Nos. 12-16995 & 12-16998

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATASHA N. JACKSON, JANIN KLEID, and GARY BRADLEY,

Plaintiffs-Appellants,

vs.

NEIL S. ABERCROMBIE, Governor, State of Hawai‘i,

Defendant-Appellant,

and

(caption continued on next page)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Dist. Ct. No. CV 11-00734 ACK-KSC

JUDGE: The Honorable Alan C. Kay, U.S. District Judge, District of Hawaii

DEFENDANT-APPELLANT GOVERNOR NEIL S. ABERCROMBIE'S MOTION TO EXCEED TYPE-VOLUME LIMITATION

DECLARATION OF GIRARD D. LAU

OPENING BRIEF (containing word count certification)

CERTIFICATE OF SERVICE

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HAWAII FAMILY FORUM,

Defendant-Intervenor-Appellee

DEFENDANT-APPELLANT GOVERNOR NEIL S. ABERCROMBIE'S MOTION TO EXCEED TYPE-VOLUME LIMITATION

Pursuant to Circuit Rule 32-2, Defendant-Appellant Governor Neil S. Abercrombie hereby moves for leave to file the attached Opening Brief that exceeds the 14,000 word type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B).[1] Specifically, he seeks leave of the Court to file a 21,134 word brief. This word count is listed on the Certificate of Compliance contained within the brief. A copy of his brief is attached to this motion. See Circuit Rule 32-2 ("Any such motion shall be accompanied by a single copy of the brief the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the line or word count.").

This motion is supported by the declaration of attorney Girard D. Lau, which demonstrates his diligence in reducing the volume of the brief, and sets forth his substantial need.

[1] In compliance with Circuit Rule 32-2, Governor Abercrombie files this motion on April 25, 2014, the due date of his opening brief, pursuant to this Court's Order filed March 19, 2014. See Circuit Rule 32-2 ("A motion for permission to exceed the page or type-volume limitations set forth at Fed. R. App. P. 32(a)(7)(A) or (B) must be filed **on** or before **the brief's due date** and must be accompanied by a declaration stating in detail the reasons for the motion.").

DATED: Honolulu, Hawaii, April 25, 2014.

Respectfully Submitted,

s/ Girard D. Lau
GIRARD D. LAU
ROBERT T. NAKATSUJI

Attorneys for Defendant-Appellant
Neil S. Abercrombie, Governor
of the State of Hawai‘i

DECLARATION OF GIRARD D. LAU

Pursuant to 28 U.S.C. § 1746, I, Girard D. Lau, hereby declare that:

1. I am counsel for Defendant-Appellant Governor Neil S. Abercrombie, in the above-entitled case. The Governor supports plaintiffs' challenge to Hawaii's former statutory ban on same-sex marriage.

2. Pursuant to Circuit Rule 32-2 Governor Abercrombie moves for leave to file the attached opening brief that exceeds the 14,000 word type-volume limitation set forth in FRAP 32. Specifically, he seeks to file a 21,134 word brief.

3. This motion is timely filed, pursuant to Circuit Rule 32-2, because it is filed on or before April 25, 2014, the due date for the Opening Brief, pursuant to this Court's Order filed March 19, 2014. Pursuant to Circuit Rule 32-2, counsel has attached a copy of Governor Abercrombie's 21,134 word opening brief to this motion. See Circuit Rule 32-2 ("Any such motion shall be accompanied by a single copy of the brief the applicant proposes to file ….").

4. This motion is predicated on counsel's **substantial need** for extra words. Counsel acknowledges that a motion seeking leave to file a brief that exceeds the type-volume limitation is generally disfavored and, ordinarily, parties are very often able to comply with the 14,000 word limit governing opening and answering briefs. We thus regret having to make this motion, but this is an extraordinary case. This is a **landmark civil rights case** addressing the constitutionality of state

laws prohibiting **same-sex marriage**, on both Equal Protection and Due Process grounds. It involves multiple complex legal issues and sub-issues. For example, Governor Abercrombie's Opening Brief must address, argue, and/or respond to the lower court's rulings regarding the following complex issues:

- Whether the summary dismissal order of the U.S. Supreme Court in Baker v. Nelson, 409 U.S. 810 (1972), is binding on this Court and precludes both plaintiffs' Equal Protection and Due Process claims. This requires our making multiple **independent** arguments **against** Baker's binding effect, including discussing precisely what issues were **necessarily** decided in Baker, critical factual differences in this case, and also whether subsequent doctrinal developments from the U.S. Supreme Court undermine Baker's impact;
- Although SmithKline Beecham v. Abbott Laboratories, 740 F.3d 471, 483 (9th Cir. 2014), held that "heightened scrutiny applies to classifications based on sexual orientation," a sua sponte en banc call has been made, and thus the potential that SmithKline's ruling could be narrowed, or overturned, exists. Certiorari to the United States Supreme Court could also potentially narrow or overturn SmithKline. Accordingly, the Governor's brief must address whether, given the doctrine established in Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc), the Ninth Circuit's no-suspect-class

ruling in High Tech Gays v. Defense Indus. Sec. Clearance, 895 F.2d 563 (9th Cir. 1990), is no longer binding on this three-judge panel in light of subsequent Supreme Court and en banc rulings that we argue undermine the underlying reasoning of High Tech Gays. For similar reasons, we must address and refute the District court's claim that another Ninth Circuit case, Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008), binds this panel;

- Whether sexual orientation is a suspect or quasi-suspect classification. This requires addressing **four** different criteria (history of discrimination, distinguishing characteristics or immutability, minority status and lack of political power, and ability to perform or contribute to society), each of which involve citation and discussion of multiple studies, expert declarations, and/or historical or contemporary facts. Discussion of which factors are most important, and which may not be dispositive, is also required;
- What the proper standard of scrutiny is, including whether, if heightened scrutiny is not applied, a more searching form of rational basis review is appropriate;
- Whether the recent U.S. Supreme Court ruling in United States v. Windsor, 133 S.Ct. 2675 (2013), by itself requires striking down Hawaii's ban on same-sex marriage, and whether it otherwise impacts the Equal Protection and Due Process analyses;

- Whether the same-sex marriage ban satisfies even rational basis review. This involves addressing multiple asserted rational bases, including the "responsible procreation," "optimal mother-father," and "proceeding with caution" theories. Scientific evidence must be addressed regarding some of these theories. Complicating the discussion are arguments involving the impact of Hawaii's civil union law on these purported rationales, and whether Hawaii, like California in Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), "took away" marriage rights, and is thus entitled to similar Perry analysis;
- the critical goal underlying the responsible procreation theory, and thus why that theory is inherently "impossible to credit." Romer v. Evans, 517 U.S. 620 (1996);
- The application of "one-step-at-a-time" equal protection theories, and why such theories should not apply here, for multiple different reasons;
- The nature and scope of the different types of harm -- both psychological and societal, and pecuniary and tangible -- inflicted by the two-tier system created by Hawaii's former civil union, but no marriage, system for same-sex couples;
- Whether the fundamental right to marry under the Due Process Clause extends to same-sex couples. This requires an extensive discussion of the

underlying reasons marriage is a fundamental right, and how tradition and history are not determinative.

5. Recognizing this complexity, the district court below granted Governor Abercrombie leave to file a **25,000** word combined memorandum in support of his countermotion for summary judgment and in opposition or response to all three other parties' summary judgment motions (CR 74 and 75), in order to adequately address these multiple complex issues.[2] Indeed, counsel notes that the decision Governor Abercrombie is appealing, District Judge Alan Kay's August 8, 2012 summary judgment order, itself contains at least roughly 27,753 words.[3] In contrast, we are seeking to file only a 21,134 word Opening Brief, far less than the words used by us, and the District court, below. **And unlike the litigation below,**

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[2] The actual word count of Governor Abercrombie's combined memorandum was 24,469 words.

[3] In order to determine the word count for **Judge Kay's order**, issued August 8, 2012, counsel's office downloaded, from the Court's Electronic docket, a PDF copy of the order (without file-stamp headers and footers). Counsel's office then deleted the caption page, two pages of table of contents, the Judge's signature block (beginning with "DATED" line), and the civil case information at the bottom of the last page of the order. Once the document was stripped of the non-substantive material, counsel's office ran two word counts. The first was using Microsoft Office 2003's word count feature. To do this, counsel's office copied the stripped down order and pasted it in rich text format into a blank Word document. The Microsoft Office word count for using this process totaled 27,753 words. The second word count was done using a free trial version of AnyCount 8.0.7, a **PDF** word count software program. Using the same stripped down PDF, the AnyCount software word count totaled 28,626 words. We are unsure of the exact reason for the 873 word difference between the two word count processes.

we now must additionally address in our Opening Brief the impact of the new United States Supreme Court's opinion in Windsor, the recent Ninth Circuit's SmithKline ruling, and a slew of recent federal district court rulings regarding same-sex marriage.

Furthermore, this Opening Brief is required to address (pursuant to this Court's 3/19/14 Order) **an entirely new and different issue not present during the District Court proceedings -- mootness due to Hawaii's legislative repeal of its ban on same-sex marriage during the pendency of this appeal.** And in conjunction with mootness, the Opening Brief must also address the vacatur doctrine, as the Governor and plaintiffs assert that if the appeals are to be dismissed as moot, the District Court's order and judgment should first be vacated by this Court. Accordingly, the Governor needs the extra words requested.

6. Indeed, in Sevcik v. Sandoval, No. 12-17668, which similarly challenges the constitutionality of a ban on same-sex marriage (Nevada's), and involves substantially the same issues presented in the case at bar, the Ninth Circuit granted plaintiffs in Sevcik leave to file their **25,529 word** Opening Brief. Our brief of only 21,134 words, is roughly 4,400 words shorter.

6. Nevertheless, we address below our diligent efforts to reduce this brief to the minimum size possible, without forfeiting significant arguments, or hurting clarity of presentation.

7. In sum, counsel requires 21,134 total words in order to adequately address the multiple, complex legal issues involved, the 27,753 word analysis set forth in Judge Kay's summary judgment order, the new developments raised by Windsor, SmithKline, and other federal district court rulings, and the newly arising mootness and vacatur issues.

8. Counsel represents that he has made a **diligent** effort to keep Governor Abercrombie's opening brief as succinct and streamlined as possible. Counsel has cut out everything from the opening brief that is not essential to a complete presentation of Governor Abercrombie's argument, including lesser arguments, and additional citations supporting arguments. Counsel has eliminated excess sentences and words wherever possible, and sincerely believes that he cannot cut any additional material from the opening brief without eliminating important arguments, or reducing the clarity of existing arguments. Counsel thus believes he has been **diligent** in reducing the number of words in the brief as much as possible, and that there is "**substantial need**" for the requested type-volume extension counsel seeks.

9. Counsel is requesting the minimum number of extra words that he believes in good faith to be absolutely necessary in order to adequately brief the numerous complex issues in this appeal.

10. Clyde Wadsworth, counsel for Plaintiffs-Appellants Natasha N. Jackson et al., represents that Plaintiffs do not oppose this motion.

11. Bill Wynhoff, counsel for Defendant-Appellee Director of Health, our party **opponent** below (the Governor supports plaintiffs), represents that the Director does not oppose this motion.

12. Byron J. Babione, counsel for Hawaii Family Forum, an intervenor **opponent** below, indicates that HFF also does not oppose this motion, provided the Governor does not oppose a similar motion HFF may file seeking leave to file a brief no longer than 22,000 words. The Governor's counsel stated to Mr. Babione that the Governor would not oppose such a motion. **Thus, no party to this case opposes the Governor's instant motion.**

13. For the above reasons, and based on the diligence and substantial need demonstrated by counsel, counsel respectfully requests leave to file the attached 21,134 word opening brief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Honolulu, Hawaii, on April 25, 2014.

s/ Girard D. Lau
GIRARD D. LAU

Attorney for Defendant-Appellant
Neil S. Abercrombie, Governor
of the State of Hawai‘i

Nos. 12-16995 & 12-16998

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATASHA N. JACKSON, JANIN KLEID, and GARY BRADLEY, Plaintiffs-Appellants, vs. NEIL S. ABERCROMBIE, Governor, State of Hawai‘i, Defendant-Appellant, and *(caption continued on the next page)*	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII Dist. Ct. No. CV 11-00734 ACK-KSC JUDGE: The Honorable Alan C. Kay, U.S. District Judge, District of Hawaii

GOVERNOR ABERCROMBIE'S OPENING BRIEF

ADDENDA 1-8

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and

HAWAII FAMILY FORUM,

Intervenor-Defendant-Appellee.

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JURISDICTIONAL STATEMENT

Plaintiffs sued to enjoin Hawaii's statutory ban on same-sex marriage as a violation of the Equal Protection and Due Process clauses of the U.S. Constitution. [ExcerptCR6:26-28[1]]. Accordingly, the District court had jurisdiction over this case pursuant to 28 U.S.C. §1331 (federal question) and §1343 (civil rights).

Defendant-Appellant Governor Neil Abercrombie **supported** plaintiffs' federal constitutional challenges to the ban, and filed a partial summary judgment motion. Defendant-Appellee Hawaii Director of Health Loretta Fuddy (Director) **defended** the ban. [ExcerptCR27:8-9]. The District court, in its order filed 8/8/12, rejected all of plaintiffs' constitutional claims, granting Director's and Defendant-Intervenor Hawaii Family Forum (HFF)'s summary judgment motions, and denying plaintiffs' and Governor's motions for summary judgment. [ExcerptCR117]. That order is a final order that disposes of all parties' claims. The court filed and entered Judgment in a Civil Case, on 8/8/12. [ExcerptCR118].

Plaintiffs and the Governor both filed Notices of Appeal on 9/7/12. [ExcerptCR123&121]. Pursuant to 28 U.S.C. §1291 (final decisions), and FRAP 4(a)(1)(A) (30 days), this Court of Appeals thus has jurisdiction over the Governor's and Plaintiffs' appeals, which have been consolidated. See Abend v. MCA, 863 F.2d 1465, 1482 n.20 (9th Cir. 1988).

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[1] **This notation refers to Excerpts of Record, tabbed Clerk's Record document No. 6, at pages 26-28 (these pages are added, not original, page numbers).**

On October 18, 2013, the Governor filed a Motion to Exceed Type-Volume Limitations, and attached his proposed Opening Brief to that motion. The motion was never acted upon. On March 19, 2014, this Court ordered that "[i]n addition to all other issues the parties may wish to raise in the briefs, the parties shall brief the issue of whether the enactment of Hawaii's Marriage Equality Act of 2013 ["Act 1"] moots these consolidated appeals." The Governor submits this Opening Brief in compliance with that order.[2]

As explained below, the Governor asserts that Act 1 moots these consolidated appeals, and requires vacatur of the District Court's order and judgment.

ISSUES PRESENTED FOR REVIEW

1. Does Act 1 moot these consolidated appeals, and require vacatur of the District Court's order and judgment?

2. If the appeals are not moot, did the District court err in rejecting plaintiffs' federal Equal Protection and Due Process challenges to Hawaii's former ban[3] on same-sex marriage?

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[2] The Governor also submitted on October 18, 2013, his Excerpts of Record. Because the Court never issued an order filing those Excerpts -- apparently waiting for the Opening Brief to be ordered filed -- the Governor asks that those previously submitted Excerpts be filed now in support of this Opening Brief.

[3] **Although the statutory ban no longer exists, unless the context suggests otherwise, it will be referred to hereinafter as if it still exists.**

A. Does Baker v. Nelson, 409 U.S. 810 (1972), summary dismissal foreclose both of plaintiffs' constitutional challenges?

B. If not, does the ban discriminate on the basis of a suspect or quasi-suspect classification, and/or infringe on the fundamental right to marry, and what is the appropriate level of scrutiny to be applied?

C. Is the ban supported by any state interests that satisfy even rational basis review, much less heightened or strict scrutiny?

3. Did the District court err in granting summary judgment to the Director and HFF, and in denying the plaintiffs' and Governor's summary judgment motions?

REVIEWABILITY AND STANDARD OF REVIEW

Except for the mootness and vacatur issues, all of the issues were raised in the Governor's 6/29/12 Memorandum (in support of his summary judgment motion and in response/opposition to other parties' summary judgment motions) CR92:1-85,94, and further addressed in his 7/17/12 Reply Memorandum. CR108. The issues were also raised and addressed at the summary judgment hearing held on 7/24/12 [ExcerptCR130] and in the **other** parties' summary judgment pleadings. The issues were ruled upon in the District court's 8/8/12 Order [ExcerptCR117].

The **standard of review** for the above issues, which all involve questions of law, is "de novo," and this Court reviews summary judgment rulings applying the

"same standard used by the trial court." Szajer v. Los Angeles, 632 F.3d 607, 610 (9th Cir. 2011).

The issues regarding mootness and vacatur were raised by the Governor in his December 17, 2013, and January 3, 2014, filings, CR120,124, and in filings of plaintiffs, Defendant Director, and Intervenor HFF, CR121,122,123, and have not been ruled upon by any court.

STATEMENT OF THE CASE AND OF THE FACTS (combined)

A. Nature of Case.

The **federal** Equal Protection and Due Process constitutionality of Hawaii's ban on same-sex marriage is the critical civil rights issue at stake in this case. The Governor agrees with plaintiffs that the ban is unconstitutional on both grounds.

Plaintiffs Jackson and Kleid are a lesbian couple who sought and were denied a marriage license from the Hawaii Department of Health (headed by Defendant Director), because HRS §572-1 limits marriage to a man and woman. [ExcerptCR6:2,19-20]. Plaintiff Bradley is a gay man who did not seek a marriage license to marry his long-time and now-civil-union partner only because it was futile to do so. [ExcerptCR6:3,19-20].

B. Course of Proceedings.

Plaintiffs sued Defendants Director and the Governor seeking to enjoin them from enforcing HRS §572-1's **statutory** ban on same-sex marriage, see

Addendum1, and a declaration that the ban violates **federal** Equal Protection and Due Process. [ExcerptCR6:29-30].

Defendant Governor agreed with plaintiffs' constitutional challenges to Hawaii's **statutory** ban, and filed an answer to that effect. [ExcerptCR9].[4] Director Fuddy, however, defended the statutory ban. [ExcerptCR10]. Over objections, HFF -- an anti-same-sex-marriage organization -- was allowed to intervene to defend the ban. [ExcerptDKT:9#43]. On 6/15/12, plaintiffs moved for summary judgment to invalidate the ban, CR65, and Director and HFF sought summary judgment upholding the ban. CR63,67. On 6/29/12, the Governor filed his countermotion for partial summary judgment, seeking strict (or heightened) scrutiny for both plaintiffs' Equal Protection and Due Process challenges, and his memorandum (supporting his countermotion and plaintiffs' motion, and opposing the Director's and HFF's motions), arguing also that the ban does not survive even rational basis review. CR92.

C. Disposition Below.

The District court rejected all of plaintiffs' constitutional challenges, concluding that Baker's summary dismissal order forecloses the claims, that regardless, rational basis review applies, and that the ban survives that review.

[4] The Governor, however, disagreed with plaintiffs' challenge to **Article I, Section 23**, of the Hawaii **Constitution**, see Addendum2, because it does not ban same-sex marriage, but merely leaves the matter up to the legislature. [ExcerptCR9:3].

[ExcerptCR117]. The Court granted Director's and HFF's motions for summary judgment, denied plaintiffs' and the Governor's motions for summary judgment, id., and rejected HFF's motion to dismiss the Governor for lack of standing. [ExcerptCR117:35-37].

While these appeals were pending, the Hawaii Legislature via Act 1 repealed the ban on same sex marriage, effective December 2, 2013.

SUMMARY OF ARGUMENT

Act 1's repeal of Hawaii's challenged ban on same sex marriage moots these appeals. The existence of legal challenges to Act 1 does not avoid mootness. This Court should vacate the District Court's order and judgment under the vacatur doctrine -- the "established" and generally "automatic" practice of vacating judgments in cases that have become moot on appeal.

If the appeals go forward, however, Baker does not foreclose plaintiffs' claims because Baker 1) necessarily decided only a gender, not sexual orientation, discrimination claim, 2) did not involve a state with a full civil union law, and 3) did not involve take-away of rights. Furthermore, Lawrence v. Texas' recognition of a right to same-sex intimate relations, and Windsor's invalidation of laws imposing disadvantaged and demeaning second-class status on same-sex couples, are each doctrinal developments barring Baker preclusion.

The Ninth Circuit's High Tech Gays' no-suspect-class conclusion, rooted in Bowers, is not binding in light of Lawrence's overruling of Bowers, Windsor's implicit rejection of rational basis review for same-sex marriage discrimination, **subsequent** scientific and political developments, and other Supreme Court and Ninth Circuit precedents. In any event, the Ninth Circuit's SmithKline ruling adopts heightened scrutiny for all classifications based upon sexual orientation.

Sexual orientation is a suspect (or quasi-suspect) classification because gay men and lesbians have indisputably suffered discrimination throughout history, and their orientation bears no relation to ability to perform or contribute to society. Although not a prerequisite to heightened scrutiny, sexual orientation is not only a distinguishing, but immutable, characteristic as well. Gay men and lesbians are also a very small minority with extremely limited political power (moreover, white people and men receive strict and intermediate scrutiny, respectively, despite their having the most political power). Thus, strict or heightened scrutiny applies.

Moreover, the Supreme Court's Windsor ruling independently condemns laws, like Hawaii's allowing civil unions but not marriage, that impose a "disadvantaged" and "demeaning" second-class status and "stigma" upon same-sex couples. Hawaii's scheme, like DOMA, denies not only the psychologically significant title of "marriage," but also deprives same-sex couples of the same

federal benefits and responsibilities, too. Windsor flatly invalidates such laws, without even requiring consideration of conceivable rational bases.

Regardless, the same-sex marriage ban does not satisfy even rational basis review. The Hawaii legislature emphasized that "the legally-married status [is] the most desirable status in which to bear and rear children." Yet the ban does nothing to encourage heterosexuals to marry before procreating, and, worse, affirmatively precludes same-sex couples from entering that desired status for the benefit of their children. The ban thus undermines the very interest in child welfare (from the stability marriage provides) opponents offer to support the ban.

Furthermore, Hawaii's civil union law giving same-sex couples equal state legal rights also undermines any purported state interests served by the marriage ban. And proceeding one-step-at-a-time is not permissible when inclusion of same-sex couples promotes the same goal, when "dignitary benefits" like the status of being married are involved, where instead of inadvertence, a deliberate legislative decision to exclude same-sex couples was made, and where a "take-away" of rights in Hawaii is involved. Opponents provide no rational basis justifying the serious psychological, pecuniary, and other tangible harm the ban inflicts on same-sex couples and their children.

Although same-sex couples may not accidentally procreate, the State's interest in the stability marriage provides to children does not depend upon

whether the child is accidentally or intentionally produced. Because either type of child benefits from having married parents, the accidental procreation theory is simply "impossible to credit." Romer. Moreover, where politically unpopular groups are targeted, a "more searching form" of rational review is appropriate.

Hawaii is not concerned with any purported optimal mother-father childrearing environment because it gives same-sex couples equal parenting and adoption rights regarding children. Also, the scientific evidence conclusively establishes that same-sex couples are equally effective parents.

An interest in "proceeding with caution" is invalid because it is mostly an undefined fear without specification of **harm**, and opponent's authorities do not support alleged fear. Finally, changing "public consciousness" regarding an "ancient" "social institution" is not a harm, and "legislative prerogative" regarding marriage is not a rationale for banning, versus allowing, same-sex marriage.

Failing even rational basis review, the ban certainly cannot survive any form of heightened scrutiny (under which, one-step-at-a-time is certainly inapplicable).

Marriage is a fundamental right because it is essential to the "pursuit of happiness" and fundamental to our "very existence and survival." Loving. Marriage's importance to same-sex couples' **happiness** is not disputed. The Supreme Court's emphasis on "**existence and survival**" was not focused on biological ability to procreate (regardless, same-sex couples, too, procreate through

adoption and now-common technologies), but rather upon marriage-creating **legal and social responsibilities** of a couple to **each other** for the **couple's** mutual benefit and survival, and **jointly** to raise **their children** for **their** survival. Because the above "survival" benefits would apply equally to married **same-sex** couples and their children, the fundamental right to marry extends to same-sex couples. And Lawrence and Loving make clear that neither history nor tradition can save certain laws from Due Process attack.

ARGUMENT

Although this case is complex, in some ways it is very simple. If "equality" means anything at all, it is that plaintiffs and thousands of others like them in Hawaii -- who have been badly mistreated throughout history -- must be able to pursue, through marriage, the same happiness and benefits and responsibilities afforded to all others. And if the "liberty" protected by the Due Process Clause means anything, it is the liberty to love and commit to the person one chooses (same-sex or otherwise), with the legal and social benefits and responsibilities attendant to that commitment.

I. Repeal of Challenged Same-Sex Marriage Ban Moots these Appeals and Requires Vacatur of District Court Order and Judgment.

Because Hawaii's ban on same-sex marriage was repealed during the pendency of these appeals, the appeals are now moot and this Court should order vacatur of the District Court's Order and Judgment.

A. These Appeals are Now Moot.

"'[I]t is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment' is under review. Article III of the United States Constitution 'requires that there be a live case or controversy at the time that' a reviewing federal court decides the case." Log Cabin Republicans v. United States, 658 F.3d 1162, 1165 (9th Cir. 2011) (quoting Burke v. Barnes, 479 U.S. 361, 363 (1987)) (citation omitted). "[A] case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language." Id. at 1166.

The statute that prohibited same sex marriage in Hawaii was HRS §572-1, which, at the time this case was initiated, provided in relevant part: "[T]he marriage contract ... shall be **only between a man and a woman** ...." (Emphasis added.) On November 12, 2013, the Hawaii Legislature passed the Hawaii Marriage Equality Act, Act 1 (Second Special Session, 2013), and the Governor signed it on November 13, 2013. Act 1 took effect on December 2, 2013. Act 1 amended HRS §572-1 to read, in relevant part: "[T]he marriage contract ... shall be permitted **between two individuals without regard to gender** ...." Act 1, § 3 (emphasis added). Act 1 also included amendments to several other sections in order to make them consistent with this provision. Consequently, Act 1 removed the challenged language in the prior version of HRS §572-1 and amended it so as

to legalize same sex marriage in Hawaii. There is no longer a live case or controversy and this case is moot.

It is true that two lawsuits have been filed challenging the validity of Act 1: McDermott v. Abercrombie, Civil No. 13-1-2899 (Haw. First Cir. 2013), and Amsterdam v. Abercrombie, U.S. Dist. Ct. Civil No. 13-00649 SOM-KSC (D. Haw. 2013). However, the filing of these actions does not affect the mootness of the instant case for several reasons. **First**, the argument that new litigation challenging an amended law (that otherwise moots a case) prevents a case from being moot has been expressly rejected by at least two federal circuits. Miller v. Benson, 68 F.3d 163, 164-65 (7th Cir. 1995) ("Whatever the outcome of the state case [attacking the amended law], this federal … challenge to a statutory limitation that has been removed by the political branches ... lacks any continuing significance. . . . The state legislature gave plaintiffs what they sought, and this case is therefore moot."); Citizens for Responsible Gov't State Pol. Action Committee v. Davidson, 236 F.3d 1174, 1184 (10th Cir. 2000) ("[W]e do not believe that the mere filing of a lawsuit [attacking the validity of the bill repealing certain challenged statutes] is sufficient to resurrect Article III jurisdiction over the repealed statutes."). See also 13C Wright, Miller & Cooper, Federal Practice and Procedure Juris. § 3533.6 (3d ed. 2014) (Westlaw) ("The fact that independent litigation challenges the new enactment that satisfies the claims in the present

action is not likely to defeat mootness. Courts are not interested in predicting the outcome or consequences of proceedings in another court, nor in retaining jurisdiction as an opportunity for collateral attack on another court's eventual judgment."). In Benson, the Seventh Circuit was also concerned about potential conflicts between courts caused by not dismissing a case as moot:

> It would hardly be appropriate to retain [a case] on the docket to permit the plaintiffs a form of collateral attack on the state decision, should their fears about the course of that litigation be realized.

Benson, 68 F.3d at 165. In the present case, this concern also exists, since both lawsuit outcomes could theoretically be collaterally attacked if this appeal is stayed as Hawaii Family Forum requests, rather than dismissed now as moot.

Second, the Ninth Circuit has already rejected the possibility that the legislature will reenact the old law as "**speculation**" that "cannot breathe life into [a] case." Log Cabin, 658 F.3d at 1167. "Repeal is 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" Id. The only time the possibility of reenactment will defeat mootness is in the "rare" circumstance "where it is **virtually certain** that the repealed law will be reenacted." Id. (emphasis added.) For example, mootness has been defeated where a government entity **admits** that it intends to reenact "precisely the same provision" that it had repealed. Id. (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n.11 (1982)). The mere **possibility**,

however, of legislative reenactment is analogous to the **possibility** of litigation invalidating the new law. Just like legislative reenactment, the possibility of litigation invalidating the new law is pure "**speculation**" that "cannot breathe life into this case." Log Cabin, 658 F.3d at 1167. Moreover, not only is the present litigation attacking Act 1 not "**virtually certain**" to succeed, but the claims raised are so **weak** as to be almost frivolous. The suits in McDermott and Amsterdam have already been rejected by the trial courts.[5]

Third, there are several compelling policy reasons to reject the argument that new litigation challenging an amended law prevents a case from being moot. If the fact that a legal challenge could one day overturn an amended law defeats mootness, then the mootness-by-superseding-legislation doctrine would be **eviscerated**, as **any** new law could **one day** be challenged. Courts could never find an appeal moot via legislation. Even waiting for currently pending lawsuits (such as McDermott and Amsterdam) to be finally resolved on appeal would not suffice, as a new lawsuit under a new theory could arise **at any time**. Furthermore, there is no harm (i.e., prejudice) to any party if the case is dismissed as moot, at least provided vacatur of the district court's ruling is first entered. If a plaintiff's case is dismissed as moot but then the superseding legislation is later invalidated, that plaintiff can always bring a new lawsuit (as long as vacatur was granted as

[5] This Court should take judicial notice of the following court orders and judgments in these cases, attached as Addenda 7 and 8.

well, to eliminate any potential of a res judicata or collateral estoppel bar). There is an even stronger argument in the present case that mootness does not harm any party because the **plaintiffs** (who **lost** below) agree that this case is moot (unlike in Benson) and the only party objecting to immediate mootness is the intervenor **defendant** HFF (who **prevailed** below). But HFF is not harmed because if the challenges to Act 1 **succeed**, then the same sex marriage ban is reinstated (which HFF wants), and no court ruling on the merits of the instant appeal would exist to interfere with that reinstatement (because this appeal would have been dismissed as moot). If the challenges to Act 1, however, **fail**, because the case would then be dismissed as moot at that point anyway, HFF is no worse off by an immediate mooting of this appeal.

B. This Court Should Order Vacatur.

Equitable principles support vacatur of a lower court ruling where the appellant that challenges the ruling below loses its ability to appeal because of mootness. As the Ninth Circuit ruled in Log Cabin, 658 F.3d at 1167-68:

> The **"established" practice** when a civil suit becomes moot on appeal is to vacate the district court's judgment and remand for dismissal of the complaint. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 [] (1950). Vacatur ensures that "those who have been prevented from obtaining the review to which they are entitled [are] not ... treated as if there had been a review." *Id.* It "prevent[s] an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what [the Supreme Court has] called a 'preliminary' adjudication." *Camreta*.

"Under the '*Munsingwear* rule,' vacatur is **generally 'automatic'** in the Ninth Circuit when a case becomes moot on appeal." NASD Dispute Resolution, Inc. v. Judicial Council of the State of California, 488 F.3d 1065, 1068 (9th Cir. 2007). Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." Dilley v. Gunn, 64 F.3d 1365, 1369 (9th Cir. 1995) (quoting Munsingwear, 340 U.S. at 40).

The Supreme Court in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 25 (1994), explained that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." The Supreme Court, however, has placed some limits on vacatur where "the party seeking relief from the judgment below caused the mootness by voluntary action." Id. at 24. Because **plaintiffs** here, however, certainly did not cause the mooting event (the passage of Act 1) -- the Hawaii legislature being independently responsible for enactment of Act 1 -- plaintiffs are surely entitled to vacatur of the District Court's order and judgment. See Chemical Producers and Distributors, Ass'n v. Helliker, 463 F.3d 871, 879 (9th 2006) (even a party who lobbied legislature for mooting legislation is not precluded from seeking vacatur because "[l]obbying Congress or a state legislature cannot be viewed as 'causing' subsequent legislation for purposes of the

vacatur inquiry. Attributing the actions of a legislature to third parties rather than to the legislature itself is of dubious legitimacy, and the cases uniformly decline to do so."). [6]

The **Governor** himself is independently entitled to vacatur because he, too, like plaintiffs, cannot control the independent actions of the legislature. Chemical Producers, 463 F.3d at 879 ("Even where new legislation moots the executive branch's appeal of an adverse judgment, the new legislation is not attributed to the executive branch."). If the legislature did not pass the bill, the bill would not have become law no matter how much the Governor wanted the bill to pass.[7] The

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[6] For these reasons, this Court should **itself** direct vacatur, without remand for further consideration by the district court. Chemical Producers and Distributors Ass'n v. Helliker, 463 F.3d 871, 878 (9th Cir. 2006) ("Where mootness was caused not by the 'voluntary action' of the party seeking vacatur but by 'happenstance' or the 'vagaries of circumstance,' **we** direct vacatur.").

Moreover, even if vacatur in this case were not automatic, despite this Court's precedent saying it is (see supra), the equities favor vacatur. The district court's decision below has "legal consequences." Even though the district court's decision does not bind any court (except perhaps through possible res judicata or collateral estoppel effect), it is still "on the books," may carry persuasive value, and is a decision to which the Hawaii federal district court, and other federal courts, could look to and cite. Indeed, if the fact that district court decisions do not bind other courts precluded vacatur, then vacatur of district court decisions would never occur. There is simply no legal basis for requiring plaintiffs or the Governor to prove any other practical hardship. The courts have imposed no such additional requirement on the "established" and "automatic" practice of vacating judgments in cases that have become moot on appeal. Munsingwear, Log Cabin, NASD, supra.

[7] Although the Governor called the special session, making passage of the bill possible, actual passage of the bill by the legislature is plainly not in his control. By analogy, even if every legislator voting in favor of a bill (which passes)

Governor, too, therefore, did not "cause the mootness by voluntary action" (rather, the **legislature** did) so as to preclude him from seeking vacatur of the District Court's order and judgment.

Therefore, the **Governor** is also independently entitled to vacatur as well. Regardless, it is beyond debate that **plaintiffs** are entitled to vacatur. Vacatur, which should be "automatic," will eliminate the now unappealable District Court ruling and preclude any possibility of it "spawning legal consequences," including having preclusive res judicata or collateral estoppel effect of any kind.[8]

Accordingly, the Governor's and plaintiffs' consolidated appeals are moot. **This court** should thus first vacate the District Court's order and judgment under

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submitted an affidavit stating that absent the lobbying effort of X, he or she would have voted against that bill, thereby proving that the lobbyist was a but-for and proximate cause of the legislation's passage, Chemical Producers would still conclude that the lobbyist "cannot be viewed as 'causing' subsequent legislation for purposes of the vacatur inquiry." Id. And that makes sense because the ultimate responsibility for the bill's passage rests in the hands of the legislature. Analogously, then, the Governor's calling the special session does not make him the "cause" of the legislation for purposes of the vacatur doctrine; only the legislature could actually pass the bill.

The Governor's signing of the bill also does not make him the "cause" of the bill's passage for purposes of the vacatur inquiry. First, as noted above, if the legislature did not itself pass the bill, there would have been no bill for the Governor to sign. Second, even if the Governor had declined to sign the same-sex marriage bill, as long as he did not veto it, the bill would have become law without his signature. See Haw. Const. Article III, Section 16.

[8] The Governor, however, does not concede the existence or extent of any preclusive effect of the District Court's ruling in all or certain circumstances.

the vacatur doctrine, as appellants have requested, and then dismiss the appeals.

In the unlikely event these appeals are not dismissed as moot, the Governor now addresses the merits of the appeals.

II. *Baker v. Nelson* is not controlling.

Baker v. Nelson's summary dismissal order is not controlling for multiple independent reasons.

A. The particular challenge here, based upon *sexual orientation*, a civil union backdrop, and a take away, was not **necessarily** decided in *Baker*.

Dismissals for want of a substantial federal question reject only "the specific challenges presented in the **statement of jurisdiction**." Mandel v. Bradley, 432 U.S. 173, 176 (1977).[9] The District court ignored the fact that although discrimination against homosexuals was mentioned in the Baker jurisdictional statement's introductory sections, that was not the subject of the main argument sections, which focused solely upon **gender**. [ExcerptCR93:24-28]. Those argument sections never once suggested heightened scrutiny should apply to classifications on the basis of **sexual orientation**. Indeed, the argument section was very explicit that "the discrimination in this case is one of **gender**." ExcerptCR93:27. But even if the prefatory sections referencing homosexuality discrimination could be construed as possibly also raising sexual orientation

[9] See also Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1979) (court not bound because "the **jurisdictional statement** . . . at no point . . . directly address[ed] the question now before us.").

discrimination, it cannot be said that such question was "**necessarily decided**," Mandel v. Bradley, 432 U.S. at 176, which is the operative standard. The absence of any suggestion that sexual orientation requires some form of heightened scrutiny, along with the express statement that the discrimination "in this [Baker] case is one of **gender**," precludes sexual orientation discrimination having been **necessarily** decided. Because sexual orientation discrimination thus at best "merely **lurk[ed]** in the record," Illinois, 440 U.S. at 183, and was "**only briefly alluded to** in [the] jurisdictional statement," Lecates v. Justice of Peace, 637 F.2d 898, 905 (3d Cir. 1980), it is deemed not resolved. Because Baker thus only "**necessarily**" decided the **gender** discrimination claim, it cannot control plaintiffs' claims here based upon **sexual orientation** discrimination. See Illinois, 440 U.S. at 181 (finding prior summary disposition not binding because the equal protection challenge in the current case was based upon a **different classification**).

Furthermore, and independently, unlike Hawaii today, Baker's Minnesota of 1972 had no civil union law offering same-sex couples the same state rights and responsibilities of married opposite-sex couples. HRS §572B-9 (Addendum4). The Ninth Circuit even ruled that a full civil union or domestic partnership law **cuts heavily against marriage bans**. Perry v. Brown, 671 F.3d 1052, 1092 (9th

Cir. 2012)[10] ("Proposition 8 could not have reasonably been enacted to … encourage responsible procreation" because "[s]imply taking away the designation of 'marriage,' **while leaving in place all the substantive rights and responsibilities of same-sex partners**, [could] not do any of the things its Proponents now suggest were its purposes.").[11] Even if a civil union law would not **necessarily** have changed the Baker result, that does not mean Baker is controlling. What matters is that the civil union law **might** change the result, because the civil union law's presence is **an additional fact that may raise a "different question."** Perry, 671 F.3d at 1082 n.14 (where a different question from Baker is presented, Baker will not control); Mandel, 432 U.S. at 177 (court must look at "all of the facts" in the summary dismissal case, and where they "are very different from the facts of this case," the former is not controlling). Thus, Hawaii's full civil union law raises a sufficiently "different question" from the facts

[10] **The Perry decision was vacated,** but **entirely** on **unrelated jurisdictional grounds,** in Hollingsworth v. Perry, 133 S.Ct. 2652 (2013). **Perry's analysis, therefore, retains persuasive value.** See Frank v. United Airlines, 216 F.3d 845, 856 (9th Cir. 2000); DHX v. Allianz, 425 F.3d 1169, 1176 (9th Cir. 2005). We will not repeat this vacating point again in this brief.

[11] That Perry used the term "taking away" does not change anything, because the **logic** of the statement holds equally true if that phrase is replaced with "not providing."

presented in Baker to prevent Baker from controlling this Hawaii case.[12]

Finally, there is yet another major different fact here, not present in Baker. The Hawaii Supreme Court in 1993 had held that Hawaii's same-sex marriage ban was subject to strict scrutiny under the **Hawaii** Constitution, thereby **providing Hawaii same-sex couples with the "right" to same-sex marriage absent the state's ability to satisfy strict scrutiny**. See Baehr v. Lewin, 74 Haw. 530, 582 (1993).[13] Hawaii subsequently took that "right" away by the passage of Art. I, Section 23, in 1998, giving the Legislature "the power to reserve marriage to opposite-sex couples." See Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 at *6 (Haw. Dec. 9, 1999) [Addenda2&5]. This Court in Perry emphasized that **taking away** existing marriage rights substantially alters the constitutional equation, and cuts against the validity of a same-sex marriage ban. 671 F.3d at 1088. Although the "take away" of marriage rights in Hawaii (nullifying judicial ruling granting right to same-sex marriage *absent state satisfying strict scrutiny*) is somewhat different from the "take away" of right to same-sex marriage in

[12] The District court wrongly claims the Baker plaintiffs made similar arguments regarding same-sex couples raising and adopting children. [ExcerptCR117:45]. The Baker plaintiffs, however, only noted that such couples could, **as a physical matter**, raise and adopt children, [ExcerptCR93:26], not that Minnesota gave them equal **legal** rights to do so.

[13] "On remand, [under] 'strict scrutiny' standard, the burden will rest on [health director] to … demonstrat[e] that [HRS §572–1] furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."

California (where actual marriages had temporarily been allowed), it presents a significantly different situation from the **wholly** non-take-away situation in Baker, and thus precludes Baker from controlling this case. It must be emphasized again that this Court need not agree that Hawaii's "take away" situation would have yielded a different result in Baker; it need only agree that it raises a "different question" that **might** have a different answer. See Perry, 671 F.3d at 1082 n.14 (ruling, **prior to** deciding the impact of California's "take away" situation, that Baker is not controlling because Perry involved "a wholly different question: whether the people of a state may ... strip a group of a right or benefit ... that they had previously enjoyed."). Perry ultimately ruled that a different result from Baker is **required** based upon **California's** "take away" situation, and that means a different result in **Hawaii's** "take away" situation, too, is at least **possible**. Thus, Baker, for this additional reason, cannot control.

The District court has no answer to any of these fundamental differences, focusing instead upon the fact that there are some similarities between the claims in Baker and those in this case. [ExcerptCR117:44-46]. But even one factual difference that **might** change the ultimate conclusion is sufficient to preclude Baker from controlling. Because at least three such differences exist here (as explained above), Baker cannot control.

B. *Lawrence* and *Windsor* Doctrinal Developments preclude *Baker* from binding this Court.

Separately, and regardless of the above, the subsequent Lawrence v. Texas **doctrinal development** undermines any binding effect of Baker. See Hicks v. Miranda, 422 U.S. 332, 344 (1975) (summary dismissals are not binding **when subsequent "doctrinal developments indicate otherwise."**). At the time Baker was decided in 1972, there was no established constitutional right to engage in intimate same-sex relations. Indeed, when the United States finally did address that specific question some 14 years later in Bowers v. Hardwick, 478 U.S. 186 (1986), it ruled that same-sex intimate relations could be **criminally** prosecuted. If Baker **did** implicitly resolve a **sexual orientation** discrimination claim -- an assumption we make, *arguendo*, in this section (even though contrary to the prior subsection) -- then it is understandable why Baker would have rejected such a claim in the Bowers era for two reasons: first, because heightened scrutiny would not be warranted, and second, because a ban on same-sex marriage would satisfy rational basis review.

For if it is constitutionally permissible to **criminalize** same-sex intimate relations, it is difficult to understand why same-sex marriage -- which legitimizes same-sex intimate relations (just as opposite-sex marriage legitimizes heterosexual sexual activity) -- should be given the protection of strict or even heightened scrutiny. It is inconsistent to allow same-sex intimate relations to be criminalized,

while at the same time providing heightened protection for the very type of marital relationship that condones that "criminalizable" conduct. In short, it would not have been surprising that Baker, in the Bowers era, would have **rejected heightened scrutiny** for a same-sex marriage ban challenged on sexual orientation grounds, had it decided that question.

Furthermore, at the time Baker was decided, it would have been easy to find **a rational basis** for a marriage ban discriminating against gay men and lesbians: namely, to not encourage or legitimize conduct that a state may constitutionally criminalize. Thus, it is unsurprising that Baker would have found the same-sex marriage ban to satisfy the rational basis test.

Baker **cannot** be controlling **today**, however, because the Supreme Court subsequently overruled Bowers in its landmark Lawrence v. Texas ruling, holding that same-sex couples have a constitutional Due Process right to engage in same-sex intimate relations. 539 U.S. 558 (2003). This significant "doctrinal development" undermines the above syllogisms that otherwise would justify a Baker ruling rejecting heightened scrutiny, and finding that a same-sex marriage ban satisfies rational basis review. Because same-sex intimate relations are now constitutionally protected, there is now no inconsistency in affording heightened protection for same-sex legal relationships (including marriage), because even if such legal relationships do legitimize same-sex intimate relations, they are

legitimizing **constitutionally protected conduct**. Similarly, Lawrence's constitutional protection for same-sex intimate relations eliminates the prior rational basis that a ban on same-sex marriage furthers the state's interest in not encouraging conduct that the state may constitutionally criminalize.

This is **not** to say that Lawrence necessarily **requires** heightened scrutiny, or that Lawrence requires concluding that a same-sex marriage ban does not satisfy rational basis review; it is simply to say that the Bowers doctrinal framework -- that would support Baker rejecting heightened scrutiny and finding satisfaction of rational basis review -- has been so eviscerated that Baker cannot control today. Whatever impact Baker could have had on the case at bar in the Bowers era is gone completely **post-Lawrence**. Hicks, 422 U.S. at 344 (summary dismissals are not binding when subsequent "**doctrinal developments** indicate otherwise"). This Court, therefore, must put aside Baker's summary dismissal, and decide the Due Process and Equal Protection questions in this case **itself**.

The District court erred in relying upon the fact that the Supreme Court has "not explicitly or implicitly overturned its holding in Baker." [ExcerptCR117:40]. No such overturning is required when it comes to **summary dismissals**. See Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979) (dismissal for lack of substantial federal question "is **not** entitled to the same deference given a ruling after briefing, argument, and a written opinion."). Indeed, requiring overturning would render

superfluous the "doctrinal developments" exception, as obviously an overruled decision is not controlling. The District court provides no answer to the Governor's showing that Lawrence's overruling of Bowers eliminates the easy doctrinal underpinning supporting Baker.

The District court wrongly relies on Lawrence's statement that the case did "not involve whether the government must give formal recognition to any relationship." [ExcerptCR117:41]. But that just means the obvious: that Lawrence did not address whether same-sex marriage must be recognized. It does not mean Lawrence does not **impact issues** that may be highly **relevant to the same-sex marriage question**. As already demonstrated, Lawrence's overruling of Bowers undercuts a simple doctrinal basis supporting the Baker result.

For similar reasons, Baker could have easily found no **fundamental right** to same-sex marriage (under the **Due Process** Clause) because same-sex marriage condones conduct that could, at that time, be made criminal. Once Lawrence overturned Bowers, however, a fundamental right to same-sex marriage became very plausible. See discussion infra at 80-88. The District court thus erred in concluding that Baker precludes the Due Process claim, too [ExcerptCR117:42-43], by wholly ignoring this key Lawrence doctrinal development. It also erred in relying on the Perry **dissent**, which also ignored Lawrence's impact on relevant underlying issues.

Finally, the Supreme Court's **Windsor** Due-Process/Equal-Protection decision -- invalidating laws that impose a disadvantaged and demeaning second-class status and stigma upon same-sex couples (as Hawaii's ban does), discussed infra at 52-56 -- is itself a critical **doctrinal development** that precludes Baker from controlling the Due-Process/Equal-Protection challenges here.

In sum, even if Baker had decided the exact same questions presented here -- despite the three clear differences noted supra at 19-23 -- Baker still cannot control this case in light of the subsequent game-changing Lawrence and Windsor doctrinal developments.[14] Several recent district courts have agreed that Baker is not binding on the question of a constitutional right to same-sex marriage. See, e.g., DeBoer v. Snyder, Civil Action No. 12-CV-10285, 2014 WL 1100794, at *15 n.6 (E.D. Mich. Mar. 21, 2014); De Leon v. Perry, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *8-10 (W.D. Tex. Feb. 26, 2014); Bostic v. Rainey, Civil No. 2:13cv395, 2014 WL 561978, at *9-10 (E.D. Va. Feb. 13, 2014); Bishop v. United States, 962 F.Supp.2d 1252, 1274-77 (N.D. Okla. 2014); Kitchen v. Herbert, 961

[14] The District court's reliance on Massachusetts v. U.S. Dep't HHS, 682 F.3d 1, 8 (1st Cir. 2012), which said that Baker precludes arguments that "rest on a constitutional right to same-sex marriage," is misplaced. First, and most importantly, for the multiple reasons provided above, that conclusion is patently erroneous. Second, that statement was pure ***dicta***, as that court found DOMA to violate the constitution without resting its conclusion upon a constitutional right to same-sex marriage, rendering the comment about Baker wholly unnecessary to the ruling. Third, perhaps because it was *dicta*, the statement was entirely conclusory, **without any analysis**. Fourth, as a First Circuit case, it cannot bind this Ninth Circuit.

F.Supp.2d 1181, 1194-95 (D. Utah 2013).

III. Sexual Orientation is a Suspect or Quasi-Suspect Classification requiring Ban to be Reviewed under Strict, or at minimum, Heightened, Scrutiny.

The ban on same-sex marriage discriminates on the basis of sexual orientation because only gay men and lesbians are denied the right to marry the person they love. Although the U.S. Supreme Court has not yet ruled on the level of scrutiny for discrimination on the basis of sexual orientation, it has set forth four sometimes relevant factors. They are: whether the group 1) as a historical matter, has been subjected to discrimination; 2) exhibits obvious, immutable, **or** distinguishing characteristics that define them as a discrete group, 3) is a minority **or** politically powerless, and 4) whether the group's characteristic "generally provides no sensible ground for differential treatment," because it "bears no relation to ability to perform or contribute to society." Bowen v. Gilliard, 483 U.S. 587, 602 (1987); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-441 (1985). Applying these factors overwhelmingly supports some form of heightened scrutiny. See infra at 41-51.

But the District court concluded that this Circuit's High Tech Gays v. Defense Indust. decision, 895 F.2d 563 (9th Cir. 1990) -- rejecting sexual orientation as a suspect or quasi-suspect class -- is binding. That conclusion is plainly wrong, as explained below. See Golinski v. Office of Personnel

Managment, 824 F.Supp.2d 968, 985 (N.D. Cal. 2012) ("**the outdated holding in High Tech Gays**, subjecting gay men and lesbians to rational basis review, **is no longer a binding precedent**."). Most importantly, this Court in **SmithKline Beecham v. Abbott Laboratories**, 740 F.3d 471, 483 (9th Cir. 2014), held that "**heightened scrutiny** applies to classifications based on sexual orientation." **Unless overturned en banc, SmithKline binds this Court.** SmithKline's rejection of rational basis review was correct for the following reasons.

A. *High Tech*'s reasoning has been so undermined by subsequent U.S. Supreme Court precedent that it cannot bind this Court.

The Ninth Circuit's decision in Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc), means that the **subsequent** U.S. Supreme Court ruling in Lawrence v. Texas (2003) -- undercutting the reasoning of High Tech -- and other developments, allow this Court to ignore the High Tech ruling, and reach its own conclusion on the suspect status of sexual orientation discrimination.

The lynchpin of High Tech's rejection of sexual orientation as a suspect category was the Supreme Court's Bowers ruling allowing same-sex intimate relations to be criminally prosecuted. 478 U.S. 186 (1986). High Tech explained: "**because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.**" 895 F.2d at 571. The court explained:

> "The Constitution, in light of [*Bowers*], cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result." … "**It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict [or heightened] scrutiny under the equal protection clause.**"

Id. at 571 n.6 (citations omitted). In short, High Tech's rejection of heightened scrutiny for sexual orientation rested predominantly upon the Bowers ruling allowing criminalization of same-sex intimate relations.

Because Bowers was subsequently overruled in Lawrence -- holding such conduct constitutionally protected -- the critical underpinning and reasoning of High Tech has been shattered. Thus, High Tech cannot bind this Court.

> We must ... address when if ever, a district court or a three-judge panel is free to reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, **but not identical** issue. ....
>
> We hold that **the issues decided** by the higher court **need not be identical** in order to be controlling. Rather, the relevant court of last resort must have **undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable**.

Miller, 335 F.3d at 899-900 (9th Cir.). Lawrence clearly "undercut the **theory or reasoning** underlying the [High Tech] precedent" by overruling the Bowers decision upon which High Tech heavily relied. Because same-sex intimate relations can no longer be criminalized, it is **no longer** absurd for gay men and lesbians to be "entitled to greater than rational basis review for equal protection

purposes."[15] High Tech is thus not controlling.

The District court ignored this clear logic, and cites Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997), and Flores v. Morgan Hill, 324 F.3d 1130 (9th Cir. 2003), which simply rely upon High Tech. Because they, too, **pre-date** Lawrence, they, like High Tech, cannot bind this court.[16]

The District court's reliance on Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008), is also misplaced. The Witt majority did **not** in fact address the continuing validity of the High Tech/Philips **no-suspect-class** ruling. Rather, in a one-sentence cursory statement, they simply said: "Philips clearly held that **DADT does not violate equal protection** under rational basis review, and that holding was not disturbed by Lawrence, which declined to address equal protection." Witt, 527 F.3d at 821 (citations omitted). That statement means only that Philips found the DADT policy to **satisfy** rational basis review, and that Lawrence does not undermine **that** conclusion. It does not mean that the rational basis test is still the appropriate test for sexual orientation discrimination, when faced with a Miller v.

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[15] It is irrelevant whether Lawrence itself expressly ruled that sexual orientation is a suspect class. That High Tech relied heavily on Bowers for its "underlying **reasoning**," and Bowers was overruled by Lawrence, is sufficient. Miller does not require irreconcilable **outcomes**, but irreconcilable "underlying" "**theory or reasoning**." 335 F.3d at 900.

[16] Perry v. Brown did not decide whether sexual orientation is a suspect class because it did not have to, finding Proposition 8 to fail even rational basis scrutiny. 671 F.3d at 1080 nn.13 & 19.

Gammie argument that Lawrence has undermined the reasoning of High Tech on the no-suspect-class point.[17] This is true for multiple reasons.

First, the Witt majority engages in no discussion of High Tech/Philips' no-suspect-class ruling, or of Lawrence's impact on High Tech's **reasoning** (which depended heavily upon Bowers).

Second, the plaintiff in Witt did **not** assert to the **3-judge panel** the Miller argument we make here, that Lawrence has undermined the validity of High Tech/Phillips' no-suspect-class ruling (instead leaving that possibility to **en banc** review).[18] That explains why the Witt panel majority did not have to, and did not in fact, address the Miller argument. **Only Judge Canby addressed it, and he agreed that Lawrence undermined High Tech's no-suspect-class ruling**. 527 F.3d at 824.

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[17] We thus disagree with SmithKline's view that Witt reaffirmed High Tech's rejection of heightened scrutiny for equal protection challenges based on sexual orientation post-Lawrence. 740 F.3d at 480.

[18] See Witt's Appellant Brief at 49 [ExcerptCR108:38] ("Major Witt acknowledges that . . . Phillips [] rejected a claim that [DADT] violated equal protection by treating gay and straight service members differently without rational basis. Major Witt believes this case was wrongly decided, and preserves her right to seek its reversal **en banc**."); see also Witt, 527 F.3d at 823 (Canby, J.) (Judge Canby noted, and the majority did not disagree, that plaintiff Witt "does **not** pursue [the Philips sexual orientation discrimination equal protection claim] before our **three-judge panel**, [but only] preserve[s] her right to assert the claim in the event [of] **en banc review**"). Thus, plaintiff Witt never made the Miller argument we make here that, in light of the subsequent Lawrence decision, a three-judge panel is not bound by the Ninth Circuit's High Tech/Phillips' no-suspect-class ruling.

Finally, the Witt majority in its **one** paragraph equal protection section, did not even expressly address the specific type of discrimination relevant here -- **sexual orientation** discrimination, i.e., discriminatory treatment of gay men and lesbians *vis-a-vis* **heterosexuals** -- but instead dealt with a very different classification. The majority addressed only the "argu[ment] that DADT violates equal protection because the Air Force has a mandatory rule discharging those who engage in homosexual activities **but not those 'whose presence may also cause discomfort among other service members,' such as child molesters**." Witt, 527 F.3d at 821; Witt's Appellant Brief at 49-51 [ExcerptCR108:38-40] ("Major Witt makes a different equal protection argument not addressed in Philips.").

For these multiple reasons, the District court **erred** in relying upon Witt to reject our Miller argument that High Tech is no longer controlling in light of Lawrence, and other developments. Indeed, Judge Canby, the **only** judge in Witt to address our Miller argument, fully adopted it.

Regardless, **Windsor** certainly undermines High Tech's rational basis standard, for the reasons spelled out in SmithKline. The most compelling reason is that Windsor, in concluding that DOMA violated the equal protection component of the Due Process clause, did **not** bother to even consider the multiple rational bases put forth by BLAG in support of DOMA, nor any other **conceivable** rational bases. That conclusively establishes that rational basis review was not the

applicable standard, and that Windsor was applying some form of heightened scrutiny. SmithKline, 740 F.3d at 481-82.

Although SmithKline's adoption of heightened scrutiny for sexual orientation discrimination makes the following analysis unnecessary, the remaining non-Bowers-related reasoning of High Tech has also been undermined by other subsequent Supreme Court and Ninth Circuit precedent, and factual developments. High Tech went on to apply a multi-part test looking to whether the group a) suffered a history of discrimination, b) exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group, and 3) is a minority or politically powerless. 895 F.2d at 573.

High Tech conceded the history of discrimination factor. Id. Thus, if even one of the remaining factors is called into question, High Tech's conclusion with regard to the multi-part test is no longer binding. And this is separate and apart from the fact that, as explained above, High Tech's conclusion is already not binding because its lynchpin rationale -- Bowers' allowing criminal prosecution for same-sex intimate relations -- has been gutted by Lawrence.

High Tech then found "[h]omosexuality . . . not an immutable characteristic." Id. However, this finding is no longer controlling for three independent reasons. First, a more recent Ninth Circuit decision expressly concludes the exact opposite, stating that "[s]exual orientation and sexual identity

are immutable." Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000). Ninth Circuit law has already evolved beyond High Tech. That Hernandez did not discuss suspect classifications is irrelevant; it resolved an element supporting suspect status.

Second, scientific studies that have come out **after** 1990, when High Tech was decided, make clear that sexual orientation is indeed an immutable characteristic, thereby rendering High Tech's non-immutability finding simply wrong in light of the current empirical evidence. See Herek Decl.¶¶9, 28-31 [ExcerptCR93:68-69,79-83] (2009 study showed 95% of gay men and 84% of lesbian women perceived little or no choice regarding their sexual orientation). High Tech cannot bind this panel when new scientific empirical facts have arisen after 1990. See Oregon Natural Desert Ass'n v. U.S. Forest Service, 550 F.3d 778, 785-86 (9th Cir. 2008) (stare decisis inapplicable when case involves "new factual circumstances").

Third, **either** 1) High Tech decided only that a category **other than sexual orientation**, i.e., the category of homosexual **behavior** or **conduct**, was not suspect, **or** 2) its reason for concluding that **sexual orientation** is not suspect has been undercut by subsequent Supreme Court rulings. As to the first point, High Tech expressly and repeatedly refers to its inquiry as deciding the suspect status of "homosexuality," rather than "sexual orientation." 895 F.2d at 571, 573, 574.

Although the two terms could be synonymous, the reason High Tech gives for finding homosexuality not immutable indicates the High Tech Court was not using them synonymously:

> Homosexuality is not an immutable characteristic; it is **behavioral** and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes. The **behavior** or conduct of such already recognized classes is irrelevant to their identification.

Id. at 573-74. Thus, High Tech's conclusion of non-immutability was rooted in its apparent view that homosexuality is not defined by the sexual attraction or **orientation** of the person, but rather by whether or not the person engages in homosexual conduct or behavior. This is confirmed by High Tech's statement that even if a valid distinction could be made between discrimination based upon sexual **orientation** versus homosexual **conduct**, "this differentiation is not relevant to this case, as the DoD regulations challenged by the plaintiffs all relate to **conduct**." 895 F.2d at 573 n.9. Thus, High Tech decided only that engaging in homosexual **conduct or behavior** is not immutable, as opposed to deciding that sexual **orientation** is not immutable. This is especially clear because the opinion did not reference a single study or other source supporting the non-immutability of sexual **orientation**, a conclusion that is not something a non-psychology-expert, like a court of law, may simply assume is true.

Alternatively, if High Tech is viewed, contrary to the above, as actually deciding that sexual **orientation** is not immutable, then its **reasons** for so concluding have been undermined by subsequent Supreme Court decisions. As quoted above, High Tech reasons that homosexuality is not immutable because "it is **behavioral**." Id. at 573-74. And because homosexual **behavior** or **conduct** itself could at least be argued to be not immutable -- in that obviously no person, even if gay or lesbian, need engage in homosexual conduct (complete celibacy being an option) -- High Tech avoided grappling with the harder question of whether **orientation** is immutable. That is, High Tech, even if ostensibly ruling on the immutability of **orientation**, did so by improperly **separating orientation** from **conduct** (and assessing the immutability of the conduct, not orientation). This separation of orientation from conduct, however, has been rejected by subsequent Supreme Court rulings.

> Our decisions have declined to distinguish between [sexual orientation] status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination."); *id.*, at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.");

Christian Legal Society v. Martinez, 130 S.Ct. 2971, 2990 (2010). Because the **reasoning** underlying High Tech's rejection of immutability -- **separating**

orientation from behavior (and finding the latter not immutable) -- has been undermined by Christian Legal and Lawrence, the rejection is not binding on this Court. See Miller v. Gammie, supra. A federal district court recently reached the same conclusion. Golinski, 824 F.Supp.2d at 984-85 (finding High Tech's **non-immutability** ruling not binding).

For any one of the above three reasons, therefore, High Tech's non-immutability finding is not binding upon this Court.

In addition, High Tech's **not-politically-powerless** conclusion is also not binding in light of **subsequent** factual developments involving reduced gay and lesbian political power, including the overwhelming nationwide backlash provoked by Hawaii's 1993 Baehr v. Lewin decision, leading to DOMA, and 30 new constitutional bans on same-sex marriage. See discussion infra at 45-47. A ruling resting on a particular complex of facts cannot bind a subsequent court faced with a very different and new set of facts. See Oregon Natural, 550 F.3d at 785-86. The District court's rebuttal that suspect status "does not depend on the particular … facts of a case," [ExcerptCR117:81], is clearly wrong, because obviously political powerlessness turns on the current facts regarding gay and lesbian political power. Thus, this Court's disagreeing with High Tech's 24-year-old political power conclusion would not be "overrul[ing] binding Ninth Circuit precedent," but simply deciding a different case based upon new and different facts.

Finally, High Tech failed to even apply the highly important fourth factor -- whether the classification bears no relation to ability to perform or contribute to society -- that cuts clearly in favor of suspect status. See discussion infra at 49-52. A **subsequent** Ninth Circuit decision **en banc** emphasized the importance of this factor. See U.S. v. De Gross, 960 F.2d 1433, 1439 (9th Cir. 1992) (citing and applying Frontiero's focus -- in determining suspect class status -- on "an individual's ability to perform or contribute to society"). High Tech's failure to even apply this critical fourth factor (as demanded by subsequent **en banc** precedent) thus precludes High Tech from binding this Court. See Overstreet v. United Brotherhood, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005) (Miller v. Gammie principle applies to intervening **en banc** decisions).

Therefore, with two of the four factors indisputably cutting in favor of suspect status for sexual orientation (history of discrimination and no relation to ability to perform or contribute), **and** the remaining two factors (immutability and political powerlessness) not bound by High Tech's negative conclusion, High Tech's overall conclusion (not suspect) is plainly not binding on this Court.[19] Of

[19] Indeed, even if this Court were to conclude that one (or even two) factors cut against suspect status, because at least two cut indisputably in favor, the overall outcome of a full factor analysis is at least open to question.

Furthermore, in a confusing twist, High Tech actually considered an **additional** factor in the analysis of suspectness: whether the classification "burdens a fundamental right;" and concluded it did not because, **given Bowers**, "homosexual

course, as noted before, given that the lynchpin rationale behind High Tech's no-suspect-class conclusion -- Bowers' allowing criminalization of homosexual conduct -- was later overruled, that development **by itself** precludes High Tech from binding this Court, regardless of the factors. See Golinksi, 824 F.Supp.2d at 985 ("**High Tech['s] rational basis [standard] … is no longer a binding precedent.**"). Moreover, SmithKline commands heightened scrutiny.

B. Four-Part Test Overwhelmingly Demonstrates Sexual Orientation is a Suspect (or at least Quasi-Suspect) Class.

Although it is not necessary for heightened scrutiny that a classification satisfy all four criteria,[20] sexual orientation, in the context of marriage, plainly does satisfy all four criteria, and thus the case for strict or heightened scrutiny here is overwhelming.

1. History of Discrimination

First, gay men and lesbians have indisputably been subjected to pervasive discrimination throughout history, see Chauncey Decl. [ExcerptCR93:164-222], and the Director, HFF, and the District court, do not claim otherwise. This Court, even in High Tech, has so ruled. 895 F.2d at 573.

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conduct is not a fundamental right." 895 F.2d at 573-74. Because Lawrence has since overruled Bowers, High Tech's ruling is thus further undermined.

[20] See discussion, infra, at 51-52.

2. Immutability or Distinguishing Characteristic

Second, sexual orientation has been legally and scientifically accepted to be an immutable characteristic. See Herek Decl.¶¶9, 28-31 [ExcerptCR93:68-69,79-83] (95% of gay men and 84% of lesbian women perceive **little or no choice** regarding their sexual orientation. Also, "sexual orientation is highly resistant to change through psychotherapy or religious interventions."). No evidence to the contrary was submitted.

HFF's Laumann study indicating that most people ever having a same-sex partner have at some point in life had an opposite-sex partner, CR68:Exh.14p.311, does **not** support HFF's conclusion that those person's orientation **changed over time**; it could simply mean that although they were always gay or lesbian, they, at some point, had an opposite-sex partner because of social pressure. See Herek Decl.¶38 [ExcerptCR93:89]. And even if their orientation did change, there is nothing to indicate that they had any **choice** in the matter (Herek ¶28). See City of Cleburne, 473 U.S. at 441 (characteristics "**beyond the individual's control**" weigh in favor of "heightened review"); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (explaining "accident of birth" aspect of immutability as relevant because such characteristics "bear [no] relationship to **individual responsibility**").

Most significantly, the Ninth Circuit has concluded that "[s]exual orientation [is] immutable," and that "[h]omosexuality is as deeply ingrained

as heterosexuality." Hernandez-Montiel, 225 F.3d at 1093 (9th Cir. 2000). A clearer statement by this very Court is impossible. Moreover, like other courts that have ruled it "[in]appropriate to require a person to repudiate or change [one's] sexual orientation," In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008), the Ninth Circuit, too, stated that "[s]exual orientation [is] so fundamental to one's identity that a person should not be required to abandon [it]." Hernandez-Montiel, 225 F.3d at 1093.[21] In sum, the immutability factor clearly "weighs in favor of the application of heightened scrutiny." Golinski, 824 F.Supp.2d at 987.

Furthermore, immutability is not necessary to meet this prong; possession of a "**distinguishing characteristic**" that "define[s] them as a discrete group" is sufficient. Lyng v. Castillo, 477 U.S. 635, 638 (1986) (looking to "obvious, immutable, **or** distinguishing characteristics that define them as a discrete group"); Bowen, 483 U.S. at 602 (same). Gay men and lesbians clearly have a distinguishing characteristic -- their sexual/romantic attraction to members of the same sex. Herek Decl.¶16 [ExcerptCR93:72]. Even if this characteristic can sometimes be hidden, it certainly cannot be hidden **when it matters** for purposes of this case:

[21] High Tech Gays' contrary ruling on immutability is not controlling. See discussion, supra at 35-39. Even if sexual orientation were not immutable, that would not be fatal to heightened scrutiny, as religion is a suspect classification, yet a person's religion is plainly not immutable. The same is true for the suspect class based on alienage. Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977) (strict scrutiny applies to resident aliens despite their ability to opt out of class voluntarily).

when a gay or lesbian couple wants to marry. Seeking the marriage license will reveal the couple's sexual orientation. Herek Decl.¶37 [ExcerptCR93:88-89]. In any event, illegitimacy is subject to heightened scrutiny, even though it "does not carry an obvious badge, as race or sex do." Mathews v. Lucas, 427 U.S. 495, 504, 506 (1976). Similarly, aliens and people of religion are suspect classes even though they, too, generally do not carry obvious or distinguishing characteristics.

3. Minority and Lack of Political Power

Third, gay men and lesbians are indisputably a minority, and a very small minority, making up a mere 3.5% of the U.S. population.[22] That low number, by itself, precludes them from having significant political power in a representative democracy where the majority rules. Moreover, gay men and lesbians are drastically underrepresented proportionally in political offices nationwide. See Segura Decl.¶¶44-46 [ExcerptCR93:417-18] (1.2% of state legislatures, 0.75% of Congress, and 0.05% of local officials, are openly gay; or 3 to 70 times underrepresented proportionally). This weakens even further their political power which is already miniscule due to their low 3.5% population percentage. Segura Decl.¶¶44-48 [ExcerptCR93:417-19].

As summarized by Professor Segura, "Gay men and lesbians do not possess

[22] Gates [ExcerptCR93:38] & Segura Decl.¶44 [ExcerptCR93:417] (3.5% of U.S. population identify as gay, lesbian or bisexual).

a meaningful degree of political power," "are powerless to secure basic rights," and "are subject to political exclusion and suffer political disabilities greater than other groups that have received suspect classification protection from the courts." See Segura Decl.¶¶10, 27, 81-85 [ExcerptCR93:403,408,431-32,403].

This lack of political power is manifested in a multitude of ways at both the federal and state level. See entire Segura Decl., espec. ¶¶29-43 [ExcerptCR93:409-16]. In 1996, for example, the federal Defense of Marriage Act -- denying federal recognition of same-sex marriages -- was passed by **overwhelming** margins in both the Senate (85-14), and in the House (342-67). [ExcerptCR93:46,47]. "From 1974 to 1993, at least 21 referendums were held on the sole question of whether an existing law or executive order prohibiting sexual orientation discrimination should be repealed or retained. In 15 of these 21 cases, a majority voted to repeal the law or executive order." Wintemute [ExcerptCR93:50]; see also Segura Decl.¶¶36-38 [ExcerptCR93:413-14].

Perhaps most important are the abundant examples of gay and lesbian lack of political power in the very area of relevance to this case: regarding the **right to marry**. And these examples have occurred quite recently, whereby judicial rulings supporting same-sex marriage have been reversed by ballot initiatives or constitutional amendments. See, e.g., Perry, 671 F.3d at 1065-67 (explaining how California Supreme Court ruling granting same-sex couples right to marry was

overturned in 2008 by California's Proposition 8 ballot initiative amending California Constitution). Although prior to 1998, "[n]o states had constitutional provisions defining marriages as a union between a man and a woman," by May 2012, there were 30 states with **constitutional** amendments restricting marriage to opposite-sex couples, plus another 9 states that did the same via **statute** alone. See National Conference [ExcerptCR93:51]; Segura Decl.¶34 [ExcerptCR93:412]. Indeed, after three Iowa Supreme Court justices took part in a decision requiring same-sex marriage, the voters of Iowa recalled every one of them in 2010; the first time in history Iowa high court members had been recalled. Segura Decl.¶25 [ExcerptCR93:407-08]; Chauncey Decl.¶102 [ExcerptCR93:221]; Sulzberger [ExcerptCR93:54-56]. Finally, in May, 2012, voters in North Carolina (which Obama won in 2008) passed a constitutional amendment by a more than 20% margin that not only bans same-sex marriage, but civil unions and domestic partnerships as well. Robertson [ExcerptCR93:57-58].

Moreover, perhaps the most relevant assessment of gay and lesbian political power for this case would involve their political power **in Hawaii**, and in the very context of **marriage**. The historical background of **this very case**, of course, provides that perfect example. The Hawaii Supreme Court in 1993, in Baehr v Lewin, held that Hawaii's ban on same-sex marriage was subject to strict scrutiny.

74 Haw. at 583, 852 P.2d at 68.[23] A Hawaii circuit court subsequently held that Hawaii could not satisfy strict scrutiny. Baehr v. Miike, 1996 WL 694235 at *21-*22 (Haw. 1st Cir. Ct. 12/3/96). But before that combination of judicial rulings could go into effect and allow actual same-sex marriages, a constitutional amendment effectively nullifying those judicial rulings was proposed by the **Hawaii legislature**, and **ratified by the electorate**. Baehr v. Miike, 1999 Haw. LEXIS 391 at *5-*8 (Haw. 1999) [Addendum5]. That amendment (which became Article I, Section 23) was ratified by an **overwhelming 69.2% to 30.6% margin**. [ExcerptCR93:59]. Prior to Act 1, the political power of gay men and lesbians in Hawaii -- the location of most relevance to this case -- had thus been demonstrably proven to be lacking when it came to marriage equality. Civil unions are not marriage.

The District court notes that some politicians (Governor Abercrombie, President Obama, and some in Congress) support gay marriage, but that support alone cannot translate into marriage equality unless others, e.g., state legislatures, cooperate as well. Moreover, the general voting public must also lend its support, lest constitutional amendments overturn any legislative or judicial gains, as happened in Hawaii and elsewhere. Furthermore, publicly stated support can fade

[23] A motion for reconsideration or clarification was partially granted, but this did not modify the relevant ruling in any substantive manner. 74 Haw. at 645-46; 852 P.2d at 74-75 (1993).

when opposition is mobilized. Segura Decl.¶¶18-19 [ExcerptCR93:405-06].

Finally, the strong prejudice faced by gay men and lesbians from substantial segments of the population, and even elected officials, weakens their political power even further, because, for example, even lawmakers sympathetic to them may feel pressured to vote against their interests. Segura Decl.¶¶65-73 [ExcerptCR93:423-27]. Other factors, too, including well-financed opposition, one-party capture, and violence or threats affecting mobilization, contribute to further weakening of their political power. Segura Decl.¶¶50-64, 74-80 [ExcerptCR93:420-23,427-30].

As the Second Circuit explained: "**[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.**" Windsor, 699 F.3d at 184. For all of the reasons given above, the clear answer is "no." The Second Circuit agreed. Id. at 185.

In sum, the third factor -- minority status and lack of political power -- cuts strongly in favor of heightened scrutiny. See also Golinski, 824 F.Supp.2d at 989 ("as a class, gay men and lesbians are a minority and have relatively limited political power to attract the favorable attention of lawmakers. Although this factor is not an absolute prerequisite for heightened scrutiny, the Court finds ... that

gay men and lesbians remain a politically vulnerable minority.").

Finally, women and racial minorities are entitled to heightened or strict scrutiny, even though women have substantial political power (and are not even a minority), Frontiero v. Richardson, 411 U.S. at 686 n.17 (1973) (plurality opinion) (subjecting gender classification to heightened scrutiny despite acknowledging that woman "do not constitute a small and powerless minority"), and despite racial minorities having achieved substantial statutory protections (on both the federal and state level) from discrimination, and significant electoral success. Segura Decl.¶¶81-85 [ExcerptCR93:431-32]. Indeed, **men** and **white** people (the flip side of women and racial minorities) also receive intermediate or strict scrutiny, see Mississippi Univ. v. Hogan, 458 U.S. 718, 723-24 (1982); Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995), even though they are the **most politically powerful** of all. Thus, even if the political power factor did cut against heightened scrutiny (though it does not), it cannot singlehandedly preclude it.

4. No Relation to Ability to Perform or Contribute to Society

Finally, as to the fourth and final factor, sexual orientation provides "no sensible ground for differential treatment" because it "bears no relation to ability to perform or contribute to society." There is no evidence, nor any reason to believe, that gay men and lesbians cannot perform or contribute to society as well as heterosexual persons. Like race, gender, and religion, a person's sexual orientation

simply has no bearing on that person's ability to perform or contribute to society. See Windsor v. U.S., 699 F.3d 169, 182-83 (2d Cir. 2012); Watkins v. U.S. Army, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Sexual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'"); see also Herek Decl.¶¶22, 24 [ExcerptCR93:75,76-77] ("being gay or lesbian bears no inherent relation to a person's ability to perform, contribute to, or participate in society"); Am. Psychiatric Ass'n [ExcerptCR93:60] ("homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities.").

It is not appropriate to assess ability to perform in a more specific fashion -- e.g., whether gay men and lesbians have equal ability **to parent children** -- because that would collapse the issue of whether the standard is met with selection of the appropriate standard. Windsor, 699 F.3d at 183. And the Supreme Court itself has rejected such a specific analysis for the appropriateness of heightened scrutiny, saying "we should look to the likelihood that governmental action premised on a particular classification is valid **as a general matter**, not merely to the **specifics** of the case before us." Cleburne, 473 U.S. at 446.

In any event, gay men and lesbians are equally able **to parent**. Perry v. Schwarzenegger, 704 F.Supp.2d 921, 1002 (N.D. Cal. 2010) ("by every available metric, opposite-sex couples are not better than their same-sex counterparts;

instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal."); Lamb Decl.¶¶29, 31 [ExcerptCR93:250,252] ("There is consensus within the scientific community that parental sexual orientation has no effect on children's and adolescents' adjustment."). The American Psychological Association, reviewing the scientific evidence, has concluded that "lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children." American Psychological Association [ExcerptCR93:61]; see infra at 72-74, for fuller quotation.

In sum, because discrimination based upon **sexual orientation** satisfies **every single one** of the four relevant criteria for **suspect** status, the **sexual orientation** discrimination effected by Section 572-1's ban on same-sex marriage must be subject to strict (or heightened) scrutiny. See Windsor, 699 F.3d at 181-82 ("all four factors justify heightened scrutiny"); Golinski, 824 F.Supp.2d at 989-90 (heightened scrutiny applies to sexual orientation).

We emphasize, however, that strict or heightened scrutiny can apply even if not all four factors are present. See supra, 43 n.21, 44, 49. For example, even if this Court were not sure about the immutability/distinguishing-characteristic or politically powerless factors, the undisputed history of discrimination, and equal ability to perform or contribute to society factors **by themselves** would warrant heightened scrutiny. See Windsor, 699 F.3d at 181 ("Immutability and lack of

political power are not strictly necessary factors").

> [U.S.] Supreme Court has placed far greater weight -- indeed, … dispositive weight -- on [these] two factors[:] whether the group has been the subject of long-standing and invidious discrimination and whether the group's distinguishing characteristic bears no relation to the ability of the group members to perform or function in society. [Where] a group [satisfies those two factors], the court inevitably has employed heightened scrutiny ….

Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 427 (Conn. 2008).

In conclusion, the Governor's partial summary judgment motion seeking application of strict (or heightened) scrutiny to the sexual orientation discrimination in Hawaii's same-sex marriage ban should have been granted. SmithKline commands heightened scrutiny. The District court's failure to apply any form of heightened scrutiny requires reversal.

IV. The Supreme Court's *Windsor* ruling invalidates laws like DOMA and Hawaii's same-sex marriage ban that impose a disadvantaged and demeaning separate second-class status and stigma upon same-sex couples.

The analysis in Justice Kennedy's majority opinion in United States v. Windsor, 133 S.Ct. 2675 (2013) -- focusing on principles of equality and fairness, and attacking DOMA's effect of demeaning and disparaging same-sex couples' legal union -- by itself requires invalidation of Hawaii's same-sex marriage ban.

Windsor begins by noting that DOMA's refusal to federally recognize same-sex marriages "impose[s] restrictions and disabilities," causes "resulting **injury** and **indignity**," 133 S.Ct. at 2692, and has the "practical effect of" "impos[ing] a **disadvantage**, **a separate status**, and so a **stigma** upon all who enter into same-

sex [legal unions]." Id. at 2693. This language applies equally to Hawaii's offering same-sex couples only civil union, and not marriage, which creates a **separate disadvantaged** status for same-sex couples in two ways. First, like DOMA, Hawaii's two-tier system denies same-sex couples the psychological benefits of the title "married," and it **stigmatizes** them in the eyes of the community by publicly and overtly denying them the highly-valued and respected title of "married," relegating their relationship to a mere "civil union." See discussion, infra, at 65-67. Indeed, Hawaii's scheme is worse, denying the "marriage" label entirely, whereas DOMA denies the label for federal purposes only.

Second, Hawaii's scheme also disadvantages and stigmatizes same-sex civil unions in terms of concrete legal benefits and responsibilities by depriving those couples of the same federal benefits as DOMA. After all, Hawaii's refusal to afford same-sex couples the status of "married" renders federal laws that require **marriage** as a precondition to their benefits (or obligations) inapplicable to same-sex couples. Hawaii's laws thus do exactly what Windsor condemned DOMA for doing, denying same-sex couples **thousands** of federal benefits and responsibilities available to opposite-sex married couples. Just as DOMA "writes inequality into the entire United States Code," id. at 2694, Hawaii's refusal to grant same-sex couples the status of "married" renders them unequal under virtually the same

entire United States Code.[24] Therefore, just like DOMA, Hawaii's scheme's "principal effect is to identify a subset of state-sanctioned [legal unions] and make them unequal." Id. at 2694. Like DOMA, Hawaii's scheme:

> contrives to deprive some couples [legally joined] under the laws of their State, but not other couples, of both [federal] rights and responsibilities. By creating two contradictory [legal union] regimes within the same State, [the law] forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus **diminishing the stability and predictability of basic personal relations** . . . . By this dynamic [the law] **undermines** both the public and private **significance** of state-sanctioned same-sex [legal unions]; for it tells those couples, and all the world, that their otherwise valid [legal unions] are **unworthy of federal recognition**. This places same-sex couples in an unstable position of being in a **second-tier** [legal union]. The differentiation **demeans the couple**, **whose moral and sexual choices the Constitution protects** . . . . And it **humiliates tens of thousands of children** now being raised by same-sex couples.

Id. at 2694. Windsor's language (substituting "legal union" for "marriage") thus applies perfectly to Hawaii's scheme. Similarly, under Hawaii's scheme, "same-sex [civil union] couples have their lives burdened, by reason of government decree, in visible and public ways" "from the mundane to the profound" (with respect to, e.g., healthcare, taxes, etc.), and "brings financial harm to children of same-sex couples." Id. at 2694-95.

Windsor concludes that because DOMA's "principal purpose and … necessary effect are to **demean** those persons who are in a lawful same-sex

[24] We say "virtually," because there may be a small subset of federal laws that will apply equally to civil union and married couples due to the peculiarities of the federal law.

marriage," it is "unconstitutional." Id. at 2695. Because Hawaii's scheme has the same demeaning effect upon those in a lawful same-sex civil union -- given its creation of a two-tiered separate and unequal status -- it, too, is unconstitutional.

Windsor closes with the following condemnation of DOMA, which is equally applicable to Hawaii's scheme:

> [The law] instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their [legal union] is **less worthy** than the marriages of others. The [law] is invalid, for no legitimate purpose overcomes the purpose and effect **to disparage and to injure** those whom the State, by its marriage [and here, civil union] laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in [unions] **less respected than others**, the [] statute is in violation of [due process/equal protection].

Id. at 2696. Windsor, therefore, virtually dictates invalidating Hawaii's scheme.

Despite the opinion's references to federalism notions of respecting a state's choice to recognize same-sex marriage, the opinion explicitly denied any need to "decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." Id. at 2692. And even though the opinion occasionally weaves federalism notions into its analysis, as discussed above, it contains a separate and distinct condemnation of the demeaning and disparaging impact of two-tier legal statuses, one for opposite-sex couples, and a lesser status for same-sex couples. Even Justice Scalia, in his scathing dissent, agreed that the majority opinion has effectively signaled the unconstitutionality of state bans on same-sex marriage. See Id. at 2709 (Scalia, J., dissenting) ("the view

that [the Supreme] Court will take of state prohibitions of same-sex marriage is indicated beyond mistaking by today's opinion."). Windsor's analysis, therefore, independently requires rejection of Hawaii's ban as a violation of the equal protection and/or due process clause of the Fourteenth Amendment.

The analysis in Windsor makes it unnecessary to even consider conceivable rational bases purportedly supporting the ban. This is clear because, as noted earlier, Windsor did not even bother to consider the multiple rational bases put forth by the supporters of DOMA's constitutionality. See entire majority opinion, not once addressing rational bases put forth by BLAG or any of its amicus supporters. Indeed, Windsor did not even bother to analyze whether those rationales could save DOMA under any type of **heightened** scrutiny, which would require the rationales to be **actual** motivating rationales, and that DOMA bear a **"substantial"** relation to **"important"** governmental interests underlying those rationales. Windsor is a binding decision of the Supreme Court, and trumps any contrary analysis, at least for laws that afford separate statuses for opposite and same-sex couples, when the latter are demeaned, disparaged, and denied sweeping benefits, by that two-tier system. This Court, based upon Windsor alone, therefore, must reverse. At minimum, heightened scrutiny applies, see SmithKline, and Section III, supra. We nevertheless proceed first to consider, and reject, actual and conceivable rational bases under even deferential rational basis review.

V. The Same-Sex Marriage Ban Does Not Satisfy even Rational Basis Review.

Although the ban should be stricken under Windsor alone, and at minimum subjected to heightened or strict scrutiny, it fails even rational basis review. The 1994 legislature (which made the same-sex marriage ban explicit) emphasized that "**the legally-married status [is] the most desirable status in which to bear and rear children**." SCRep. 11-94, 1994 House Journal at 859 [Addendum6]. It thus makes no sense to ban same-sex couples who could have children from being married.[25] A ban simply ensures that any children produced or adopted by a same-sex couple will be deprived of legally married parents. Lifting the ban, on the other hand, would give those children a chance to be raised by parents in "the most desirable [legally-married] status" for "bear[ing] and rear[ing] children." House Journal, supra. See Lamb Decl.¶37 [ExcerptCR93:257] (children likely benefit if their **same-sex** parents "marry and solidify their family and parental ties").

Therefore, the ban on same-sex marriage not only does not serve the State's interest in the "propagation, health, and well-being of future generations," SCRep. 11-94, 1994 House Journal at 858 (Addendum6), but it affirmatively undermines that very interest.

[25] Same-sex couples have children through various methods, including adoption, sperm or egg donation, surrogacy, and other evolving technologies.

A. The ban on same-sex marriage is not rationally related to an interest in responsible procreation.

The primary interest asserted by the Director, HFF, and the District court is promoting responsible procreation by encouraging marriage between those couples in relationships that can naturally result in procreation. The notion is that heterosexual couples, even if they do not want children, may accidentally have children, and thus it is best to encourage heterosexual couples to get married, just in case they accidentally do bear children. This goal, of course, is only meaningful when it is tied to the underlying belief, mentioned above, that it is better for children to be born and/or raised in stable married families. Opponents agree that their ultimate goal is having children born and/or raised in stable married family units. See Director Mem. (CR63) at 30; HFF Mem. (CR67) at 1, 21. The ban on same-sex marriage, however, is not related to that interest at all. For there is no plausible basis for believing, and certainly no **evidence**, that banning same-sex couples from getting married will in any way encourage heterosexual couples to get married. Heterosexual couples will or will not get married for any number of reasons, but whether same-sex couples are allowed to marry or not will surely not be a reason. Perry, 671 F.3d at 1088 (the notion "that opposite-sex couples were *more* likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage' **[is not] even conceivably**

plausible."); Bishop, 962 F.Supp.2d at 1291 (N.D. Okla.) (similar). In short, the ban on same-sex marriage does nothing to further any interest in responsible procreation.

Even worse, the ban on same-sex marriage actually defeats the goal of responsible procreation, by denying the children of same-sex couples any possibility of having legally married parents, which the State itself has deemed "the most desirable status" for "bear[ing] and rear[ing] children." See also Lamb Decl.¶37 [ExcerptCR93:257]. Although opponents emphasize marriage's key benefit of providing a stable family unit, they oppose giving the children of same-sex couples any chance of obtaining such stability. The absurdity and irrationality of the ban is overwhelming. See De Leon, 2014 WL 715741, at *16 (W.D. Tex. Feb. 26, 2014) ("banning same-sex marriage [does not] further[] responsible procreation. ... In fact, [the ban] hinders [it].").

To be sure, same-sex couples generally do not accidentally procreate, but if the goal is to lessen the risk that children will be born and/or raised out of wedlock, the ban is irrational. Banning same-sex marriage does not increase the odds of heterosexual couples (who may accidentally procreate) getting married, and, worse, it guarantees that children of gay and lesbian couples will not be born to and raised by **married** parents.

In sum, the ban on same-sex marriage not only does not further the goal of responsible procreation, it affirmatively undermines it. The ban is thus not even rationally related to an interest in responsible procreation.

B. Hawaii's civil union law further undermines any connection between the marriage ban and rationales purportedly justifying the ban.

Hawaii's Act 1 (2011) civil union law provides same-sex couples all of the same state legal rights and obligations as marriage. See HRS §572B-9.[26] Accordingly, even if important State interests were somehow served by denying marriage to same-sex couples, the civil union law dramatically undercuts those interests and/or the ban's connection to those interests by providing same-sex couples the same state legal protections (and responsibilities) for their relationship with each other, and with any children they may have. Denying same-sex couples only the designation of "marriage" -- although a significant deprivation, see infra at 65-67 -- while at the same time giving same-sex civil union couples and their children the same state legal rights and responsibilities as is afforded married opposite-sex couples, fatally undermines these purported interests. The Ninth Circuit agreed in Perry. 671 F.3d at 1092 ("Proposition 8 could not have reasonably been enacted … to encourage responsible procreation [or serve other

[26] "Partners to a civil union . . . shall have all the same rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to those who contract, obtain a license, and are solemnized pursuant to chapter 572 [the marriage chapter]."

purposes]," because "[s]imply taking away the designation of 'marriage,' **while leaving in place all the substantive rights and responsibilities of same-sex partners**, [could] not do any of the things its Proponents now suggest were its purposes."). That Perry used the term "taking away" does not change anything, because the **logic** of the statement holds equally true if that phrase is replaced with "not providing."

The District court attempts to reconcile the marriage ban with the civil union law by positing separate **public** versus **individual** interests. [ExcerptCR117:96-98]. First, that ignores Perry's flat determination that civil union laws undercut most alleged purposes for marriage bans. Id. Second, the District court fails to explain what public interest in restricting marriage to heterosexuals would not also extend to restricting civil unions to heterosexuals as well, or conversely, why the same-sex couple's individual interest in the benefits of civil union would not extend to the benefits of marriage. Finally, the District court suggests it is illogical that having a civil union law makes a marriage ban less defensible. [Excerpt CR117:98-99]. But there is no absurdity. A full civil union law may have that effect, and logically so, because its presence may undermine the purported rationales for the marriage ban. See, e.g., infra at 71-72.

C. One-Step-At-A-Time Argument Does Not Save the Ban.

We now address the argument that the responsible procreation theory survives **rational basis** review because a state may, under that standard, proceed one step at a time, addressing only the most acute problem, leaving others to another day. The argument is: because only opposite-sex couples can accidentally procreate, it is only necessary -- or most important -- to encourage marriage of opposite-sex couples. However, the Ninth Circuit in Perry rejected this as a rational basis in the context of taking away a previously enjoyed right.

> In order to explain how *rescinding* access to the designation of 'marriage' is rationally related to the State's interest in responsible procreation, Proponents would have had to argue that **opposite-sex** couples were *more* likely to procreate accidentally or irresponsibly when **same-sex** couples were allowed access to the designation of 'marriage.' We are aware of no basis on which this argument would be even conceivably plausible. There is no rational reason to think that taking away the designation of 'marriage' from **same-sex** couples would advance the goal of encouraging California's **opposite-sex** couples to procreate more responsibly.

Perry, 671 F.3d at 1088 (italics in original).[27] The District court distinguishes Perry because unlike in Perry, the right to marry was never available in Hawaii. That distinction, however, is too simplistic and, ultimately, wrong.

First, the Johnson v. Robison, 415 U.S. 361, 383 (1974), version of the one-

[27] The **logic** of the last sentence quoted above from Perry would remain equally true if "not giving in the first place" were substituted for "taking away" (and "to" for "from"). Thus, even though Perry limited itself to the facts of its case, its **logic** indisputably extends to ours as well.

step-at-a-time argument mentioned (but ultimately not applied) in Perry, only governs "[w]hen ... the inclusion of one group promotes a legitimate governmental purpose, and **the addition of other groups would not**." 671 F.3d at 1087 (quoting Johnson). But here, the inclusion of same-sex couples **would** promote the same ultimate purpose (at the root of the responsible procreation argument) of **providing stable married family structures for any children** born to, or raised by, those couples.

Second, even if a different version of one-step-at-a-time exists, Perry expressed skepticism over the applicability of a one-step-at-a-time theory when "**dignitary benefits**" are involved, "such as an **official and meaningful state designation** that establishe[s] the **societal status** of the members of the group," 671 F.3d at 1087 n.21. This fits **marriage** precisely. Cf. Windsor (denouncing creation of **"second-tier" status**). One-step-at-a-time should thus not apply here.

Third, this is not a case where the Legislature inadvertently, or through mere oversight, failed to include same-sex couples within the marriage statute; instead, the Hawaii judiciary was on the verge of legalizing same-sex marriage in Hawaii, and the Hawaii legislature, and general electorate, consciously, and deliberately took steps to prevent marriage from being extended to same-sex couples. This **conscious and deliberate** decision to not extend the right to **a particular group of people**, like the taking away of a right, raises, we submit, the same "inevitable

inference that the disadvantage imposed is born of animosity toward the class of persons affected." Perry, 671 F.3d at 1088 (quoting Romer, 517 U.S. at 634). One-step-at-a-time should thus not apply.

Fourth, this is in fact a "take away" case. The Hawaii Supreme Court had held that the same-sex marriage ban was subject to strict scrutiny under the Hawaii Constitution, thereby **providing Hawaii same-sex couples with the "right" to same-sex marriage absent the state's ability to satisfy strict scrutiny**. See discussion, supra, at 22-23. Although this case is not identical to the situation in Perry, where same-sex marriages were actually legal in California for a period of time (and then no further), Hawaii did something very similar: confer the "right" to same-sex marriage absent the State's ability to satisfy strict scrutiny, and then subsequently take that "right" away. Thus, this case is sufficiently analogous to Perry to be governed by Perry's logic that where a right is taken away, the State must show that doing so furthers the asserted interest. This it cannot do.

Even if one were to assume, **arguendo**, that because gay men and lesbians cannot accidentally procreate, it is rational to not extend marriage to them **in the first place**, that would not suffice to save the ban. For Perry explained that where a right is taken away -- as opposed to simply not extended in the first place -- there must be a rational basis for taking away the right. But as Perry noted, and common sense dictates, there is no plausible basis for believing that banning same-sex

marriages will encourage heterosexual couples to procreate more responsibly. (And, as noted previously, banning actually **hurts** responsible procreation by precluding marriage-based stability for the children of same-sex couples.)

It is difficult to imagine any rational reason to withhold from same-sex couples the title "marriage," and its concomitant federal pecuniary and other tangible benefits. Although it is deferential, the rational basis standard "must find some footing in … realit[y]." Heller v. Doe, 509 U.S. 312, 321 (1993).

Hawaii's two-tiered system -- one for opposite-sex couples giving full federal and state legal rights plus the title "marriage," and another for same-sex couples giving only state legal rights and denying the title "marriage" -- falls short of even the long discredited "separate but equal" concept denounced in Brown v. Bd. of Educ. nearly 60 years ago. For it is not even superficially equal.

First, the title "marriage" carries with it significant psychological, sociological, and cultural meaning, and provides a state-sanctioned "stamp of approval" on opposite-sex relationships, while the ban concomitantly denies that approval to same-sex relationships.[28] Denying the title "marriage" thus deprives

[28] Herek Decl.¶¶36, 40, 42, 46 [ExcerptCR93:88,90,91-92,95] ("Denying same-sex couples the status of marriage – even if they receive virtually all other rights and privileges legally conferred by marriage –devalues and delegitimizes their relationships. It conveys a societal judgment that committed intimate relationships with people of the same-sex are inferior to heterosexual relationships, and that the participants in a same-sex relationship are less deserving of society's recognition than heterosexual couples."). Civil unions also do not provide the same

same-sex couples of that very important symbol of societal acceptance.[29] Cf. Windsor, 133 S.Ct. at 2693 ("separate status" "stigma[tizes]" "all who enter into same-sex" legal unions). Perhaps worst of all, it denies the children of same-sex couples the important recognition that their parents are in a fully accepted relationship. Cf. Id. at 2694 ("differentiation" "humiliates … children … raised by same-sex couples"). It is emotionally unhealthy to wholesale deny these children the ability to tell their friends, and society as a whole, that they are the "legitimate" children of married parents. Lamb Decl.¶41 [ExcerptCR93:259] ("Many lesbians and gay men already are parents, and it is in the best interests of their children for their parents to have equal access to the … social legitimacy benefits afforded through marriage."). More generally, denying same-sex marriages increases the stigma attached to homosexuality, which increases the risk of harassment or bullying of, or even assault upon, not only adults, but children. Cf. Herek

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psychological barriers to too-easy dissolution -- barriers that marriage provides. Id.¶41 [ExcerptCR93:90-91].

[29] Herek Decl.¶¶9, 48, 51-52 [ExcerptCR93:69,96,98-100] ("By prohibiting same-sex couples from marrying, Hawaii law effectively denies gay and lesbian persons access to the institution of marriage. This denial is an instance of structural stigma. Structural stigma gives rise to prejudicial attitudes and stigmatizing actions against the members of stigmatized groups and thus has negative consequences for the entire gay, lesbian, and bisexual population. Experiencing stigma is associated with heightened psychological distress among lesbians and gay men. To the extent that stigma prevents heterosexuals from establishing personal relationships with lesbians and gay men, it further reinforces antigay prejudice among heterosexuals.").

Decl.¶¶50, 54 [ExcerptCR93:97,102] (structural stigma against gay men and lesbians is compounded by marriage bans, "giv[ing] rise to prejudicial attitudes and individual acts against them, including ostracism, harassment, discrimination, and violence.").

Second, as noted supra at 53-54, Hawaii's two-tier scheme denies a multitude of wide-ranging federal pecuniary and other tangible benefits to civil union same-sex couples as well.

Opponents provide no rational basis for inflicting such tremendous harm on same-sex couples or their children. Ultimately, the only conceivable rationale is some form of animus or prejudice against, or moral disapproval of, gay men and lesbians. The Supreme Court, of course, has made clear that such moral disapproval or prejudice is **not** a valid **rational** basis.

> "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Romer v. Evans, 517 U.S. 620, 634 (1996).

> Moral disapproval of [homosexuals or their conduct], like a bare desire to harm the group, is … insufficient to satisfy rational basis review ….

Lawrence, 539 U.S. at 582-83 (O'Connor, J., concurring in the judgment).

Romer is particularly instructive here, because, even though noting some otherwise plausible rational bases for the discrimination there (respect for freedom

of association, conservation of resources), the Court concludes:

> The **breadth** of the amendment is so far removed from these particular justifications **that we find it impossible to credit them**.

Romer, 517 U.S. at 635. In short, an otherwise conceivable rational basis can be rejected if the surrounding facts make it "impossible to credit." Here, as in Romer, the sweeping denial of thousands of diverse tangible federal benefits, along with the psychological and societal injury inflicted on same-sex couples and their children, cf. Windsor, supra, make opponent's purported rationales simply "impossible to credit."

> D. Even putting aside a take-away situation, and the civil union law, the responsible procreation theory fails because it is inherently "impossible to credit."

Finally, even if one puts aside all of the above arguments, and Perry, the responsible procreation theory still fails to provide a rational basis to support the ban, even in a non-take-away, no civil union state. For even then, the responsible procreation argument remains "impossible to credit." Romer. This is so because the responsible procreation argument is, according to our opponents, ultimately rooted in one essential goal: "to increase the likelihood **that children will be born and raised in stable and enduring family units**," HFF Mem. (CR67) at 1, 21, because "**[w]hen procreation and childrearing take place outside stable family units, children suffer**." Director Mem. (CR63) at 30. Yet, as explained earlier, that goal is not only not served by the ban (as the ban does not increase the

likelihood of heterosexuals getting married before engaging in potentially procreative sexual activity), but that goal is affirmatively **undermined** by the ban, because it ensures that all children born to, or adopted by, same-sex couples will **not** be "born and raised in stable and enduring [married] family units." It is thus entirely "impossible to credit" the responsible procreation theory.

The District court focuses on the other element of the responsible procreation argument: that only heterosexuals accidentally procreate. [ExcerptCR117:104-05]. However, that element is plainly not the essential factor motivating the ban because **it has no independent value** separate and apart from the **essential goal of having children raised in stable married families**. After all, the ultimate interest in the stability marriage provides to children does not depend upon whether children are accidentally or intentionally produced; what matters is that all children -- whether the product of accident or intent -- be born and raised in stable married families. And because that essential goal is not served by the ban, and is actually undermined by the ban, the responsible procreation theory, while indeed a clever concoction of same-sex marriage opponents, is simply "impossible to credit." Romer.[30]

Furthermore, as recognized by Justice O'Connor, unlike the normal rational basis review applied to "economic or tax legislation," when a law "exhibits … a

[30] No case that binds this Court supports such a theory.

desire to harm a politically unpopular group, [the Supreme Court] ha[s] applied a **more searching form** of rational basis review." Lawrence, 539 U.S. at 579-80 (O'Connor, J., concurring in the judgment). See also Massachusetts v. U.S. Dep't HHS, 682 F.3d 1, 10 (1st Cir. 2012) ("Without relying on suspect classifications, Supreme Court equal protection decisions have both **intensified scrutiny** of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications."); Romer (de facto applying a stiffer rational basis test to discrimination against gay men and lesbians).[31] Because this case involves, at least in part, a "desire to harm a politically unpopular group," and "minorities … subject to discrepant treatment," **a "more searching form" of rational basis review (or "intensified scrutiny") must be applied.**

Because Hawaii allows other couples who are not able to naturally procreate -- those beyond reproductive age, those with physical conditions precluding reproduction, see infra at 83-84 -- to enter into marriage, that, too, renders the responsible procreation theory even more impossible to credit. Bishop, 962 F.Supp.2d at 1291-92 (N.D. Okla.) ("failure to impose the classification on other similarly situated groups (here, other non-procreative couples) can be probative of a lack of a rational basis," citing Cleburne); De Leon v. Perry, 2014 WL 715741, at

[31] See also Windsor v. United States, 833 F.Supp.2d 394, 402 (S.D.N.Y. 2012) (following this principle recognized in O'Connor's Lawrence opinion, and the First Circuit's Massachusetts ruling).

*15 (same idea).

Because the responsible procreation argument already fails even the ordinary rational basis test for the many reasons given above, application of any more searching form ends all debate.

E. The ban on same-sex marriage is not rationally related to promoting an alleged optimal childrearing environment of both a mother and father.

The second purported rational basis is the claim that disallowing same-sex marriages promotes the optimal childrearing environment of both a mother and father. This rationale is so specious, and so clearly rejected in Perry, that even the Director declined to make it. For even if there were any scientific basis for believing that opposite-sex parents provide a better environment for raising children than do same-sex parents -- a proposition we reject later -- that theory could not conceivably be the reason underlying **Hawaii**'s marriage ban. For if that were the motivation, Hawaii would not have enacted a civil union law giving same-sex couples access to the exact same legal rights and responsibilities with respect to raising, adopting, or otherwise parenting children. A legislature genuinely concerned about the potential inferiority of same-sex parenting would not have provided same-sex couples in a civil union the identical child-rearing rights opposite-sex married couples have. It is therefore entirely "impossible to credit," Romer, the optimal-mother-father theory at all for states like Hawaii that

give same-sex couples equal adoption and other parenting rights and responsibilities.[32]

> Moreover, the Ninth Circuit agreed with the above logic.
>
> We need not decide whether … families headed by two biological parents are the best environments in which to raise children … because … Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California. … Both before and after Proposition 8, committed opposite-sex couples ("spouses") and same-sex couples ("domestic partners") had identical rights with regard to forming families and raising children.
>
> ….
>
> Proposition 8 could not have reasonably been enacted to promote childrearing by biological parents … [because] taking away the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex partners, [could] not do any of the things its Proponents now suggest were its purposes.

Perry, 671 F.3d at 1086, 1092. That Perry referenced "taking away" in the last paragraph does not change the logic of that statement. Replacing that phrase with "not providing," would surely render Perry's statement equally true. The optimal-mother-father theory thus cannot be a valid rational basis in Hawaii, or any other state offering equal parenting rights to same-sex couples.

Second, and although **not necessary given the above**, there is no scientific basis for concluding that same-sex parents are not as good parents as opposite-sex

[32] The District court's attempt to reconcile this obvious inconsistency, [ExcerptCR117:113-14], is without merit because no state that genuinely "harbor[s] reservations" about same-sex parenting would extend full parenting rights to same-sex couples. The court was just wrong in claiming Hawaii's civil union law provided less support to same-sex parenting.

parents. Indeed, the evidence is entirely to the contrary.

> [B]eliefs that lesbian and gay adults are not fit parents have no empirical foundation (Patterson, 2000, 2004a; Perrin, 2002). ... The results of some studies suggest that lesbian mothers' and gay fathers' parenting skills may be superior to those of matched heterosexual parents. There is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation (Armesto, 2002; Patterson, 2000; Tasker & Golombok, 1997). On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.
> ....
> Fears about children of lesbian or gay parents being sexually abused by adults, ostracized by peers, or isolated in single-sex lesbian or gay communities have received no scientific support. Overall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.

American Psychological Association [ExcerptCR93:61].

> Research comparing the adjustment of children and adolescents of same-sex parents with the children and adolescents of heterosexual parents consistently shows that the children or adolescents in both groups are equivalently adjusted. The children and adolescents of same-sex parents are as emotionally healthy, and as educationally and socially successful, as children and adolescents raised by heterosexual parents. The social science literature overwhelmingly rejects the notion that there is an optimal gender mix of parents or that children and adolescents with same-sex parents suffer any developmental disadvantages compared with those with two opposite-sex parents.
>
> There is consensus within the scientific community that parental sexual orientation has no effect on children's and adolescents' adjustment.

Lamb Decl.¶¶29, 31 [ExcerptCR93:250,252].

The District court's claim that opponents provided "conflicting" evidence, making the issue "at least debatable," [ExcerptCR117:110-12], wholly ignored the

Governor's demonstration to the contrary. [ExcerptCR92:4-8]; [ExcerptCR108:2-4]. See generally Henry v. Himes, No. 1:14-cv-129, 2014 WL 1418395, at *16 (S.D. Ohio Apr. 14, 2014) ("[T]he overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples.").

Regardless, as discussed earlier, Hawaii's grant of equal parenting rights to same-sex couples proves **Hawaii** does not subscribe to the optimal-mother-father theory. This theory thus cannot save the ban. Perry was right.

Moreover, denying same-sex marriage affirmatively harms the children of same-sex couples by depriving them of the very stability our opponents claim is important to their welfare (as noted supra at 59). Obergefell v. Wymyslo, 962 F.Supp.2d 968, 994-95 (S.D. Ohio 2013) ("The only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married."); Kitchen, 961 F.Supp.2d at 1212 ("If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children.").

Furthermore, and as noted supra at 66-67, same-sex marriage bans "cause[] needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted." De Leon, 2014 WL 715741, at *14; Bostic,

2014 WL 561978, at *18 (same); Windsor, 133 S.Ct. at 2694 (similar).

F. The ban on same-sex marriage is not rationally related to any legitimate interest in proceeding with caution.

The District court accepted as a final rationale the need to **proceed with caution** in expanding marriage to include same-sex couples. We submit that cannot be a legitimate objective unless its proponents **specify the particular harms** they believe may result from extending marriage to same-sex couples. Without such specification, "proceeding with caution" is nothing more than an undefined expression of fear, with no connection to reality, and cannot yield a genuine rational basis. See Heller, 509 U.S. at 321 (rational basis must have "footing in reality."). And where "caution" comes at the expense of a group which has indisputably suffered discrimination historically and to this day, requiring concrete and defined potential harms should especially be required.

Yet the District court **relies only upon undefined fears**. [ExcerptCR117:116-17] (stating no specific feared harm, and simply worrying about some unstated and unknown "effect of allowing same-sex marriage."). The one "exception" is its reliance upon a statement issued by the Witherspoon Institute, an anti-same-sex-marriage organization, saying that (1) "same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage," and (2) "would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take

responsibility for the children they beget." [ExcerptCR117:115-16]. The first point is nothing more than a variation on the baseless notion that allowing same-sex marriage would make heterosexual couples less likely to engage in responsible procreation (i.e., less likely to get married before engaging in potentially procreative sexual activity). Perry correctly rejected that absurd notion. 671 F.3d at 1088. Moreover, allowing same-sex couples who want to, or do, have children together (either by adoption, or through now-common technologies) to get married will actually support, not undercut, the idea that having children is connected to marriage. If anything, **banning** same-sex marriage breaks the connection between marriage and having children, as same-sex couples who have children will necessarily have them without the benefit of marriage.

The second point is equally absurd. There is no reason to believe that heterosexual fathers would feel less inclined to take responsibility for their children simply because gay people are allowed to marry. Indeed, providing two married parents for the children of same-sex couples will, if anything, show both heterosexual, as well as gay, fathers, the importance of both parents' (whether opposite-sex or same-sex) involvement with their children.

Finally, the District court cites Cherlin's claim that same-sex marriage contributes to the "deinstitutionalization" of marriage, [ExcerptCR117:115-16], which Cherlin claims "could" mean that a smaller proportion of people will marry.

First, Cherlin virtually concedes he is speculating at best. [CR71-4:p.857-58] (setting forth three alternative scenarios, including one in which a higher proportion of people marry). Second, Cherlin, himself, posits multiple factors, only one of which is same-sex marriage, as contributing to deinstitutionalization. Indeed, Cherlin says it is the **other** factors -- "nonmarital childbearing, cohabitation, and divorce" -- that may cause "people [to] spend a smaller proportion of their adult lives in intact marriage." [CR71-4:p.858]. Even Cherlin's statement that it is possible that "the proportion of people who ever marry could fall further" was not clearly tied to same-sex marriage at all, but to heterosexual "cohabitation and childbearing beforehand." [CR71-4:p.857-58]. See Kitchen, 961 F.Supp.2d at 1213 ("The State contends that it has a legitimate interest in proceeding with caution when considering expanding marriage to encompass same-sex couples. But the State is not able to cite any evidence to justify its fears."); DeBoer, 2014 WL 1100794, at *14 ("This 'wait-and-see' justification is not persuasive. … '[A]ny deprivation of constitutional rights calls for prompt rectification.'").

Indeed, any attempt to suggest that same-sex marriage will make heterosexuals less likely to marry -- the only "harm" Cherlin speculates may result from same-sex marriage -- was already rejected by Perry, when it concluded it was not even "conceivably plausible" that "opposite-sex couples were more likely to

procreate irresponsibly [i.e., not get married first] when same-sex couples [could marry]."). 671 F.3d at 1088.[33] Indeed, making an entire new class of people (**same-sex** couples) eligible for marriage, could only **increase** the proportion of people who marry.

Next, the District court fears same-sex marriage would "render a profound change in the public consciousness of a social institution of ancient origin." [ExcerptCR117:116]. But unless such a change causes **harm** -- which the court does not indicate -- that is no justification for discrimination. Interracial marriage, too, may have effected an equally profound change in public consciousness regarding the institution of marriage, but that is not a harm.

Finally, the District court emphasizes the **legislature's** prerogative to decide important questions regarding marriage, [ExcerptCR117:118-19], but that obviously provides no independent rationale for why the legislature **chose to ban**, **rather than to allow**, same-sex marriage. In any event, the legislature's prerogatives obviously cannot trump the Equal Protection Clause.

In sum, the proceed with caution rationale must be rejected.

[33] Furthermore, any fears that stem from people having negative reactions to same-sex couples getting married cannot be recognized. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

Because none of the District court's (or any other) reasons rationally support the same-sex marriage ban, the ban is invalid under **even rational basis** review.

VI. The Same-Sex Marriage Ban Certainly Fails any form of Heightened Scrutiny.

A fortiori, the ban cannot survive any form of **heightened scrutiny**, which is applicable. See SmithKline, and discussion supra at 51-52 (sexual orientation is a suspect or quasi-suspect class), and infra at 87-88 (same-sex couples have fundamental right to marry). The **exclusion** of same-sex couples is certainly not, under **strict scrutiny**, "narrowly tailored to further [a] compelling government interest[]." Grutter v. Bollinger, 539 U.S. 306, 326 (2003). Nor is that exclusion, under **intermediate scrutiny**, "substantially related to the achievement of [the] objective[]"[34] of assuring stability for children. After all, the ban does not encourage heterosexuals to marry, and it affirmatively undermines stability for the children of same-sex couples (by prohibiting their parents' marriage).

One-step-at-a-time is simply inapplicable under any form of **heightened** scrutiny -- the **exclusion** must **itself** help "achieve the objective;" it is insufficient to say the excluded group does not serve the objective as well as the included group does. Thus, the responsible procreation argument, already not credible under rational basis review, becomes frivolous under heightened scrutiny.

[34] United States v. Virginia, 518 U.S. 515, 533 (1996); see also Witt, 527 F.3d at 819 (under "heightened scrutiny," "the intrusion must significantly further [the] interest," **and** "be necessary to further that interest.").

In addition, under heightened scrutiny, only actual, not mere conceivable, interests put forth by the legislature may be considered. See Virginia, 518 U.S. at 533, 535-36 (under any form of heightened scrutiny, "a tenable justification must describe **actual** state purposes, not rationalizations for actions in fact differently grounded," and "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"). Thus, we can ignore HFF's optimal-mother-father theory, HFF's and the Director's proceed with caution theories, and any other conceivable theories, because those theories were not set forth by the Hawaii Legislature when it inserted the man/woman requirement in §572-1 in 1994.

Hawaii's ban is thus plainly invalid under the Equal Protection Clause.

VII. The Fundamental Right to Marry under the Due Process Clause extends to Same-Sex Couples.

The United States Supreme Court unanimously declared that:

> …. 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.
> Marriage is one of the "basic civil rights of man," fundamental to our very **existence and survival**. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without **due process of law**.

Loving v. Virginia, 388 U.S. 1, 12 (1967). See also Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting the same "orderly pursuit of happiness" and "existence and survival" elements from Loving, and stating that "the right to marry is of

fundamental importance for **all individuals**."); Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("freedom of personal choice in matters of marriage . . . is one of the liberties protected by the Due Process Clause"). Although Loving found a Due Process violation only as to marriage restrictions on the basis of race, Loving unambiguously found that marriage itself was a fundamental right. Although there are differences between racial and sexual orientation restrictions, there is no reason to believe that marriage for same-sex couples is any less "essential to the **orderly pursuit of [their] happiness**." See Herek Decl. ¶¶43-44 [ExcerptCR93:92-94] (noting, inter alia, that over 75-85% of those in same-sex relationships would likely marry their partner if legally allowed).

Nor is there any reason to view same-sex marriage as any less a "'basic civil right[] of man,' fundamental to **our very existence and survival**." Although some might argue that only opposite-sex marriage is "fundamental to our very existence and survival," because only opposite-sex couples procreate, that would surely be wrong. First, the underlying premise is no longer true, because adoption, as well as now-common technologies, allow same-sex couples to procreate as well. Most importantly, the Supreme Court's reference to marriage being fundamental to existence and survival could not have been focused on the biological ability to

procreate. This is clear because mere biological procreation can occur outside of marriage, and often does.

Instead, what the Supreme Court was referring to as fundamental to "existence and survival" was not procreation per se, but the institution of marriage, which provides that a couple undertake **legal and social responsibilities and obligations** 1) to **each other** for the **couple's** mutual benefit and survival, see Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Marriage is a "**bilateral loyalty**"); Turner, 482 U.S. at 95 (marriage is an "expression[] of emotional support and public commitment"), **and** 2) **jointly** to **their children**. Where children are involved, the institution of marriage ensures that such children are raised by **both** parents who, in a committed legal and social relationship, will work **together** to protect the health, safety, and welfare of their children, and develop them into responsible members of society. Cf. Lehr v. Robertson, 463 U.S. 248, 256-57, 258, 260-61 (1983).[35]

It is **in that legal and social commitment sense** (not natural procreative

[35] "[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." "**Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring**." "When an unwed father demonstrates a full commitment to the responsibilities of parenthood **by 'com[ing] forward to participate in the rearing of his child**,' his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But **the mere existence of a biological link does not merit equivalent constitutional protection**."

capacity), that the institution of marriage promotes the "existence and survival" of human beings in a modern society. Indeed, opponents agree with this basic point by emphasizing the benefit to children from the stability marriage provides. Marriage provides the couple with mutual obligations, both legal and social, of support for **one another**, and provides significant support for the safety, welfare, and development of **any children** the couple may have by providing two parents -- in a committed legal and social relationship -- to **together** protect, feed, clothe, educate, and develop their children into decent and productive members of society. See Zablocki, 434 U.S. at 384 (focusing not on procreation but on marriage's importance as "**the foundation of family and society**, **without which there would be neither civilization nor progress**," and marriage's tie to "establish[ing] a home and **bring[ing] up** children," as opposed to merely giving birth to children). It is those **legal and social responsibilities and obligations to each other and jointly to any children**, not biological procreative capacity, that make marriage a "'basic civil right[] of man,' fundamental to **our very existence and survival**." Loving.

Indeed, procreative capacity is hardly the essence of marriage, especially in Hawaii, which grants couples who have no intent, or are physically unable, to have children the same right to enter into marriage. See 1984 Haw. Sess. Laws at 238 (removing requirement for valid marriage that "[n]either of the parties is impotent

or physically incapable of entering into the marriage state."). Indeed, the U.S. Supreme Court has distinguished, and treated as **separate and distinct**, the decision to **marry**, from the decision to **procreate**. See Zablocki, 434 U.S. at 386 ("the decision to **marry** has been placed on the same level of importance as decisions relating to **procreation** [and] **childbirth**.").[36]

Once it is understood that it is those **legal and social obligations** of a couple in a marriage **to each other** and **to their children** that make marriage fundamental to "our very existence and survival," it becomes clear that there is no reason to exclude same-sex couples from this fundamental right to marry. For same-sex couples, like heterosexual couples, benefit from the legal and social responsibilities of mutual support **for each other** that marriage provides. And, the **children** of same-sex couples, too, will benefit just as much (as children of opposite-sex couples) from the legal and social responsibilities (resulting from marriage) that their parents will **jointly** have **to them** to **together** protect them, and develop them into responsible adults. See Zablocki, 434 U.S. at 384 (marriage is fundamental because it is the "foundation of family and society;" the right "'to **marry, establish a home, and bring up children**' is a central part of the liberty protected by the Due Process Clause"). Lamb Decl.¶37 [ExcerptCR93:257] (children of same-sex

[36] In any event, same-sex couples can, and frequently do, procreate (through adoption and new technologies). Gates [ExcerptCR93:29]; Lamb Decl.¶42 [ExcerptCR93:259].

parents would likely benefit "if their parents could choose to marry and solidify their family and parental ties" because "children … tend to do better with two parents than one").

Indeed, preventing same-sex couples from marrying **undermines** "existence and survival" by lessening those couples' obligations (both legal, and societal) to care for each other. And, where children are involved, the ban undercuts the children's "survival" by weakening the bond between their parents who are supposed to **together** protect and develop their children. Moreover, the ban directly "humiliates [the] children" and "brings financial harm to [them]." Windsor, 133 S. Ct. at 2694, 2695; see supra at 53-54, 66-67.

To argue that even though marriage is a fundamental right, same-sex marriage is not, is thus highly problematic. First, and most importantly, as just explained, the **reasons** marriage is fundamental to "our very existence and survival," Loving, 388 U.S. at 12, apply **equally** to opposite and same-sex couples. That, by itself, requires including same-sex couples within the fundamental right to marry recognized by the Supreme Court.

Second, because Lawrence makes clear that "neither **history nor tradition** could save a law prohibiting miscegenation from constitutional attack," 539 U.S. at 577-78, neither can the history or tradition of excluding same-sex couples from marriage justify that exclusion today. In fact, interracial marriage was banned in

30 states as of 1952, see Loving, 388 U.S. at 6 n.5, and **41 states** at some point in their history banned it. See [ExcerptsCR108:7-36]. Yet despite that clear history and tradition of excluding interracial couples from marriage, the Supreme Court in Loving had no trouble finding interracial marriage to be a fundamental right. As Lawrence recognized, "[h]istory and tradition are the starting point **but not** in all cases **the ending point of the substantive due process inquiry**." 539 U.S. at 572.[37]

It is especially inappropriate to rely upon an historical or traditional practice of excluding certain groups from a right when the principal reasons for recognizing the right as fundamental -- which are part of that tradition -- would **include** the excluded groups. As demonstrated earlier, the reasons the Supreme Court recognizes marriage as a fundamental right -- it being essential to the "orderly pursuit of happiness," and fundamental to our very "existence and survival," as well as being the "foundation of family and society," and furthering the "establishment of a home and bringing up of children" -- apply equally well to same-sex couples.

Finally, to allow tradition and history to singlehandedly restrict the scope of a fundamental right would mean that longstanding discriminatory practices, once widely accepted in the nation, would escape Due Process scrutiny simply because

[37] And by overruling Bowers, Lawrence made recognition of a fundamental right to same-sex marriage even more compelling.

those practices were longstanding, and once widely accepted. Such a construction would defeat the very protections enshrined in the Due Process Clause. See Lawrence, 539 U.S. at 577-78 (adopting Justice Steven's position in Bowers that "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.").

Finally, Justices Scalia and Thomas, who dissented in Lawrence, were convinced that the majority's recognition of a Due Process right to same-sex intimate relations necessarily required recognition of a Due Process right to same-sex **marriage** as well. See Lawrence, 539 U.S. at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in **marriage** is concerned.").

For all the above reasons, the fundamental right to marry necessarily includes the right of **same-sex** couples to marry as well. The U.S. District Court in Perry reached the same conclusion. See Perry v. Schwarzenegger, 704 F. Supp.2d 921, 991-93 (N.D. Cal. 2010) (same-sex couples seek the same fundamental right

to marry).[38] Other district courts, too, have recently recognized same-sex marriage to be protected by the fundamental right to marry under the Due Process Clause. See, e.g., Henry, 2014 WL 1418395, at *7-9 (S.D. Ohio); De Leon, 2014 WL 715741, at *17-21 (W.D. Tex.); Bostic, 2014 WL 561978, at *11-20 (E.D. Va.); Kitchen, 961 F.Supp.2d at 1196-1205 (D. Utah).

Opponents must therefore demonstrate that the ban is narrowly tailored to serve a compelling state interest. See Reno v. Flores, 507 U.S. 292, 301-302 (1993) ("'due process of law' . . . include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest."). Because they cannot do so, see supra at 79-80, the ban violates the Due Process Clause.

CONCLUSION

Only legalization of same-sex marriage would allow plaintiffs, and tens of thousands of other same-sex couples in Hawaii, to "pursue the happiness" and assume the mutual responsibilities -- important to human "existence and survival" -- that are at the heart of the fundamental right to marry. And only legalization will give plaintiffs the equality of treatment they so justly deserve.

Because legalization has occurred, the appeals are moot. This Court should thus vacate the District Court's order and judgment, and then dismiss these appeals.

[38] That decision stands as the final decision in the case, given Hollingsworth's rejection of Proposition 8 supporters' right to appeal).

Otherwise, HRS §572-1's ban on same-sex marriage should be invalidated on both Equal Protection and Due Process grounds. Accordingly, the District court's grant of HFF's and the Director's motions for summary judgment must be reversed. The Governor's motion for partial summary judgment subjecting the ban to strict or heightened scrutiny should have been granted. And because the ban does not survive rational basis review, much less any form of heightened scrutiny, plaintiffs' motion for summary judgment should have been granted.

DATED: Honolulu, Hawaii, April 25, 2014.

s/Girard D. Lau
GIRARD D. LAU
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CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-2 FOR CASE NUMBERS 12-16995 & 12-16998

I certify that: this brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 21,134 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

Also, this brief is proportionately spaced and has a typeface of 14 points or more.

s/Girard D. Lau
GIRARD D. LAU
ROBERT T. NAKATSUJI
Attorneys for Defendant-Appellant
Governor Neil S. Abercrombie

Ninth Circuit Case Nos. 12-16995 & 12-16998

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellant Governor Neil S. Abercrombie represents that Sevcik, et al. v. Sandoval, et al., Ninth Cir. No. 12-17668, is a related case pending in this Court. Sevcik is related because that case raises issues that are roughly the same or closely related to those raised in the consolidated Jackson appeals, Ninth Cir. Nos. 12-16995 and 12-16998.

In addition, SmithKline Beecham v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) (Ninth Cir. Nos. 11-17357 and 11-17373), is a related case and potential en banc proceedings are pending in this Court. SmithKline is related because it shares an issue with the Jackson appeals: whether sexual orientation discrimination requires heightened scrutiny.

Governor Abercrombie is unaware of any other case, currently pending in this Court, that is related, as defined in Ninth Circuit Rule 28-2.6.

DATED: Honolulu, Hawaii, April 25, 2014.

s/ Girard D. Lau
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INDEX TO ADDENDA

ADDENDUM 1

Haw. Rev. Stat. § 572-1

§ 572-1. Requisites of valid marriage contract

In order to make valid the marriage contract, which shall be only between a man and a woman . . . .

ADDENDUM 2

Haw. Const. Art. I, Sec. 23

The legislature shall have the power to reserve marriage to opposite-sex couples.

ADDENDUM 3

U.S. Const. 14th Amendment (due process and equal protection clauses)

Section 1. . . . nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDENDUM 4

Haw. Rev. Stat. § 572B-9

§ 572B-9. Benefits, protections, and responsibilities

Partners to a civil union lawfully entered into pursuant to this chapter shall have all of the same rights, benefits, protections, and responsibilities under the law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted those who contract, obtain a license, and are solemnized pursuant to chapter 572 [the marriage chapter].

ADDENDUM 5
Hawaii Supreme Court ruling in
Baehr v Miike, No. 20371, 1999 Lexus 391 (Haw. Dec. 9, 1999)

NINIA **BAEHR,** GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, JOSEPH MELILLO, Plaintiffs-Appellees, vs. LAWRENCE **MIIKE,** in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellant.

NO. 20371

SUPREME COURT OF HAWAI'I

1999 Haw. LEXIS 391

December 9, 1999, Decided

PRIOR HISTORY: [*1] APPEAL FROM THE FINAL JUDGMENT filed on December 11, 1996. FIRST CIRCUIT COURT. CIV. NO. 91-1394-05.

DISPOSITION: Ordered that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

COUNSEL: On the briefs: Charles J. Cooper (of Cooper, Carvin & Rosenthal, PLLC) and Margery S. Bronster (Attorney General of Hawaii), for the defendant-appellant Lawrence Miike.

Daniel R. Foley (of Partington & Foley), Evan Wolfson (of Lambda Legal Defense Fund, Inc.), and Kirk H. Cashmere, for the plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo.

James E.T. Koshiba (of Koshiba Agena & Kubota), for amicus curiae Hawaii's Future Today.

Craig Furusho, for amicus curiae The National Legal Foundation.

Robert K. Matsumoto, Jay Alan Sekulow (of The American Center for Law & Justice), and Marie A. Sheldon, for amici curiae Representative Michael Kahikina, Representative Ezra Kanoho, Representative David Stegmaier, Representative Romy M. Cachola, Representative Felipe Abinsay, Jr., and Representative Gene Ward.

Karen A. Essene, for amicus curiae [*2] The Madison Society of Hawaii.

Berton T. Kato, for amicus curiae National Association for Research and Therapy of Homosexuality, Inc.

Paul Alston and Lea O. Hong (of Alston Hunt Floyd & Ing), for amicus curiae N Mamo O Hawaii.

ADDENDUM 5
Hawaii Supreme Court ruling in
Baehr v Miike, No. 20371, 1999 Lexus 391 (Haw. Dec. 9, 1999)

Sandra Dunn, Steffen N. Johnson (of Mayer, Brown & Platt), and Kimberlee W. Colby, Steven T. McFarland, and Samuel B. Casey (of Christian Legal Society), for amici curiae The Christian Legal Society, Lutheran Church - Missouri Synod, National Association of Evangelicals, The Institute on Religion and Democracy, The Association for Church Renewal, Liberty Counsel, Biblical Witness Fellowship, Episcopalians United, Inc., The Presbyterian Lay Committee, Focus Renewal Ministries in the United Church of Christ, and Good News: A Forum for Scriptural Christianity Within the United Methodist Church.

Michael Livingston (of Davis, Levin, Livingston & Grande) and Mary L. Bonauto and Amelia A. Craig (of Gay & Lesbian Advocates & Defenders), for amici curiae Gay and Lesbian Advocates & Defenders, National Organization for Women, Inc., National Organization for Women Foundation, Inc., NOW Legal Defense and Education Fund, National Center for Lesbian [*3] Rights, Northwest Women's Law Center, People For The American Way, Asian American Legal Defense and Education Fund, and Mexican American Legal Defense and Educational Fund.

Steven H. Aden (of Dold LaBerge & Aden), for amicus curiae The Rutherford Institute.

Richard Kiefer (of Carlsmith Ball Wichman Case & Ichiki), for amici curiae Urie Brofenbrenner, Ph.D., Susan D. Cochran, Ph.D., Anthony R. D'Augelli, Ph.D., Susan E. Golombok, Ph.D., Richard Green, M.D., J.D., Martha Kirkpatrick, M.D., Lawrence A. Kurdek, Ph.D., Letitia Anne Peplau, Ph.D., Ritch C. Savin-Williams, Ph.D., Royce W. Scrivner, Ph.D., and Fiona Tasker, Ph.D.

Frederick W. Rohlfling III and J. Stevens Keali'iwahamana Hoag (of Frederick W. Rohlfling III & Associates), for amicus curiae The Church of Jesus Christ of Latter-Day Saints.

Mary Blaine Johnston, for amicus curiae American Friends Service Committee.

Robert Bruce Graham, Jr. (of Ashford & Wriston), for amicus curiae Hawaii Catholic Conference.

David S. Brustein, for amici curiae Andrew J. Cherlin, Ph.D., Frank F. Furstenberg, Jr., Ph.D., Sara S. McLanahan, Ph.D., Gary D. Sandefur, Ph.D., Lawrence L. Wu, Ph.D.

Ronald V. Grant [*4] (of Dwyer Imanaka Schraff Kudo Meyer & Fujimoto), for amicus curiae Independent Women's Forum.

Paul Alston and William M. Kaneko (of Alston Hunt Floyd & Ing), for amicus curiae Japanese Americans Citizens League of Honolulu.

Robert Bruce Graham, Jr. (of Ashford & Wriston) and L. Steven Grasz (Deputy Attorney General, State of Nebraska), for amici curiae states of Nebraska, Alabama, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina, and South Dakota.

ADDENDUM 5
Hawaii Supreme Court ruling in
Baehr v Miike, No. 20371, 1999 Lexus 391 (Haw. Dec. 9, 1999)

Chris R. Davis (of Phelps-Chartered) and Robert Bruce Graham (of Ashford & Wriston), for amicus curiae Westboro Baptist Church.

Edward C. Kemper, Sandy S. Ma (of American Civil Liberties Union of Hawaii Foundation), Matthew A. Coles and Jennifer Middleton (of American Civil Liberties Union Foundation), and Leslie G. Fagan and Tobias Barrington Wolff (of Paul, Weiss, Rifkind, Wharton, & Garrison), for amicus curiae American Civil Liberties Union of Hawaii Foundation.

Thomas J. Kuna-Jacob (pro se), amicus curiae.

Robert Bruce Graham, Jr. (of Ashford & Wriston) and David Zweibel (of Agudath Israel of America), for amicus curiae Agudath Israel of America.

OPINION: SUMMARY DISPOSITION [*5] ORDER

Pursuant to Hawaii Rules of Evidence (HRE) Rules 201 and 202 (1993), this court takes judicial notice of the following: On April 29, 1997, both houses of the Hawaii legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawaii Constitution (the marriage amendment). See 1997 House Journal at 922; 1997 Senate Journal at 766. The bill proposed the addition of the following language to article I of the Constitution: "**Section 23.** The legislature shall have the power to reserve marriage to opposite-sex couples." See 1997 Haw. Sess. L. H.B. 117 § 2, at 1247. The marriage amendment was ratified by the electorate in November 1998.

In light of the foregoing, and upon carefully reviewing the record and the briefs and supplemental briefs submitted by the parties and amicus curiae and having given due consideration to the arguments made and the issues raised by the parties, we resolve the defendant-appellant Lawrence Miike's appeal as follows:

On December 11, 1996, the first circuit court entered judgment in favor of plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo (collectively, [*6] "the plaintiffs") and against Miike, ruling (1) that the sex-based classification in Hawaii Revised Statutes (HRS) § 572-1 (1985) was "unconstitutional" by virtue of being "in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution," (2) that Miike, his agents, and any person acting in concert with or by or through Miike were enjoined from denying an application for a marriage license because applicants were of the same sex, and (3) that costs should be awarded against Miike and in favor of the plaintiffs. The circuit court subsequently stayed enforcement of the injunction against Miike.

The passage of the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex

couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is. n1 In light of the marriage amendment, HRS § 572-1 must be given [*7] full force and effect.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 In this connection, we feel compelled to address two fundamental misapprehensions advanced by Justice Ramil in his concurrence in the result that we reach today. First, Justice Ramil appears to misread the plurality opinion in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, reconsideration and clarification granted in part, 76 Haw. 276, 875 P.2d 225 (1993) [hereinafter, "Baehr I"], to stand for the proposition that HRS § 572-1 (1985) defines the legal status of marriage "to include unions between persons of the same sex." Concurrence at 1. Actually, that opinion expressly acknowledged that "rudimentary principles of statutory construction renders manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female." Baehr I, 74 Haw. at 563, 852 P.2d at 60. Second, because, in his view, HRS § 572-1 limits access to a marriage license on the basis of "sexual orientation," rather than "sex," see concurrence at 1 n.1, Justice Ramil asserts that the plurality opinion in Baehr I mistakenly subjected the statute to strict scrutiny, see id. at 2-3. Notwithstanding the fact that HRS § 572-1 obviously does not forbid a homosexual person from marrying a person of the opposite sex, but assuming arguendo that Justice Ramil is correct that the touchstone of the statute is sexual orientation, rather than sex, it would still have been necessary, prior to the ratification of the marriage amendment, to subject HRS § 572-1 to strict scrutiny in order to assess its constitutionality for purposes of the equal protection clause of article I, section 5 of the Hawaii Constitution. This is so because the framers of the 1978 Hawaii Constitution, sitting as a committee of the whole, expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination based on sex. See Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 675 (1980). Indeed, citing the foregoing constitutional history, Lewin conceded that very point in his answering brief in Baehr I when he argued that article I, section 6 of the Hawaii Constitution (containing an express right "to privacy") did not protect sexual orientation because it was already protected under article I, section 5. Lewin could hardly have done otherwise, inasmuch as his proposed order granting his motion for judgment on the pleadings in Baehr I contained the statement that "undoubtedly, the delegates [to the convention] meant what they said: Sexual orientation is already covered under Article I, Section 5 of the State Constitution."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [*8]

The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS § 572-1 is now a valid statute, the relief sought by the plaintiffs is unavailable. The marriage amendment has rendered the plaintiffs' complaint moot.

ADDENDUM 5
Hawaii Supreme Court ruling in
Baehr v Miike, No. 20371, 1999 Lexus 391 (Haw. Dec. 9, 1999)

Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

IT IS FURTHER ORDERED that the circuit court shall not enter costs or attorneys' fees against the plaintiffs.

DATED: Honolulu, Hawaii, December 9, 1999.

CONCURBY: RAMIL

CONCUR: CONCURRING OPINION BY RAMIL, J.

I emphatically believe that this court's opinion in Baehr I should be overruled. Given the plain language of HRS § 572-1 n1 and the long-standing definition of marriage, n2 I disagree with the plurality's approach in Baehr I of availing itself of the plain meaning rule of statutory construction to transform the definition of marriage to include unions between persons of the same sex. In so doing, Baehr I placed this court at the center of the heated debate over the very definition of marriage.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 I disagree with the plurality's perfunctory use of the plain meaning rule of statutory construction in Baehr I to construe HRS § 572-1 as classifying on the basis of gender. In my view, the trait on which HRS § 572-1 distinguishes applicants for marriage licenses is not gender, but rather sexual orientation. For example, if a male plaintiff in this case somehow changed his gender to become a woman, but remained homosexual (i.e., lesbian), she would still be disadvantaged by the prohibition on same-sex marriage inasmuch as she would not be permitted to marry another woman. However, if that same male plaintiff somehow changed his homosexual orientation, he would not be disadvantaged by HRS § 572-1 inasmuch as he would be able to marry a female. In short, HRS § 572-1 disadvantages homosexuals, whether male or female, on account of their desire to enter into a marriage relationship with a person of the same sex. [*9]

n2 From time immemorial, "marriage" has been defined as the:

legal union of one man and one woman as husband and wife. . . . Marriage. . . is the legal status, condition or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.

ADDENDUM 5
Hawaii Supreme Court ruling in
Baehr v Miike, No. 20371, 1999 Lexus 391 (Haw. Dec. 9, 1999)

Black's Law Dictionary 972 (6th ed. 1990) (emphases added). The concept of marriage as a union between a man and a woman remained largely undisturbed and embedded in the collective consciousness of our society until Baehr I.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In my view, the debate over whether marriage should include unions between persons of the same sex involves a question of pure public policy that should have been left tot he people of this state or their elected representatives. same-sex marriage may or may not, be a worthy idea. I do not, and indeed this court should not, express an opinion in this regard. See Konno v. County of Hawaii, 85 Haw. 61, 77, 937 P.2d 397, 413 (1997). [*10] If same-sex marriage is to be sanctioned by this state, it must be done in accordance with the laws of this state. The effort by the plaintiffs n3 and the plurality in Baehr I to subject to strict scrutiny the restriction of marriage to a man and a woman simply does not find support in our constitution. Indeed, the plurality's departure from the long-held definition of marriage constituted a fundamental paradigm shift of the concept of marriage and amounted to a public policy judgment ordinarily consigned to the people through their elected representatives. n4

See Konno, 85 Haw. at 74, 937 P.2d at 410.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 I note that the plaintiffs, in Baehr I, did not fully brief the issue of gender discrimination in the context of the equal protection clause of the Hawaii Constitution.

n4 Article I, section 5 of the Hawaii Constitution provides in relevant part that "no person shall . . . be denied the equal protection of the laws . . . because of race, religion, sex or ancestry." [Emphasis added.] Based upon this language, the framers contemplated the denial of a person's civil rights as a result of his or her sex (i.e.) gender).

In contrast, with respect to the specific right to marry, the framers of the 1950 Hawaii Constitution did not contemplate the denial of the right to marry on the basis of sex. During the constitutional convention of 1950, the framers of the bill of rights considered a specific provision, section 22, that would have expressly guaranteed the right to marry. See Committee of the Whole Report No. 5 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 304 (1960) (hereafter "Committee of the Whole Report No. 5"). Ironically, the word "sex" was not included in the proposed section 22. Specifically, the proposed draft section provided that "the right to marry shall not be denied or abridged because of race, nationality, creed or religion." See Committee of the Whole Report NO. 5 at 304. In contrast to what eventually became the equal protection

clause, which refers expressly to "sex," the language drafted by the framers with respect to the specific right to marry did not mention "sex." Id. In my view, the fact that the framers refrained specifically from the use of the work "sex" in the context of the specific right to marry indicated that the framers did not even conceive the possibility of same-sex marriage. See Hawaii State AFL-CIO v. Yoshina, 84 Haw. 374, 381, 935 P.2d 89, 96 (1997) ("where [the framers] included)] particular language in the one section of a [constitution provision], but omit[] it in another . . . it is generally presumed that [the framers] act[ed] intentionally and purposefully in the disparate inclusion or exclusion."].

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*11]

Surely, the meanings of words undergo continuous evolvement, and we should be mindful that " customs change with an evolving social order." Baehr I, 74 Haw. 530 at 570, 852 P.2d 44 at 63. I am also mindful, however, that our primary task as the final arbiter of the Hawaii Constitution is to determine the intent of the framers and to effectuate that intent. State v. Mallan, 86 Haw. 440, 448 950 P.2d 178, 186 (1998); cf. State v. Dudoit, 90 Haw. 262, 276, 978 P.2d 700, 714 (1999) Ramil, J., dissenting); Robert's Hawaii School Bus v. Laupahoehoe, 91 Haw. 224, 239, 982 P.2d 853, 868 (1999). Because the only unequivocal support in the history of our constitution and society is in favor of restricting marriage to a man and woman, I believe that Bahr I erroneously subjected HRS § 572-1 to strict scrutiny.

The plurality's analysis in Baehr I veered recklessly down the perilous path of interpreting the plain words of our constitution without any consideration to the intent of its framers, thereby establishing misguided precedent for future cases that call for the interpretation of our constitution. Cf. [*12] State v. Richie, 88 Haw. 19, 31, 960 P.2d 1227, 1239 (1998) (statutory provision should be construed in light of precedent, legislative history, and common sense), By invoking the equal protection clause of our constitution to justify a departure from the long-held paradigm of marriage as a union exclusively between a man and a woman, the plurality ignored our foremost obligation to construe our constitution in accordance with the intent of its framers. In the absence of clear support for such a drastic step, it was improper for this court to usurp the people's role by making our own policy decision in favor of same-sex marriage. "The determination of what the law could be or should be is one that is properly left to the people, [who are sovereign,] through their elected legislative representatives." Konno, 85 Haw. at 79, 937 P.2d at 415 (brackets added). As Thomas Jefferson observed long ago: Some men [and women] look at constitutions with sanctimonious reverence, and deem them like the are of the covenant, too sacred to be touched. They ascribe to the men [and woman] of the preceding age a wisdom more than human, and suppose what [*13] they did to be beyond amanded. . . . I am certainly not an advocated for frequent and untried changes laws and constitutions. I think moderate imperfections had better be borne with. . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. . . . As new discoveries are made, new truths disclosed, and manners and opinion change with the change of circumstances, institutions must advance also, and keep pace with times. . . . Each generation is as independent of the one preceding, as that

was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believe most promotive of its own happiness.

Thomas Jefferson, Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816 in Complete Jefferson 291-92 (Padover ed. 1943). Like Thomas Jefferson, "I know of no safe depository of the ultimate powers of the society but people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." Thomas Jefferson, Letter from Thomas Jefferson to William Charles [*14] Jarvis, Sept. 28, 1820 in 10 Writings of Thomas Jefferson 160 (Ford ed. 1899).

IV. CONCLUSION

For the reasons discussed above, I concur with the result of the majority but disagree that HRS § 572-1 stands on "new footing." Notwithstanding the marriage amendment passed by the electorate, I believe that this court should overrule Baehr I to avoid setting precedent that is inconsistent with the fundamental principles of constitutional interpretation

MARION R. RAMIL, Associate Justice

ADDENDUM 6
House Standing Committee Report 11-94, 1994 House Journal

Signed by all members of the Committees except Representatives Peters, White and Tanimoto.

SCRep. 11-94 Judiciary on H.B. No. 2312

The purpose of the bill is to clarify that the marriage licensing statutes relate solely to male-female couples, and that the primary purpose of issuing marriage licenses is to regulate and encourage the civil marriage of those couples who appear, by virtue of their sex, to present the biological possibility of producing offspring from their union.

Testimony in support of the bill was received by your Committee from representatives of the Christian Voice of Hawaii, St. John's Church, Christian Coalition of Hawaii, Roman Catholic Church of Hawaii, Church of Jesus Christ of Latter-Day Saints, and other organizations as well as from numerous private individuals.

Testimony in opposition to the measure was received by your Committee from representatives of the Hawaii Civil Rights Commission, ACLU Hawaii, Hawaii Equal Rights Marriage Project and other organizations as well as from numerous private individuals.

Your Committee notes that the Hawaii Supreme Court, in Baehr v. Lewin, 852 P.2d 44 (1993) placed a burden upon the State of Hawaii to identify a purpose behind Hawaii's marriage licensing laws. The Hawaii Court, unlike every other court in the country which has considered the matter, was unable to discern any connection between the marriage laws and the promotion and protection of the propagation of the human race. Instead, the plurality opinion suggests that the only apparent purpose for licensing marriage is to provide "access" to a number of rights and benefits.

This result was reached upon a mistaken view of the legislative intent in enacting Act 119, 1984 Haw. Sess. Laws.

Act 119, as correctly noted by the Court, deleted the then existing prerequisite that "[n]either of the parties is impotent or physically incapable of entering into the marriage state[.]"

The Court, however, goes on to state, at page 3, footnote 2 of the plurality opinion that "The legislature's own actions thus belie the dissent's wholly unsupported declaration, . . . that 'the purpose of HRS §572-1 is to promote and protect propagation . . .'"

This unfortunate conclusion led the Hawaii Court to examine the constitutionality of the statute without the benefit of a correct understanding of the compelling interest of the State underlying Hawaii's marriage laws.

Considering that the Court was laboring under this misapprehension, it is not entirely surprising that the Hawaii Court reached the novel, unique and unprecedented conclusion that denying a marriage license to same-sex couples is presumptively unconstitutional.

It is your Committee's firm intention, as declared unequivocally in the purpose clause of the bill, to express this Legislature's intent that the propagation, health, and well-being of future generations form the central underlying basis and purpose of the State's regulation of marriage, and for confining the issuance of a marriage license to male-female couples.

Your Committee finds that the 1984 amendments to the marriage licensing laws were intended to conform the marriage licensing statutes to the well established constitutional principle that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause," (Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 680, 54 L. Ed. 2d 618 (1978)), and were not intended to attenuate the fundamental purpose of HRS §572-1.

Your Committee notes that the Hawaii Supreme Court recognized in Baehr that this fundamental right to marry applies only to couples of the opposite sex, and specifically does not apply to couples of the same sex. Hence, the Legislature in 1984 and again with this legislation, confirms that the marriage licensing laws should, and must, accommodate male-female couples with physical limitations on their productive capacities.

The statute, therefore, is drawn as narrowly as possible to avoid unnecessary abridgments of constitutional rights, by excluding only those couples, who, by their genetic composition, cannot possibly produce a child from their union and who have no fundamental right to a state-licensed marriage.

Your Committee wishes to make it absolutely clear that the bill does not require anyone to have children in order to get married, nor does it require any person to have children in order to remain married, nor does it prohibit the elderly or handicapped from receiving and retaining a marriage license. This measure also does not in any way impact on the contraceptive or reproductive decisions of any person.

No one could seriously argue that the framers of the Hawaii State Constitution in adopting a prohibition against sex discrimination intended to compel the issuance of marriage licenses to couples of the same sex. And indeed, this type of provision has been properly construed as not infringing upon a state's decision to confine the issuance of marriage licenses to opposite sex couples when the purpose of doing so is in accord with the vital societal values associated with the propagation of the human race. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974).

Your Committee finds that the licensing laws are regulatory in nature, and were designed specifically to address the concerns that arise when opposite sex couples unite. To simply grant marriage licenses to same-sex couples is to raise a host of questions as to the logic behind many of the laws that apply to legally married couples. If the marriage licensing laws do not have as their fundamental purpose the propagation, health, and well-being of future generations, but are instead simply a gateway to benefits, there seems little reason or logic in, for example, limiting their application solely to

ADDENDUM 6
House Standing Committee Report 11-94, 1994 House Journal

couples, or in requiring judicial review of the dissolution of the union, or in imposing parental responsibility upon both partners to the union, or in prohibiting the marriage of close relatives.

Rather, this State has, as have the other forty-nine states, designed a system which seeks to support and encourage the legally-married status as the most desirable status in which to bear and rear children. Your Committee is concerned that a marriage licensing system which is deemed to be without the fundamental purpose common to that of the other states in the union may not be recognized in those states.

The issuance of a license, and hence the regulatory aspect of the marriage licensing laws is distinct and separate from the issue of whether same-sex couples, or indeed divorced or single persons, whether part of a couple or not, are constitutionally entitled to some or all of the benefits which the Legislature has created as an inducement for opposite-sex couples to obtain a marriage license and submit themselves to regulation by the State.

Your Committee finds that it would be a grave mistake for constitutional issues to be decided based upon a mistaken view of the Legislature's intent in creating and continuing the status of a state-licensed marriage. Furthermore, as noted in State v. Wilson, 856 P.2d 1240, 1245 (Haw. 1993), it is proper and useful for the Legislature to clarify the intent of its actions in such circumstances.

Finally, your Committee notes that marriage is not a word reserved exclusively to the State. The State licenses and regulates opposite-sex couples, and it is only that licensed relationship to which the State refers in its statutes and laws. Such action, however, does not impinge upon the ability of same-sex couples to structure their legal relationship in accordance with their own personal, moral or religious beliefs.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 2312 and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committee except Representatives Oshiro and Takamine.
(Representatives Amaral, Chun and Hirono voted no.)

ADDENDUM 7

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

REPRESENTATIVE BOB McDERMOTT, GARRET HASHIMOTO, WILLIAM E. K. KUMIA, DAVID LANGDON, Plaintiff, vs. GOVERNOR NEIL ABERCROMBIE AND LORETTA J. FUDDY, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII, Defendants.	Civil No. 13-1-2899-10 KKS ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Motion for Summary Judgment Hearing: DATE: January 29, 2014 TIME: 10:00 a.m. JUDGE: Hon. Karl K. Sakamoto No Trial Date

ADDENDUM 7

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment, came on for hearing before the Honorable Karl K. Sakamoto on January 29, 2014, at 10:00 a.m. Shawn A. Luiz, Esq. and Robert K. Matsumoto, Esq. appeared on behalf of Plaintiffs Representative Bob McDermott, Garrett Hashimoto, William E.K. Kumia, and David Langdon (collectively "Plaintiffs"). David M. Louie, Esq., Attorney General of Hawaii, and John F. Molay, Esq., and Deirdre Marie-Iha, Esq., Deputy Attorneys General, appeared on behalf of Defendants Governor Neil Abercrombie and Loretta J. Fuddy, Director, Department of Health, State of Hawaii.

The Court, having considered the Motion, and the memoranda, declarations and exhibits in support and in opposition thereto, having heard the arguments of counsel, and being fully advised in the premises, rules as follows:

Every enactment of the Legislature is presumptively constitutional, which would include the Hawaii Marriage Equality Act of 2013. The party challenging that statute has the burden of showing unconstitutionality beyond a reasonable doubt.

In *Koike v. Board of Water Supply*, 44 Hawaii 100 (1960), the Hawaii Supreme Court stated that there can be no doubt at this day that laws duly passed by the Legislature are to be deemed constitutional and valid unless the contrary clearly appears. Here, the Court determines whether the Hawaii Marriage Equality Act of 2013 is constitutional.

First, is the Marriage Equality Act of 2013 constitutional according to Article I, Section 23, which reads: The Legislature shall have the power to reserve marriage to opposite-sex couples?

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As the Court announced earlier, the fundamental principle in construing that constitutional provision is to give effect to the intention of the framers and to the people adopting it. The intent is to be found in the instrument itself, meaning the language of Article I, Section 23.

The general rule is that if words are used in the constitutional provision that are clear and unambiguous, then they are to be construed as they are written, and the Court has already concluded that the language is clear and unambiguous. There's no ambiguity in Article I, Section 23, in that it speaks only of the Legislature having the power to reserve marriage. What the Plaintiffs attempt to do is to read that language as if it read "marriage is reserved to opposite-sex couples, period." Here, the language talks about the ability of the Legislature to constitutionally reserve to it a power to define marriage limiting it to opposite-sex couples. It's a narrow limitation given in Article I, Section 23, because basically, by that provision, it allowed the Legislature the power to evade or escape any judicial review under *Baehr v. Lewin*, 74 Hawaii 530 (1990).

When looking at the legislative intent behind that constitutional amendment, Plaintiffs are right in that it clarifies that the Legislature has the power to reserve marriage to opposite-sex couples. The bill that proposed the constitutional amendment (H.B. 117, 1997, Def. Ex. B) also says that the Legislature further finds that the question of whether or not the state should issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people. In the session laws, the bill notes that this issue is to be decided by the elected representatives of the people, meaning the Legislature.

ADDENDUM 7

It goes further to state: This constitutional measure is thus designed to confirm that the Legislature has the power to reserve marriage to opposite-sex couples. And it also goes on to say more importantly for this issue: And to ensure that the Legislature will remain open to the petitions of those who seek a change in the marriage laws. *See* Def. Ex. B.

So the Legislature in its wisdom contemplated that as times evolve, that there is and would be the possibility of change occurring to the marriage laws, and they anticipated this. Based upon that, the Marriage Equality Act is constitutional upon examination of Article I, Section 23.

The next question is: Is the Marriage Equality Act of 2013 constitutional under the equal protection and due process provisions of our state constitution? There, the court points to the *Baehr v. Lewin*, 74 Hawaii 530 (1990), where the court examined whether a statute limiting marriage to opposite-sex couples was constitutional.

There, the Hawaii Supreme Court found that the plain language of Article I, Section 5, of the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex. They also quoted from the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967) to state: The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free people.

The Hawaii Supreme Court went further and quoted from *Skinner v. Oklahoma*, 316 U.S. 535 (1942) to state that so fundamental does the United States Supreme Court consider the institution of marriage that it has deemed marriage to be one of the basic civil rights of men and women.

ADDENDUM 7

The *Baehr* decision went on to hold that sex is a suspect category for purposes of equal protection analysis under Article 1, Section 5, of the constitution. There, the *Baehr* case seemed to conclude that the contested statute was presumptively unconstitutional.

Looking at whether the Marriage Equality Act of 2013 is constitutional under the federal constitution, the court looks at *United States v. Windsor,* 133 S.Ct. 2675 (2013) that addressed the defense of marriage act to find that under the federal constitution, Hawaii's Marriage Equality Act is also constitutional.

The Court therefore concludes that same-sex marriage is constitutional under both the State and Federal constitutions. Therefore, same-sex marriage is legal.

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is GRANTED and judgment shall hereby issue in favor of Defendants.

DATED: HONOLULU, HAWAII, ~~MARCH~~ April 21, 2014

KARL K. SAKAMOTO

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

KARL K. SAKAMOTO
Judge of the Above-Entitled Court

APPROVED AS TO FORM:
OBJECT TO GROUNDS

Robert K. Matsumoto

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ROBERT K. MATSUMOTO, ESQ.
Attorneys for Plaintiffs
REPRESENTATIVE BOB McDERMOTT,
GARRET HASHIMOTO, WILLIAM E.K. KUMIA,
DAVID LANGDON

McDermott v. Abercrombie, et al., Civ. No. 13-1-2899-10 (KKS), First Circuit Court; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ADDENDUM 7

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

REPRESENTATIVE BOB McDERMOTT, GARRET HASHIMOTO, WILLIAM E.K. KUMIA, DAVID LANGDON

Plaintiff,

vs.

GOVERNOR NEIL ABERCROMBIE, LORETTA J. FUDDY, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII,

Defendants.

Civil No. 13-1-2899-10 KKS

JUDGMENT FOR DEFENDANTS GOVERNOR NEIL ABERCROMBIE AND LORETTA J. FUDDY, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII

JUDGMENT FOR DEFENDANTS GOVERNOR NEIL ABERCROMBIE AND LORETTA J. FUDDY, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII

Judgment is hereby entered in favor of Defendants Governor Neil Abercrombie and Loretta J. Fuddy, Director, Department of Health, State of Hawaii and against Plaintiffs,

ADDENDUM 7

Representative Bob McDermott, Garret Hashimoto, William E.K. Kumia and David Langdon, upon all counts of the First Amended Complaint, pursuant to the Court's Order Granting Defendants' Motion for Summary Judgment, dated March _____, 2014.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment be entered in favor of Defendants Governor Neil Abercrombie and Loretta J. Fuddy, Director, Department of Health, State of Hawaii and against Plaintiffs, Representative Bob McDermott, Garret Hashimoto, William E.K. Kumia and David Langdon. This resolves all claims against all parties and there are no other parties or claims remaining.

DATED: HONOLULU, HAWAII, ~~MARCH~~ April 21, 2014

KARL K. SAKAMOTO

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

KARL K. SAKAMOTO
Judge of the First Circuit Court

APPROVED AS TO FORM ONLY:
OBJECT TO GROUNDS

Robert K. Matsumoto

SHAWN A. LUIZ, ESQ.
ROBERT K. MATSUMOTO, ESQ.
Attorneys for Plaintiffs
Representative Bob McDermott, Garret Hashimoto,
William E.K. Kumia and David Langdon

McDermott v. Abercrombie, et al., Civ. No. 13-1-2899-10 (KKS), First Circuit Court; JUDGMENT FOR DEFENDANTS GOVERNOR NEIL ABERCROMBIE AND LORETTA J. FUDDY, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII.

ADDENDUM 8

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

C. KAUI JOCHANAN AMSTERDAM, Plaintiff, vs. NEIL ABERCROMBIE; CLAYTON HEE; JOSEPH SOUKI; DONNA MERCADO KIM; and KARL RHOADS, in their individual and official capacities, Defendants.	CIVIL NO. 13-00649 SOM-KSC ORDER GRANTING MOTION TO DISMISS AND DENYING AS MOOT ALL OTHER PENDING MOTIONS

ORDER GRANTING MOTION TO DISMISS AND DENYING AS MOOT ALL PENDING MOTIONS

I. INTRODUCTION.

On November 26, 2013, this court dismissed Plaintiff C. Kaui Johanan Amsterdam's Complaint, which sought to enjoin a recently enacted state law that allows same-sex couples to marry. ECF No. 7. Because the law was about to take effect, this court treated Amsterdam's motion for "immediate temporary injunction" as a request for a temporary restraining order and reviewed the claims in Amsterdam's Complaint posthaste. The court noted that it was "required sua sponte to examine jurisdictional issues such as standing," D'Lil v. Best W. Encina Lodge & Suites, 538 F.3d 1031, 1035 (9th Cir. 2008) (internal quotation omitted), and held that Amsterdam failed to assert a claim for which he had standing. The court gave Amsterdam leave to amend his Complaint

ADDENDUM 8

to assert the particularized injury he would allegedly suffer, or to clarify any constitutional claims he sought to bring.

On December 24, 2013, Amsterdam filed his First Amended Complaint ("FAC"), along with a "motion for an immediate temporary injunction" and a "motion for judgment." ECF Nos. 9, 15, 16. On January 14, 2014, the State filed a motion to dismiss Amsterdam's FAC. ECF No. 29. Because Amsterdam continues to provide insufficient allegations of individualized injury giving him standing to challenge Hawaii's marriage equality law, the court grants the motion to dismiss and denies as moot all other pending motions. Noting that there is no indication that Amsterdam will be able to cure the FAC's deficiencies by further amendment, this court concludes that any future amendment would be futile.

II. BACKGROUND.

On November 13, 2013, Governor Neil Abercrombie signed into law Senate Bill 1 from the 2013 Special Session of the Hawaii Legislature. That new law, known as the Hawaii Marriage Equality Act of 2013, took effect on December 2, 2013, and provides same-sex couples with the same rights, benefits, protections, and responsibilities of marriage that opposite-sex couples enjoy.

Amsterdam, a Native Hawaiian, claims to be an "officer of The Interim Government of The Kingdom of Hawaii" and a "leader

ADDENDUM 8

in the Native Hawaiian and Jewish communities." FAC 1-2, ECF No. 9. Amsterdam seeks to enjoin the Hawaii Marriage Equality Act as violating various laws that recognize the "unique [] political status of Native Hawaiians." Id. at 3. In his original Complaint, Amsterdam largely relied on section 5(f) of the Admission Act as the legal basis for his claim. Amsterdam argued that section 5(f) was violated "because the majority of Native Hawaiians who testified during the legislative process were against [marriage equality] and [had] requested that their cultural and spiritual beliefs be respected." ECF No. 7 at 4. This court, having been called upon in prior cases to construe section 5(f), is conscious that it says nothing about marriage at all.

This court noted that Amsterdam had "fail[ed] to show a legally cognizable injury caused by Defendants' conduct that th[e] court could redress." Id. at 5. The court also noted, "Although it [wa]s not entirely clear from the Complaint, Amsterdam may believe that the Hawaii Marriage Equality Act of 2013 violates his federal constitutional rights under the Freedom of Religion Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment." Id. However, the court stressed that Amsterdam "allege[d] no facts supporting any such claim" and did not "even sufficiently allege that he practices a religion affected by the Hawaii Marriage Equality Act

ADDENDUM 8

of 2013 or that he is a member of a protected class that is being treated less favorably than another." Id. The court then noted that "[i]n case Amsterdam intended to assert violations of his First and Fourteenth Amendment rights under the United States Constitution, [he should] file a First Amended Complaint no later than December 24, 2013." Id. at 6.

On December 24, 2013, Amsterdam filed his First Amended Complaint, along with a "motion for an immediate temporary injunction" and a "motion for judgment." ECF Nos. 9, 15, 16. With the Hawaii Marriage Equality Act already in effect, the court saw no need to take immediate action. See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty., 415 U.S. 423, 439 (1974) ("[U]nder federal law [temporary restraining orders] should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."). On January 14, 2014, the State filed a motion to dismiss Amsterdam's FAC on the grounds of lack of standing and failure to state a claim.

III. LEGAL STANDARD

"Rule 12(b)(1) jurisdictional attacks can be either facial or factual." White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their

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face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

When, as here, the challenge is facial rather than factual, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Fed'n of African Amer. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996). In a facial attack on jurisdiction, the court "confin[es] the inquiry to allegations in the complaint." Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty., 343 F.3d 1036, 1040, n.2 (9th Cir. 2003).[1]

IV. ANALYSIS

As this court said in its order dismissing Amsterdam's original Complaint, Amsterdam must establish standing by showing that: 1) he suffered a "concrete and particularized" and "actual or imminent" (as opposed to "conjectural or hypothetical") injury-in-fact; 2) his injury is causally connected to the conduct complained of; and 3) it is likely (not merely speculative) that the injury will be "redressed by a favorable

[1] Although the State also moves to dismiss the FAC under Rule 12(b)(6), this court does not reach that issue and therefore does not include here the legal standard for such a motion.

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decision." San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996); accord Ass'n of Pub. Agency Customers v. Bonneville Power Admin., 733 F.3d 939, 950 (9th Cir. 2013). "At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing." Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013) (internal quotation omitted).

Although Amsterdam lists many federal statutes that he says entitle him to relief, the FAC fails to cure the basic defect evident in the original Complaint: Amsterdam simply fails to articulate a legally cognizable injury. Amsterdam argues that the Act "is contrary to and undermines Hawaii's Motto and the religious, cultural moral values of the Plaintiff and the majority of Native Hawaiians." FAC at 6, ECF No. 9. Amsterdam further asserts that "[s]ame-sex sexual relations are . . . a desecration of the land and as such weaken[] and destroy[] the health and well-being of the land, the Native Hawaiian People, the population-at-large, and the Plaintiff." Id. at 7.

These generalized grievances reflect Amsterdam's disapproval of the legislature's judgment, not a concrete and particularized injury to him personally. "Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011). The courts are not a "vehicle for the vindication of

value interests." Diamond v. Charles, 476 U.S. 54, 62 (1986), nor is their proper role to superintend the political judgment of democratically elected legislators. See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 598-99 (2007) ("[T]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the [lawfulness of] legislative or executive acts."). A plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large does not state an Article III case or controversy." Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013). A "generalized grievance, no matter how sincere, is insufficient to confer standing." Id.

Amsterdam does not even attempt to identify an injury unique to him; instead, quite to the contrary, Amsterdam styles himself as a representative of a Native Hawaiian community that he alleges disapproves of the State's policy. There is no authority for the proposition that Native Hawaiians are exempt from the ordinary rules of party standing applicable to all litigants in federal court. In failing to articulate an injury other than generalized disapproval of same-sex marriage, Amsterdam fails to meet his burden of showing that he has suffered an injury.

The closest Amsterdam comes to a particularized grievance is his claim that he is injured "as an [e]ducator"

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because the "Hawaii Public School System . . . teaches eleven year olds about oral and anal sex and promotes and normalizes homosexual values and lifestyle," and his "cultural moral values of Righteousness . . . [make him] unable to teach such [information]." FAC at 10. However, the FAC does not actually allege that Amsterdam is a school teacher, only that he "received his Masters in Education at U.C.L.A." Id. In any event, Amsterdam fails to articulate any reason why the Hawaii Marriage Equality Act affects the classes taught in Hawaii's schools. That is, Amsterdam does not allege that, without same-sex marriage, schools would refrain from teaching about oral and anal sex or about what he calls "homosexual values and lifestyle." In fact, he appears to be complaining that such matters have been addressed in schools even before the law in issue took effect. Amsterdam's alleged injuries as an "educator," even if they were real, would not be redressable by a court order enjoining the Act. See Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123, 1125 (9th Cir. 2006) (noting that when there is "no redressability, [there is] no standing").

The State provides a series of alternative reasons to dismiss the Complaint, including Amsterdam's failure to state a claim under federal law, the improper naming of certain parties, and certain Defendants' immunity from suit. Because Amsterdam

lacks standing to bring his claims, the court does not address any of the State's nonjurisdictional arguments.

The State also asks the court to deny Amsterdam any further leave to amend. A district court's "discretion . . . [to deny leave] is particularly broad where, as here, a plaintiff previously has been granted leave to amend." Griggs v. Pace Am. Grp., Inc., 170 F.3d 877, 879 (9th Cir. 1999). "Dismissal without leave to amend is proper if it is clear that the complaint [cannot] be saved by amendment." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008). In dismissing his original Complaint, the court clearly informed Amsterdam that his abstract disapproval of the Hawaii legislature's judgment did not constitute sufficient Article III injury for him to challenge the Marriage Equality Act. Amsterdam has expounded on his disapproval of the law further in the FAC, but has not explained how he has suffered particularized injury. Moreover, based on the allegations in the FAC, the court cannot see how the Act's operation could possibly harm Amsterdam in a concrete and particularized way. The court therefore concludes that any further amendment by Amsterdam would be futile.

V. CONCLUSION.

The court grants the State's motion to dismiss, and denies as moot all other pending motions. The Clerk of Court is

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directed to enter judgment for Defendants and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 19, 2014.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District Judge

ADDENDUM 8

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

C. KAUI JOCHANAN AMSTERDAM

Plaintiff(s),

V.

NEIL ABERCROMBIE; CLAYTON HEE; JOSEPH SOUKI; DONNA MERCADO KIM; KARL RHOADS, in their individual and official capacities

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case: CV 13-00649 SOM-KSC

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

February 19, 2014

At 4 o'clock and 20 min p.m.
SUE BEITIA, CLERK

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of the Defendants pursuant to the "Order Dismissing Case; Order Denying as Moot All Pending Motions" filed on November 26, 2013 and the "Order Granting Motion to Dismiss and Denying as Moot All Other Pending Motions" filed on February 19, 2014. It is further ordered that the Clerk of Court shall close this case.

February 19, 2014
Date

SUE BEITIA
Clerk

/s/ Sue Beitia by ET
(By) Deputy Clerk

Ninth Circuit Case Nos. 12-16995 & 12-16998

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Governor Abercrombie's opening brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 25, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, April 25, 2014.

s/ Girard D. Lau
GIRARD D. LAU
ROBERT T. NAKATSUJI

Attorneys for Defendant-Appellant
Neil S. Abercrombie, Governor,
State of Hawai‘i

Ninth Circuit Case Nos. 12-16995 & 12-16998

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Governor Abercrombie's motion to exceed type-volume limitation with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 25, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, April 25, 2014.

s/ Girard D. Lau
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