supreme Court's decision in *Windsor*, while not expressly using the phrases "heightened scrutiny" or "suspect class," plainly applied a more exacting analysis to the Federal Marriage Ban than traditional rational basis review. *SmithKline*, 740 F.3d at 483.

Because the Marriage Bans single out individuals for differential treatment based on a suspect classification, they merit heightened scrutiny. Same-sex

couples meet the traditional four part test for membership in a suspect class. "[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). In trying to avoid application of heightened scrutiny, the State claims that heightened scrutiny does not apply because the Marriage Bans do "not discriminate on the basis of sex because they "treat [] men and women equally." This argument has been rejected by the Supreme Court in *Loving*.

There is no rational relationship between any legitimate governmental purpose and the Marriage Bans. According to the State, the sole purpose of civil marriage is to discourage "procreating without commitment" and since "same sex couples do not significantly contribute to" this problem, "the state's use of marriage to help mitigate it sensibly does not include them." The Marriage Ban exacerbates the very problem the State purportedly seeks to solve by insisting that the children of same-sex couples continue to be denied the stability and dignity of their parents' marriage. Further, the State's asserted interest is belied by its own laws. No state, including Colorado, restricts marriage to the procreative and the fertile.

The State has misrepresented the holding and history of *Loving*. Seven federal courts have relied on *Loving* in finding that marriage bans, like the ones at issue here, violate same-sex couples' fundamental right to marry. Further, *Loving* is not limited to racial issues. Instead, it went farther and held that the laws violated the Loving couple's right to marry. The Supreme Court has stated that, "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance to all individuals." *Zablocki v. Redhail,* 434 U.S. 374, 383 (1978).

Plaintiffs are not seeking a "boundary-less" right to marry whomever they may desire, as claimed by the State. Instead, plaintiffs seek to exercise the same right enjoyed by opposite-sex couples, the right to choose one's spouse subject to reasonable restrictions. The State's notation of laws limiting marriage highlights the difference between legitimate limitations on marriage and the Marriage Bans. The Marriage Bans target same-sex couples based on their sexual orientation.

The Hickenlooper Brief

While the State's Attorney General is defending the same-sex marriage ban, the Governor is doubtful that Amendment 43 and related statutes are constitutional based upon evolving jurisprudence. This dispute inevitably may require the Court to undertake an analysis about what level of scrutiny to apply under the Due Process and Equal Protection Clauses of the United States Constitution. Regardless of the level of scrutiny that is applied—no state ban on same-sex marriage has survived in the wake of *Windsor*. Rather than weighing in on these issues which have been thoroughly addressed by the parties, the Governor's brief addressed whether the four claims brought against the Governor pursuant to 42 U.S.C. § 1983 should stand. Plaintiffs are required to show that the Governor personally participated in the deprivation of their civil rights. First, a government official must be exercising some grant of power from the state to be held liable. The second part of the inquiry focuses on whether a party is a state actor. The Governor does not contest that he is a state actor, but the missing piece is whether he has exerted any power granted to him to deny plaintiffs their civil rights. Federal courts have required some level of "personal participation" for a governor to be held liable in his official capacity under 42 U.S.C. § 1983. The Governor did not direct the clerk and recorders to act in a certain manner. Likewise the Governor does not participate in the enforcement of Colorado's marital laws. The Governor's generalized duty to enforce the laws is insufficient to attach liability

under 42 U.S.C. § 1983 for Colorado's same-sex marriage ban.

The State's Combined Response

One thing holds true—marriage remains a matter within the State's sovereign power to regulate and, consequently, the states may, and do, limit who may marry who based on a number of factors. With the growing number of lower court decisions that have struck other states' laws that either ban or do not recognize same-sex marriage, a temptation to simply declare Colorado's marriage laws unconstitutional may exist. Courts are not arbiters of moral and political debates, which this case presents. Before this Court wades into the moral and political debate inherent in this lawsuit, consider the following: Can a rational person believe that redefining marriage, so as to belittle it to no more than a status symbol or congratulatory certificate, could damage the institution of marriage and its role in helping to encourage heterosexual couples to stay together to raise the children they create?

Plaintiffs relied heavily on an isolated portion of the *Windsor* decision to support their argument that Colorado's marriage laws are "designed to deprive same sex couples full protection and benefit of the law and of social recognition" and serve to injure, stigmatize, demean and degrade same-sex couples.

Colorado has no obligation to recognize marriages that contradict its strong policy interests. The "full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events with it, the conflicting status of another state. *Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

The State again argued that the sexual orientation is not a suspect class requiring application of heightened scrutiny. The Supreme Court has never concluded that sexual orientation constitutes a quasi-suspect or suspect class. The rational basis review should be applied and the laws upheld. Colorado's definition of marriage supports conceivable and legitimate state ends. The State has an

interest in maximizing the number of children that are raised by their biological parents.

The echo-chamber of cases coming after *Windsor* all share the same flaw of misreading the Supreme Court's *Windsor* opinion, and often, engaging in taking sides in the moral and social debate about marriage that has little to do with relevant constitutional claims.

If government marriage is truly about love and commitment, then the message communicated by the State will undermine the role of marriage as a prophylactic for inevitable sexual relations between opposite-sex couples that are naturally capable of producing children. Marriage as an institution based on emotion will also communicate that marriages can be discarded later in time, due to nothing more than the emotional whims of the parties to the marriage.

Plaintiffs have no answer to *Glucksberg*. *Glucksberg* remains the binding, definitive rule that this Court must determine if the claimed right is (1) "objectively, deeply rooted in this Nation's history and traditions," and (2) the right is carefully described.

Issues

1. Are the Challenged Laws[12] unconstitutional?
    a. Do the Challenged Laws violate plaintiffs' due process rights?
    b. Do the Challenged Laws violate plaintiffs' equal protection rights?
2. Should civil union survive as a separate but equal institution?
3. Should Denver Plaintiffs' claims against Governor Hickenlooper be dismissed?
4. Should the Court issue a stay of its ruling?

[12] C.R.S. §14-2-104(1)(b) and (2) and Article II, §31 of the Colorado Constitution.

Principles of Law

C.R.C.P. 56(c): Summary Judgment and Rulings on Questions of Law—Motion and Proceedings Thereon

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Standard of Review

Summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Peterson v. Halsted*, 829 P.2d 373, 376 (Colo. 1992). The court must base its evaluation of genuine issues of material fact on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." C.R.C.P. 56(c). The trial court may not assess witness credibility and the weight of evidence when determining a motion for summary judgment. *Anderson v. Vail Corp.*, 251 P.3d 1125, 1127 (Colo. App. 2010) (quoting *Kaiser Found. Health Plan of Colo. v. Sharp*, 741 P.2d 714, 718 (Colo. 1987)).

The moving party bears the initial burden of establishing that no genuine issue of material fact exists; any doubt should be resolved in favor of the non-moving party. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.,* 901 P.2d 1251, 1256 (Colo. 1995). This must be an affirmative demonstration of an absence of evidence in the record. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, n. 2 (Colo. 1987). Once the moving party meets its burden, the opposing party then must establish that there is a genuine issue for trial. *Id*. All doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

Stipulation and Agreement of the Parties

On page 2 of the Adco Motion it was recited as follows:

> The parties have stipulated that this case may be decided on summary judgment because there are no disputed issues of material fact and because the questions it presents are questions which arise under the Constitutions and laws of the United States and the State of Colorado. C.R.C.P. 56.

In a footnote on the first page of the State's Adco Motion it was recited*, inter alia*, that:

> Because both cases are legally and factually similar, and no material facts are disputed, the State is filing identical summary judgment briefs in the two cases in the interest of judicial efficiency.

Analysis

1. Are the Challenged Laws unconstitutional?

a. Do the Challenged Laws violate plaintiffs' due process rights?

> The [Due Process] Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.

Glucksburg, 521 U.S. at 720.

> As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 846-47 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927)).

> As we stated recently in *Flores,* the Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all,* no matter

> what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Glucksberg, 521 U.S. at 721 (quoting *Flores*, 507 U.S. at 302 (1993).

Marriage as a fundamental right

> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.

Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942)).

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage, e.g., *Zablocki v. Redhail, supra*; childbirth, e.g., *Carey v. Population Services International, supra*; the raising and education of children, e.g., *Smith v. Organization of Foster Families, supra*; and cohabitation with one's relatives, *e.g.*, *Moore v. East Cleveland, supra*. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."

Roberts v. U.S., 468 U.S. 609, 619-20 (1984).

> Although "(t)he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the

> decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage

Carey v. Population Services Intern. 431 U.S. 678, 684-85 (1977) (citations omitted).

> In the first of these the supreme court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations; was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the supreme court of Rhode Island said that 'marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make.

Maynard v. Hill, 125 U.S. 190, 212 (1888).

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."

Griswold, 381 U.S. at 495.

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974).

> The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:
>
> > "No state . . . shall deprive any person of life, liberty or property without due process of law."
>
> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry [. . .]

Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

> Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated."

U.S. v. Kras, 409 U.S. 434, 446 (1973).

> But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.

Skinner, 316 U.S. at 541.

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society," [. . .] rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.

M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (other citations omitted).

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Casey, 505 U.S. at 851 (citations omitted).

> In *Planned Parenthood* [ ], the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Lawrence, 539 U.S.at 573-74 (2003) (quoting *Casey*, 505 U.S. at 851).

> The State does not dispute that the right to marry is one of the fundamental rights protected by the United States Constitution [.] *See, e.g., Zablocki v. Redhail,* 434 U.S. 374, 384 (1978) ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *United States v. Kras,* 409 U.S. 434, 446 (1973) (concluding the Court has come to regard marriage as fundamental); *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Skinner v. Oklahoma ex. rel. Williamson,* 316 U.S. 535, 541 (1942) (noting marriage is one of the basic civil rights of man fundamental to our existence and survival); *Maynard v. Hill,*125 U.S. 190, 205, 211 (1888) (characterizing marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress.").
> While the right to marry is not explicitly mentioned in the text of the Constitution, this right is nevertheless protected by the guarantee of liberty under the Due Process Clause.

De Leon v. Perry, 975 F.Supp.2d 632, 657-58 (W.D. Tex. 2014).

> The right to marry is an example of a fundamental right that is not mentioned explicitly in the text of the Constitution but is nevertheless protected by the guarantee of liberty under the Due Process Clause. The Supreme Court has long emphasized that the right to marry is of fundamental importance. In *Maynard v. Hill,* the Court characterized marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress." 125 U.S. 190, 205, 211 (1888). In *Meyer v. Nebraska,* the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause. 262 U.S. 390, 399 (1923). And in *Skinner v. Oklahoma ex rel. Williamson,* the Court ruled that marriage is "one of the basic civil rights of man." 316 U.S. 535, 541 (1942).
> In more recent cases, the Court has held that the right to marry implicates additional rights that are protected by the Fourteenth Amendment. For instance, the Court's decision in *Griswold v. Connecticut,* in which the Court struck down a Connecticut law that prohibited the use of contraceptives, established that the right to marry is intertwined with an individual's right of privacy." 381 U.S. 479, 486 (1965).

Kitchen, 961 F.Supp.2d at 1197.

> The United States Supreme Court initially discussed the constitutional right to marry as an aspect of the fundamental substantive "liberty" protected by the due process clause of the federal Constitution (see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)), but thereafter in *Griswold v. Connecticut*, 381

> U.S. 479, 485 (1965), the federal high court additionally identified the right to marry as a component of a "right of privacy" protected by the federal Constitution.

In re Marriage Cases, 183 P.3d at 420.

There is no question that the right to marry is a fundamental right.

What "right to marry" is at stake?

The Court heartily endorses the recent holding by the Tenth Circuit in *Kitchen v. Herbert* that the marital right at issue was never framed as the "right to interracial marriage in *Loving* or the "prisoner's right to marriage" in *Turner* or the "dead-beat dad's" right to marriage in *Zablocki*. *See Kitchen*, 961 F.Supp.2d at 1200. Instead, the Supreme Court has repeatedly utilized the term "fundamental right to marry" without any limitations. The Court rejects the State's attempt to too narrowly describe the marital right at issue to the right to marry a person of the same sex.

The Court also concurs with the growing number of courts which have held that the fundamental right to marry includes the right to remain married. *See Kitchen*, 961 F.Supp.2d at 1201; *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *13 (D. Idaho May 13, 2014); *De Leon*, 975 F.Supp.2d at 654; *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014); *Obergefell*, 962 F.Supp.2d at 978.

Are the Marriage Bans necessary to promote a compelling state interest?

"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388 (citations omitted).

The State has variously described its interest in maintaining the Marriage Bans as follows:

> It is an attempt to deal with a *problem*, and one that has become worse in recent years: the creation of children by parents who are not committed to raising them.

State's Motions, p. 6.

> So again, Government Marriage, as distinguished from personal or religious or familial marriage, is not about recognizing or congratulating individuals who love each other. It is about avoiding the problems that society encounters when childbirth outside monogamous relationships becomes widespread. Same-sex couples, biologically speaking, simply cannot contribute to this problem.

State's Motions, p.7.

> As noted above and explained more below, the animating reason for the *government* to recognize marriage is not to recognize the love between the participants, but to encourage two people who might create and bring into society a child to remain committed to one another even if their personal commitment cools.

State's Motions, p. 19.

> The traditional institution of marriage serves the state's important government interest in discouraging the creation of children through those relationships outside the optimal environment for children to be born into and raised to adulthood.

State's Motions, p. 33.

> Government marriage is meant to try to fight the instinct to create children without remaining committed to their upbringing into adulthood. This problem is not caused by same-sex couples, at least not to any significant extent, and the state thus need not extend this part of its solution to them.

State's Motions, p. 36.

> The state has an interest in maximizing the number of children that are raised by their biological parents.

State's Combined Response, p. 19.

The avowed State interest can be distilled down to encouraging procreation and marital commitment for the benefit of the children. The problem with this post-hoc explanation is that it utterly ignores those who are permitted to marry without the ability or desire to procreate. It is merely a pretext for discriminating against same-sex marriages.

This recently fabricated "state interest" is also belied by legislative history which accompanied the enactment of the 2000 amendments to C.R.S. § 14-2-104. On February 21, 2000, at the second reading on HB 1249, Rep. Mark Paschall stated, "What we're opening the door here to, and even though the issue is being framed around same sex relationships, we're talking about opening the door to polygamy, polyandry, and polyamorous relationships." Later in the debate, Rep. Paschall stated that "[t]his is going to allow incestuous relationships. We don't want to be allowing any kind of solemnized relationship in the State of Colorado, and that's what this is going to do." Rep. Doug Dean stated, "[b]ut where I think it's important for me as a legislator to say that we don't want to recognize same-sex unions, same-sex marriages, because we believe that it contributes to the decay of society … it will be harmful to our state." Out of more than a dozen comments on the bill, only one comment was made about marriage providing a stable environment for children to be brought into the world and raised. But that same senator, John Andrews completed his comments noting that, "marriage, as an institution, thousands of years old, I would argue, is strengthened, when we maintain that traditional definition."

Likewise, when Amendment 43 was being submitted to the voters, the Amendment 43 Blue Book told voters that one reason to pass Amendment 43

was to "preserv[e] the commonly accepted definition of marriage. Marriage as an institution has historically consisted of one man and one woman."

This notion of "responsible procreation" has been raised many times before and been met without success. *See, e.g., Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012), *vacated and remanded, Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013); *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 999 (N.D. Cal. 2010); *Kitchen*, 961 F.Supp.2d at 1211-12; *De Leon*, 975 F.Supp.2d at 653; *DeBoer v. Snyder*, 973 F.Supp.2d 757, 768 (E.D. Mich. 2014); *Bishop v U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014); *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC, 2014 WL 2054264, at *13 (D. Or. May 19, 2014); *Griego v. Oliver*, 316 P.2d 865, 886 (N.M. 2013).

To the extent the State's interest is in preserving the historical tradition of one-man one-woman marriage, it cannot survive any level of scrutiny.

> Proponents suggest that these state interests in tradition arise from a legitimate desire to discourage individuals from abusing marriage rights by marrying for the sole purpose of qualifying for benefits for which they would otherwise not qualify . . . The "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe,* 509 U.S. 312, 326 (1993). This proffer lacks any rational basis.

Bostic v. Rainey, 970 F. Supp. 2d 456, 474 (E.D. Va. 2014) (citation omitted).

> The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in Bowers Justice STEVENS came to these conclusions: "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

> Justice STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here.

Lawrence, 539 U.S. at 577-78 (citations omitted).

The Court holds that the State does not have a sufficiently important/ compelling interest in forbidding same-sex marriages or nullifying Colorado residents' valid out-of-state same-sex marriages. The Marriage Bans are unconstitutional because they violate plaintiffs' due process rights.

b. Do the Challenged Laws violate plaintiffs' equal protection rights?

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. CONST. amend. XIV, § 1.

> Instead, the Equal Protection Clause is a more particular and profound recognition of the essential and radical equality of all human beings. It seeks to ensure that any classifications the law makes are made "without respect to persons," that like cases are treated alike, that those who "appear similarly situated" are not treated differently without, at the very least, "a rational reason for the difference."

Vigil, 666 F.3d at 684-85 (quoting *Enquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008)).

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 17 (1973); *cf. Lyng v. Automobile Workers,* 485 U.S. 360, 370, (1988). Classifications based on race or national origin, *e.g., Loving v. Virginia,* 388 U.S. 1, 11 (1967), and classifications affecting fundamental rights, *e.g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 672 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Jeter, 486 U.S. at 461.

> To withstand intermediate scrutiny, a classification must be "substantially related to an important government interest." *Clark v. Jeter,* 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L.Ed.2d 465 (1988). "Substantially related" means that the explanation must be " 'exceedingly persuasive.' " *United States v. Virginia,* 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996) (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L.Ed.2d 1090 (1982)). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

Windsor, 699 F.3d at 185, *cert. granted*, 133 S. Ct. 786 (2012) and *aff'd*, 133 S. Ct. 2675 (U.S. 2013), *cert. denied*, 133 S. Ct. 2884 (2013), *cert. denied*, 133 S. Ct. 2885 (2013).

The Court has previously found that the State's professed governmental interest was a mere pretext for discrimination against same-sex marriages created "*post hoc* in response to litigation." Thus, the Marriage Bans cannot even pass muster under the rational basis analysis. The sole basis for precluding same-sex marriage is self-evident—the parties are of the same sex and for that reason alone do not possess the same right to marry (or remain married) as opposite-sex couples. The Court holds that the Marriage Bans are unconstitutional because they violate plaintiffs' equal protection rights.

2. Should civil union survive as a separate but equal institution?

Having found that the Marriage Bans are unconstitutional, it would seem that the continuation of civil unions is a moot issue. Nevertheless, the Court will analyze Colorado's civil unions as it may bear on a legitimate alternative to civil marriage.

> The general assembly declares that the public policy of this state, as set forth in section 31 of article II of the state constitution, recognizes only the union of one man and one woman as a marriage. The general assembly declares that the purpose of this article is to provide eligible couples the opportunity to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses consistent with the principles of equality under law and

> religious freedom embodied in both the United States constitution and the constitution of this state. The general assembly declares that a second purpose of the act is to protect individuals who are or may become partners in a civil union against discrimination in employment, housing, and in places of public accommodation. The general assembly further finds that the general assembly, in the exercise of its plenary power, has the authority to define other arrangements, such as a civil union between two unmarried persons regardless of their gender, and to set forth in statute any state-level benefits, rights, and protections to which a couple is entitled by virtue of entering into a civil union. The general assembly finds that the "Colorado Civil Union Act" does not alter the public policy of this state, which recognizes only the union of one man and one woman as a marriage. The general assembly also declares that a third purpose in enacting the "Colorado Civil Union Act" is to state that Colorado courts may offer same-sex couples the equal protection of the law and to give full faith and credit to recognize relationships legally created in other jurisdictions that are similar to civil unions created by this article and that are not otherwise recognized pursuant to Colorado law.
>
> C.R.S. § 14-15-102: Civil Unions.

"The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." *In re Opinions of the Justices to the Senate*, 802 N.E.2d at 570. The fact is that those in a civil union do not and cannot obtain the same benefits and protections of federal law as married couples including filing joint tax returns, Family Medical Leave Act benefits, and facing loss of social security and veterans benefits. If civil unions were somehow the equivalent of marriage, there would be no real need for this second tier relationship. The State paid only lip-service to the plaintiffs' arguments that civil unions were not unlike the "separate but equal" black and white educational systems.[13]

Especially in light of the long and undisputed history of invidious

[13] The State's argument included a mere 13 lines in a 32-page brief. Combined Response, pp. 18-19.

> discrimination that gay persons have suffered; see part V A of this opinion; we cannot discount the plaintiffs' assertion that the legislature, in establishing a statutory scheme consigning same sex couples to civil unions, has relegated them to an inferior status, in essence, declaring them to be unworthy of the institution of marriage. In other words, "[b]y excluding same-sex couples from civil marriage, the [s]tate declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage."

Kerrigan, 957 A.2d at 417.

The Court finds that confining same-sex couples to civil unions is further evidence of discrimination against same-sex couples and does not ameliorate the discriminatory effect of the Marriage Bans.

3. Should Denver Plaintiffs' claims against Governor Hickenlooper be dismissed?

Denver Plaintiffs have asserted four claims for relief against Governor Hickenlooper based on 42 U.S.C. 1983—due process and equal protection claims for denying Unmarried Plaintiffs from getting married and due process and equal protection claims for not recognizing Married Plaintiffs' out-of-state marriages.

According to Denver Plaintiffs' complaint:

> Article IV, section 2 of the Colorado Constitution states: "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." He is responsible for upholding and ensuring compliance with the state constitution and statutes prescribed by the legislature, including Colorado's laws barring same-sex couples from marriage and refusing to recognize the valid out-of-state marriages of same-sex couples. Governor Hickenlooper also bears the authority and responsibility for the formulation and implementation of policies of the executive branch. Governor Hickenlooper is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint. Governor Hickenlooper's official residence is in the City and County of Denver, Colorado. He is being sued in his official capacity.

Paragraph 85 of the Denver Plaintiffs' complaint avers that:

> As Colorado's Governor and chief executive officer, defendant Hickenlooper's duties and actions to enforce Colorado's exclusion of same-sex couples from marriage, including those actions taken pursuant to his responsibility for the policies and actions of the executive branch relating to, for example and without limitation, health insurance coverage, vital records, tax obligations, and state employee benefits programs, violate plaintiffs' fundamental right to marry; fundamental interests in liberty, dignity, privacy, autonomy, family integrity, and intimate association; and the fundamental right to travel under the Fourteenth Amendment to the United States Constitution.
>
> Defendants similarly argue that the section 1983 damages claim against Hickenlooper and Kelley should be dismissed because they have no personal involvement in the alleged constitutional deprivations, and there is no supervisory liability under section 1983. Once again, Defendants are correct. For the reasons discussed above, Plaintiffs have not plead or otherwise shown how Defendants Hickenlooper and Kelley have had any personal involvement in the enforcement of the RES. *See Foote v. Spiegel,* 118 F.3d 1416, 1423 (10th Cir.1997) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.").

Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222, 1239-40 (D. Colo. 2012).

Denver Plaintiffs have only alleged a generalized oversight of matters relating to marriage in the State of Colorado.

> Here, the Oklahoma officials' generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce. *See Women's Emergency Network v. Bush,* 323 F.3d 937, 949-50 (11th Cir. 2003) ("Where the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction."); *see also Waste Mgm't. Holdings, Inc. v. Gilmore,* 252 F.3d 316, 330-31 (4th Cir. 2001) (concluding governor's general duty to enforce the laws of Virginia insufficient when he lacks a specific duty to enforce the challenged statutes); *Okpalobi v. Foster,* 244 F.3d 405, 422-25 (5th Cir. 2001) (en banc) (constitutional challenge to state tort statute against Governor and Attorney General not viable under the *Ex Parte*

> *Young* doctrine because no enforcement connection existed between Governor or Attorney General and the statute in question); *1st Westco Corp. v. Sch. Dist. of Phila.,*6 F.3d 108, 112-13, 116 (3d Cir. 1993) ("If we were to allow [plaintiffs] to join ... [the State officials] in this lawsuit based on their general obligation to enforce the laws ..., we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it.").

Bishop, 333 F.App'x at 365.

The Court has now declared the Marriage Bans unconstitutional. Although it is likely that the Marriage Bans will remain in place until further judicial scrutiny by a superior court of law, the Court finds that Denver Plaintiffs have not alleged sufficient facts to demonstrate that Governor Hickenlooper could be found liable for violating plaintiffs' equal protection or due process rights by the continuation of the Marriage Bans. Denver Plaintiffs' complaint against Governor Hickenlooper is dismissed without prejudice.

4. Should the Court issue a stay of its ruling?

After the completion of oral argument the State filed a Partially Stipulated Motion for Stay in the Event of Judgment for the Plaintiffs on June 25, 2014. Therein it was recited that the Adco Plaintiffs and the State agreed to a stay if the Court ruled in plaintiffs' favor. The motion declared that the Governor and the Adams County Clerk & Recorder agreed not to oppose the motion. Denver Plaintiffs and Denver Clerk & Recorder filed a Response in Opposition on June 26, 2014. The State filed a Reply on June 30, 2014. On July 2, 2014 Adco Plaintiffs withdrew their agreement to a stay based on actions by the State. On July 2, 2014 Denver Plaintiffs filed a Sur-reply.

Denver Plaintiffs argued that the State had misrepresented the status of stays issued by federal courts. Denver Plaintiffs asserted that federal law regarding stays is not controlling, but rather that Colorado procedural law applies. Denver

Plaintiffs referred to a four-factor test "when considering whether to stay an order denying or granting an injunction." *Romero*, 307 P.3d at 122. Denver Plaintiffs also argued that, based on Colorado Supreme Court precedent affirming preliminary injunctions, a declaration that the Marriage Bans are unconstitutional may preclude entry of a stay. Denver Plaintiffs examined the six-part test set forth in *Rathke v. MacFarlane*, 648 P.2d 653-54 (Colo. 1982).

The Court has read and re-read the briefs filed by the parties in an attempt to find any discussion of the grant or denial of an injunction and has found none. None of the briefs mentioned *Rathke* or analyzed the facts of this case in light of the six factors set forth therein. This Court has found the Marriage Bans unconstitutional but has not issued an injunction, mandatory or otherwise.

The State advised in its recent Reply that the United States Supreme Court stayed an injunction granted by a district court in Utah, involving a challenge to that state's marriage laws.[14] Equally significant is that four Federal Courts of Appeals have issued stays of the orders finding the marriage bans unconstitutional. *Romero* indicated that it was recognizing and adopting federal standards for granting stays.[15] *Romero* identified four factors to be considered by a court in determining whether to grant a stay.[16] *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

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[14] Included in a footnote was the text of the Supreme Court's Order granting the stay of the permanent injunction issued by the U.S. District Court for the District of Utah pending final disposition of the appeal by the 10th Circuit.
[15] *Romero* concluded that the formulation set forth by the Sixth Circuit in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F. 2d 150 (6th Cir. 1991), to be the most appropriate test.
[16] These factors are not unlike those applied in granting an injunction.

case').” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting, *e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)).

In addition, the Court has not found language in *Romero* or *Michigan Coalition*, requiring that a party seeking a stay must establish each of the four factors, but that they be considered in exercising the discretion to grant or deny a stay.[17]

a. Likelihood of success on the merits

Depending on circumstances in the cases, this factor has taken on several meanings. “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay.” *Michigan Coalition*, 945 F.2d at 153. “[S]erious questions going to the merits.” *Id*. at 154 (citing *Friendship Materials, Inc. v. Michigan Brick, Inc.,* 679 F.2d 100, 105 (6th Cir. 1982)). The State's ultimate likelihood of success on the merits has become increasingly in doubt given the avalanche of court decisions striking down same-sex marriage bans. Nevertheless, the grant of a stay by the Supreme Court in the Utah district court case and the four federal circuit courts suggests that this issue is far from over.

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

“'Irreparable harm'” is a pliant term adaptable to the unique circumstances that an individual case might present. *See State Comm'n on Human Relations v. Talbot County Detention Ctr.,* 803 A.2d 527, 542 (2002). Generally, irreparable harm has been defined as 'certain and imminent harm for which a monetary award does not adequately compensate.'” *Gitlitz v. Bellock*, 171 P.3d 1274, 1278-79 (Colo. App. 2007). The State has also identified holdings by appellate courts that

[17] “These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” *Michigan Coalition*, 945 F.2d at 153.

held 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); *O Centro Espirita Beneficiente Uniao De Vegetal. v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) and *Planned Parenthood*, 134 S. Ct. at 506. The Court has confirmed the cited holding in these cases and finds that the Court's holding that the State's Marriage Bans are unconstitutional may constitute irreparable injury.

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

Plaintiffs have alleged that they have endured discrimination for a substantial period of time and suffered injury from the enactment of bans on same-sex marriage. Stays of court orders finding the bans against same-sex marriage unconstitutional are being entered around the United States. The Court cannot find that staying the effect of this Court's Order will result in substantial injury to the plaintiffs.

d. The public interest in granting the stay

The Marriage Bans came into existence based upon actions taken by the Colorado legislature and an amendment to the Colorado Constitution based upon a vote of the citizens of this state. While plaintiffs are members of the public, they do not represent the interests of all of Colorado's citizens. The public has an interest in the orderly determination of the constitutionality of its laws and granting a stay will effectuate that end.

This Court is under no delusion that the resolution of the issue of same-sex marriages will end with this Court's decision or any lower courts' decisions. The final chapter of this debate will undoubtedly have to be written in either Denver, Colorado or Washington, D.C. While the striking down of laws banning same-sex marriages has been progressing at a rapid rate, it will take time for this issue to be

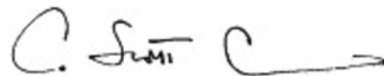
finally resolved. Having considered the *Romero* factors, all other circumstances of this case, and the events surrounding the issue of same-sex marriage, the Court finds that a stay is necessary to avoid the instability and uncertainty which would result in the State of Colorado if the Court did not stay its ruling[18] and for the orderly administration of justice. The Court orders that this judgment is stayed pending a resolution of this matter on appeal.

Order

The Court holds that the Marriage Bans violate plaintiffs' due process and equal protection guarantees under the Fourteenth Amendment to the U.S. Constitution. The existence of civil unions is further evidence of discrimination against same-sex couples and does not ameliorate the discriminatory effect of the Marriage Bans. Denver Plaintiffs' claims against Governor Hickenlooper are dismissed without prejudice. The Court's Judgment is stayed pending a resolution of the issue on appeal.

Dated this 9th day of July, 2014.

By the Court:

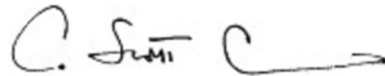


C. Scott Crabtree
District Court Judge

[18] Witness the continued issuance of marriage licenses in Boulder (despite a stay of the 10th Circuit decision) which has prompted the Attorney General to file a lawsuit in Boulder to enjoin the practice.

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JPOD (e-file) to all counsel of record and to all *pro se* parties this 9th day of July, 2014.



Court