Nos. 12-16995 & 12-16998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATASHA N. JACKSON, JANIN KLEID and GARY BRADLEY,
Plaintiffs-Appellants,

v.

NEIL S. ABERCROMBIE, Governor, State of Hawaii,
Defendant-Appellant,

and

GARY GILL, Acting Director, Department of Health, State of Hawaii,
Defendant-Appellee,

and

HAWAII FAMILY FORUM,
Intervenor-Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII,
Case No. CV 11-00734 ACK-KSC (Hon. Alan C. Kay).

PLAINTIFFS-APPELLANTS NATASHA N. JACKSON, JANIN KLEID AND GARY BRADLEY'S OPENING BRIEF

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PLAINTIFFS-APPELLANTS NATASHA N. JACKSON, JANIN KLEID AND GARY BRADLEY'S OPENING BRIEF

I. INTRODUCTION

This case is moot. On December 2, 2013, the Hawai`i Marriage Equality Act of 2013 (the "Marriage Equality Act" or the "Act") took effect. *See* Act 1 (S.B. 1), Laws 2013, 2d Sp. Sess.; Haw. Rev. Stat. ("HRS") § 572-1 (2013). By its terms, the Act provides same-sex couples equal access to marriage in Hawai`i. Under the new law, hundreds of same-sex couples – including Plaintiffs Natasha N. Jackson and Janin Kleid, and Plaintiff Gary Bradley and his partner – have married in Hawai`i. Under well-settled law, when a new law gives a plaintiff "everything [it] hoped to achieve" by its lawsuit, the controversy is moot. *Chemical Producers & Distributors Assoc. v. Helliker*, 463 F.3d 871, 876 (9th Cir. 2006). Because the Marriage Equality Act gave Plaintiffs exactly what they sought to achieve by their Complaint, this case – including Plaintiffs' and Governor Neil S. Abercrombie's appeals – is moot.[1]

Vacatur is the default rule in this situation because it prevents a district court decision that is currently unreviewable from spawning any legal consequences. In particular, Plaintiffs, who have lost their ability to appeal through no fault of their own, should not be harmed by any preclusive effects of

[1] The Governor is aligned with Plaintiffs and similarly argued that Hawai`i law limiting marriage to opposite-sex couples is unconstitutional.

the district court's "preliminary adjudication." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167-68 (9th Cir. 2011) (*per curiam*). This Court should therefore vacate the district court's August 8, 2012 Order and Judgment and remand with instructions to dismiss the case as moot. Following vacatur, these appeals should be dismissed.

In the unlikely event this Court reaches the merits of these appeals, it should reverse the district court's Order and Judgment and direct entry of summary judgment in Plaintiffs' favor, for the reasons stated in the Governor's Opening Brief ("GOB"), filed April 25, 2014. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Plaintiffs adopt by reference pertinent parts of the Governor's Opening Brief, as specified below.

II. STATEMENT OF JURISDICTION

This case arose under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983. (GCR6:¶¶94-107.[2]) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1343 (civil rights).

[2] The following citation forms are used throughout this brief: (1) the Clerk's Record is cited as "CR[district court docket number]: at [page or paragraph]"; and (2) the Governor's Excerpts of Record, which are organized based on the docket numbers of the Clerk's Record, are cited as "GCR[district court docket number] at [page or paragraph]." Plaintiffs join in the Governor's Excerpts of Record, Volumes 1 through 4, submitted to this Court on October 18, 2014.

On August 8, 2012, the district court entered its: (1) Order Granting Defendant-Intervenor Hawaii Family Forum's ("HFF") Motion for Summary Judgment and Defendant Fuddy's (the "Director") Motion for Summary Judgment, Denying Plaintiffs' Motion for Summary Judgment and HFF's Motion to Dismiss Defendant Abercrombie, and Denying as Moot Defendant Abercrombie's Motion for Summary Judgment (the "Order"); and (2) Judgment in a Civil Case Order and Judgment (collectively, the "Order and Judgment"). (GCR117, 118.) The Order and Judgment were final and disposed of all the parties' claims. (GCR118.)

Plaintiffs and the Governor filed timely Notices of Appeal on September 7, 2012 (GCR121, 123) (*see* Fed. R. App. P. 4(a)(1)(A)), giving this Court jurisdiction under 28 U.S.C. § 1291.

On December 2, 2013, the Marriage Equality Act took effect, rendering these appeals moot and divesting this Court of jurisdiction to decide the merits. (*See infra* Section VII.)

III. ISSUES PRESENTED FOR REVIEW

1. Is this case moot where:

A. The enactment of the Marriage Equality Act gave Plaintiffs exactly what they sought to achieve by their Complaint; and

B. There has been no showing that either of the two independent lawsuits challenging the Act is likely to succeed?

2. If this case is moot, must the district court's Order and Judgment be vacated, where Plaintiffs, through no fault of their own, have lost their ability to appeal?

3. If this case is not moot, did the district court err in granting summary judgment in favor of the Director and HFF, and in denying Plaintiffs' and the Governor's summary judgment motions, where:

A. The court wrongly rejected Plaintiffs' claim that excluding same-sex couples from marriage in Hawai`i violated federal due process guarantees? This claim was raised by Plaintiffs in their Complaint, briefed by the parties on the merits, and decided in the district court's Order. (GCR:6¶¶94-99; CR:86, at 7-16, 18-43; GCR:117, at 42-43, 60-71, 82-119.)

B. The court wrongly rejected Plaintiffs' claim that excluding same-sex couples from marriage in Hawai`i violated the federal right to equal protection regardless of one's sexual orientation? This claim was raised by Plaintiffs in their Complaint, briefed by the parties on the merits, and decided in the district court's Order. (GCR:6¶¶100, 102-04; CR:65-1, at 18-34; CR:86, at 16-39, 44-47; GCR:117, at 43-46, 73-119.)

C. The court wrongly rejected Plaintiffs' claim that excluding same-sex couples from marriage in Hawai`i violated the federal right to equal protection regardless of one's sex? This claim was raised by Plaintiffs in their Complaint, briefed by the parties on the merits, and decided in the district court's Order. (GCR:6¶¶100-101, 103-04; CR:65-1, at 18-34; CR:86, at 16-39; GCR:117, at 43-46, 71-73.)

This Court reviews "*de novo* a district court's grant or denial of summary judgment." *See Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054, 1059 (9th Cir. 2013).

IV. ADDENDA OF PERTINENT AUTHORITIES

Pertinent constitutional and statutory provisions are set forth in the Addenda to the Governor's Opening Brief.

V. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs Jackson and Kleid filed their Complaint because they wished to marry and, as a same-sex couple, were prohibited from doing so by former HRS section 572-1. (GCR6:¶¶61, 68) At that time, they had been together for four years, were considering having a child, and wanted to have their lifetime commitment to one another validated, recognized, and honored for what it was—a marriage. (*Id.* ¶¶62, 67.) On November 18, 2011, they applied

for a marriage license at the Hawai`i Department of Health and were turned away. (*Id.* ¶¶3-4.)

Plaintiff Bradley similarly wished to marry his partner, a foreign national. (*Id.* ¶¶9, 63-65.) Although the couple had entered into a civil union under Hawai`i law, they wanted the recognition, dignity and protection that only marriage confers. (*Id.* ¶9, 67.) In particular, Plaintiff Bradley believed he might be better able to protect his partner with respect to immigration issues if they were married. The couple did not seek a marriage license because they knew it would be futile. (*Id.* ¶10.)

Plaintiffs sued the Director and the Governor, challenging the constitutionality of Hawai`i's exclusion of same-sex couples from marriage, as effected through Article I, Section 23 of the Hawai`i Constitution (the "Marriage Amendment") and former HRS § 572-1. (GCR6.) Plaintiffs sought a declaration that their exclusion from marriage denied them equal protection and due process as guaranteed by the Fourteenth Amendment. (*Id.* at 29-30.) Plaintiffs also sought to enjoin state officials from denying same-sex couples access to marriage. (*Id.*)

B. Course of Proceedings and Disposition Below

Plaintiffs adopt by reference the sections headed "B. Course of Proceedings" and "C. Disposition Below" – which are part of the "Statement of

the Case and of the Facts" – contained in the Governor's Opening Brief.

C. Background Relevant to Mootness

1. The Marriage Equality Act and Related Litigation

On December 2, 2013, the Marriage Equality Act took effect. *See* Act 1 (S.B. 1), Laws 2013, 2d Sp. Sess. By its terms, the Act provides same-sex couples equal access to marriage in Hawai`i. *See, e.g.,* HRS § 572-1 (stating the requisites of a valid marriage contract, "which shall be permitted between two individuals without regard to gender"). Under the new law, hundreds of same-sex couples, including Plaintiffs Jackson and Kleid, and Plaintiff Bradley and his partner, have married in Hawai`i.

Following the Act's passage, plaintiffs opposed to it filed two lawsuits – one in Hawai`i state court and one in the United States District Court for the District of Hawai`i – claiming the Hawai`i legislature did not have the legal authority to pass the Act. (*See* Doc. 118,[3] Exs. "A" and "B.") To date, the claims in both suits have been rejected. In the state action, the court granted the defendants' motion for summary judgment (*i.e.*, rejected the plaintiffs' state constitutional challenge to the Act) and entered judgment in the defendants' favor. (*See* GOB, Addendum 7.) In the federal action, Chief Judge Susan Oki

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[3] Documents filed in this appeal, 12-16995, are cited as "Doc. [appellate docket number]."

Mollway dismissed the plaintiff's claims, judgment was entered in defendants' favor, and the plaintiff's appeal to this Court is currently pending. *See Amsterdam v. Abercrombie*, Civ. No. 13-00649 SOM-KSC, 2014 WL 689764 (D. Haw. Feb. 19, 2014); GOB, Addendum 8.

2. Orders and Briefing Regarding Mootness and Vacatur

On November 26, 2013, this Court issued an order to show cause, stating in part: "Hawaii's new law . . . is expected to take effect December 2, 2012. Accordingly, it appears as of December 2, 2013 these consolidated appeals may be moot." (Doc. 117.) The Court directed Plaintiffs and the Governor to voluntarily dismiss these appeals or show cause why they should not be dismissed for lack of jurisdiction. (*Id.*)

On December 17, 2013, Plaintiffs and the Governor filed their respective (1) motions to vacate the district court's Order and Judgment and (2) response to this Court's order to show cause. (Docs. 118, 119.) Appellants agreed that the Act's enactment likely mooted these appeals and requested vacatur prior to dismissal. (*Id.*) On December 27, 2013, HFF responded that "[s]o long as legal challenges to [the Hawai`i Marriage Equality Act] remain, . . . these appeals have not become moot." (Doc. 121, at 2.) On January 3, 2014, Plaintiffs and the Governor replied that the legal challenges did not defeat mootness under the relevant case law, including *Miller v. Benson*, 68 F.3d 163,

164-65 (7th Cir. 1995) (*per curiam*). (Docs. 122, 123.)

On March 19, 2014, the Court issued an Order stating in part that "The issue does not appear suitable for summary disposition at this time because this court has not yet addressed the specific mootness issue resolved by the Seventh Circuit in *Miller v. Benson*." (Doc. 125.) The Court discharged the order to show cause and directed the parties to brief the mootness issue "[i]n addition to all other issues the parties may wish to raise in the briefs." (*Id.*)

VI. SUMMARY OF THE ARGUMENT

The newly enacted Marriage Equality Act provides same-sex couples equal access to marriage in Hawai`i. Because the Act gave Plaintiffs exactly what they sought to achieve by their Complaint, this case is moot.

The two lawsuits challenging the Act do not avert mootness. To date, the claims in both suits have been rejected, and there has been no showing that either of the suits is likely to succeed. In remarkably similar circumstances, where new legislation has mooted a constitutional challenge, the Seventh and Tenth Circuits have squarely held that mootness was **not** defeated by independent litigation challenging the validity of the new statute. *See Miller*, 68 F.3d at 164-65; *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1181-84 (10th Cir. 2000). This Court similarly has held that a statutory repeal or amendment is sufficient to render a case moot,

unless "it is virtually certain that the repealed law will be reenacted." *Helliker*, 463 F.3d at 878.

The rulings in *Miller*, *Davidson* and *Helliker* apply with even greater force here, where both of the pending challenges to the Act have been dismissed. Absent any evidence that the lawsuits challenging the Act are likely to succeed, HFF's mere speculation that the Act might be held invalid is insufficient as a matter of law to defeat mootness.

When a case becomes moot on appeal, this Court's established practice is to reverse or vacate the decision below with a direction to dismiss. Circuit precedent compels this result here, because Plaintiffs, through no fault of their own, have lost their ability to appeal and should not be harmed by the legal consequences (*i.e.*, any preclusive effects) of the district court's "'preliminary' adjudication." *Log Cabin Republicans*, 658 F.3d at 1167-68. This Court should therefore vacate the district court's Order and Judgment and remand with instructions to dismiss.

VII. ARGUMENT

A. This Case is Moot

1. The Marriage Equality Act Mooted this Case

This Court has "routinely deemed cases moot where 'a new law is enacted during the pendency of an appeal and resolves the parties' dispute.'" *Log Cabin Republicans*, 658 F.3d at 1166 (quoting *Qwest Corp. v. City of*

Surprise, 434 F.3d 1176, 1181 (9th Cir. 2006)). *See Helliker*, 463 F.3d at 875-88 (case moot where statutory amendment eliminated challenged part of pesticide registration law); *Martinez v. Wilson*, 32 F.3d 1415, 1419-20 (9th Cir. 1994) (case moot where amendment eliminated challenged factors used by the state in distributing funds under the Older Americans Act). Indeed, "[a] statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994). Under these precedents, when a statutory repeal or amendment gives a plaintiff "everything [it] hoped to achieve" by its lawsuit, the controversy is moot. *Log Cabin Republicans*, 658 F.3d at 1166 (quoting *Helliker*, 463 F.3d at 876).

Here, Plaintiffs, by their lawsuit, sought equal access to marriage in Hawai`i. The Marriage Equality Act provided that access as a matter of state statute. *See* HRS § 572-1. Pursuant to the new law, Plaintiffs Jackson and Kleid, and Plaintiff Bradley and his partner, have married. In short, the Marriage Equality Act gave Plaintiffs exactly what they sought to achieve by their Complaint. There is no longer "'a present, live controversy of the kind that must exist' for this Court to reach the merits." *Log Cabin Republicans*, 658 F.3d at 1166 (quoting *Hall v. Beals*, 396 U.S. 45, 48, 90 S. Ct. 200 (1969) (*per curiam*)). Accordingly, this case is moot.

2. The Independent Litigation Challenging the Marriage Equality Act Does Not Avert Mootness

HFF's opposition to Plaintiffs' prior motion to vacate was based on the faulty legal premise that "[s]o long as legal challenges to [the Hawai`i Marriage Equality Act] remain, . . . these appeals have not become moot." (Doc. 121, at 2.) That premise ignores established law. "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." 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.6 (3d ed. 2008). *See Miller*, 68 F.3d at 164-65; *Davidson*, 236 F.3d at 1181-84. This rule applies with even greater force here, where both of the pending challenges have been dismissed and HFF cannot show that either will succeed on appeal. *Cf. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) ("This is not one of those rare cases in which it is 'virtually certain that the repealed law will be reenacted.'") (quoting *Native Vill. of Noatak*, 38 F.3d at 1510)).

In *Miller*, for example, the Seventh Circuit rejected an argument nearly identical to HFF's. 68 F.3d at 164-65. There, several students had brought a free-exercise challenge to a Wisconsin statute that excluded religious

schools from a program allowing students to attend private schools at public expense. Following summary judgment against the students and pending their appeal, the state legislature amended the statute by deleting the exclusion. The students argued that their appeal was not moot because new litigation, filed in state court to challenge the amended law as a forbidden establishment of religion, could lead to a decision restoring the original statutory scheme. The Seventh Circuit disagreed, stating: "The amendment gives plaintiffs exactly what they sought in this litigation – equal treatment of secular and sectarian private schools . . . Victory in the legislative forum makes judicial proceedings moot." *Id*. at 164. The court squarely held that mootness was not defeated by the plaintiffs' fear that the new statute might be held invalid in the pending state litigation. *Id*. at 165. Furthermore, "[t]o prevent the unreviewable decision of the district court from having any collateral consequence in the state litigation," the Seventh Circuit vacated the judgment and remanded with instructions to dismiss the litigation as moot. *Id*.

In *Davidson*, the Tenth Circuit likewise rejected an argument remarkably similar to HFF's. 236 F.3d at 1181-84. There, various individuals and groups had brought actions challenging the constitutionality of a Colorado campaign finance law. Pending the parties' appeals, the Colorado legislature amended several challenged provisions of the law. The Tenth Circuit held that

the amendments mooted the challenge as to those provisions and that mootness was **not** averted by the fact that amici curiae in the litigation had filed a state-court action challenging the validity of the amending legislation under the state open meeting act. *Id*. at 1184 ("Even if the timing of [amici's] lawsuit is purely coincidental, we do not believe that the mere filing of a lawsuit is sufficient to resurrect Article III jurisdiction over the repealed statutes.") (footnote omitted). The court vacated the portions of the district court's orders that dealt with the amended provisions and remanded the mooted claims for dismissal without prejudice. *Id*. at 1200.

Similarly, here, Plaintiffs challenged the constitutionality of Hawai`i's exclusion of same-sex couples from marriage. Pending these appeals, the Hawai`i legislature passed the Marriage Equality Act. "The [new law] gives plaintiffs exactly what they sought in this litigation" – equal access to marriage. *Miller*, 68 F.3d at 164.

HFF has wrongly argued that the old law "is in a state akin to temporary suspension rather than permanent repeal." (Doc. 121, at 1.) "There is no reason to think the [Hawai`i] legislature enacted the [new law] with a mind to restoring the old law later" – and HFF has provided none. *Helliker*, 463 F.3d at 878. HFF similarly has offered no evidence that the pending lawsuits challenging the new law – which suits have been rejected to date – are likely to succeed.

Absent such evidence, "[v]ictory in the legislative forum makes judicial proceedings moot." *Miller*, 68 F.3d at 164. Moreover, as in *Miller* and *Davidson*, the mootness of these appeals cannot be defeated by HFF's mere speculation that the new Marriage Equality Act might be held invalid in pending (or later) lawsuits. *Miller*, 68 F.3d at 164; *Davidson*, 236 F.3d at 1184. That is all HFF has offered, and it is insufficient as a matter of law to breathe life into these appeals. *See Log Cabin Republicans*, 658 F.3d at 1167 ("We can only speculate, and our speculation cannot breathe life into this case."). This case is therefore moot.

B. This Court Should Vacate the District Court's Order and Judgment

When a case becomes moot on appeal, "the 'established practice' is to reverse or vacate the decision below with a direction to dismiss." *NASD Dispute Resolution, Inc. v. Judicial Council of the State of California*, 488 F.3d 1065, 1068 (9th Cir. 2007) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71, 117 S. Ct. 1055 (1997) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S. Ct. 104 (1950)). Without vacatur, the lower court's judgment, "which in the statutory scheme was only preliminary," would escape meaningful appellate review thanks to the "happenstance" of mootness. *NASD Dispute Resolution*, 488 F.3d at 1068 (quoting *Munsingwear*, 340 U.S. at 39). "Under the '*Munsingwear* rule,' **vacatur is generally 'automatic' in the Ninth**

Circuit when a case becomes moot on appeal." *NASD Dispute Resolution*, 488 F.3d at 1068 (quoting *Publ. Util Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996)) (emphasis added). *See American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1065 (9th Cir. 2012) (vacatur is the "normal rule" when a case is mooted; that is the "default approach" because it "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences") (quoting *Munsingwear*, 346 U.S. at 41).

There is an exception to the *Munsingwear* rule when the "party seeking relief from the judgment below caused the mootness by voluntary action." *ACLU of Nevada*, 670 F.3d at 1065 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24, 115 S. Ct. 386 (1994)). When new legislation moots an appeal, however, the legislation is attributed solely to the legislature for purposes of the vacatur inquiry. *Helliker*, 463 F.3d at 879 ("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. . . . The principle that legislation is attributed to the legislature alone is inherent in our separation of powers.")

Thus, here, the mooting event – the enactment of the Marriage Equality Act – is attributable solely to the Hawai`i legislature. As a matter of established Ninth Circuit law, mootness was **not** caused by any "voluntary

action" of Plaintiffs. Under these circumstances, the default rule is to vacate the district court's Order and Judgment. *See Masto*, 670 F.3d at 1065. Circuit precedent compels this result because Plaintiffs, through no fault of their own, have lost their ability to appeal and should not be harmed by the legal consequences (*i.e.*, any preclusive effects) of the district court's "'preliminary' adjudication." *Log Cabin Republicans*, 658 F.3d at 1167-68. Accordingly, this Court should vacate the district court's Order and Judgment with a direction to dismiss.

In opposing Plaintiffs' prior motion to vacate, HFF did not dispute the fact that Plaintiffs did not cause the enactment of the Marriage Equality Act. Accordingly, as a matter of law, Plaintiffs did not cause the mootness of these appeals by "voluntary action." *Helliker*, 463 F.3d at 878 (quoting *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24).

Rather, HFF wrongly attempted to attribute the new law's enactment to the **Governor**. (*See* Doc. 121, at 8-10.) But Plaintiffs are not the Governor – indeed, they sued the Governor – and, as parties seeking vacatur of the Order and Judgment below, Plaintiffs are independently entitled to vacatur. *See Helliker*, 463 F.3d at 878 ("[w]here mootness was caused not by the 'voluntary action' of the party seeking vacatur but by 'happenstance' or the

'vagaries of circumstance,' we direct vacatur") (citing *Doe v. Madison Sch. dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999) (*en banc*)).

HFF's purported balancing of the equities was a similar diversion. (*See* Doc. 121, at 4-7.) There has been no showing that Plaintiffs caused the mootness of these appeals so as to require weighing the equities. *See Helliker*, 463 F.3d at 878 ("Where mootness was caused by the 'voluntary action' of the party seeking vacatur, 'we generally remand with instructions to the district court to weigh the equities and determine whether it should vacate its own judgment.'") (quoting *Maynard v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997)). In the absence of such a showing, this Court must "**direct vacatur**." *Helliker*, 463 F.3d at 878 (emphasis added). *See NASD Dispute Resolution, Inc.*, 488 F.3d at 1069-70 (declining to weigh the equities where the plaintiffs' actions did not render the appeal moot; "the general rule of *Munsingwear* . . . **requires us** to vacate the district court's judgment") (emphasis added).

In sum, vacatur is required where, as here, the party opposing it has failed to establish a recognized exception to the rule. Accordingly, this Court should: (1) vacate the district court's Order and Judgment with a direction to dismiss the case; and (2) subsequently dismiss these appeals.

C. The District Court Erred in Rejecting Plaintiffs' Claims Under the Equal Protection and Due Process Clauses of the Fourteenth Amendment

1. Hawai`i's Exclusion of Same-Sex Couples from Marriage Violated Constitutional Guarantees for the Reasons Stated in the Governor's Opening Brief

If this Court reaches the merits of these appeals, it should reverse the district court's Order and Judgment and direct entry of summary judgment in Plaintiffs' favor. Plaintiffs adopt by reference the following parts of the Governor's Opening Brief on the merits: Argument, Sections II. ("*Baker v. Nelson* is not controlling"); III. ("Sexual Orientation is a Suspect or Quasi-Suspect Classification . . ."); 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"); V. ("The Same-Sex Marriage Ban Does Not Satisfy even Rational Basis Review"); VI. ("The Same-Sex Marriage Ban Certainly Fails any form of Heightened Scrutiny"); and VII. ("The Fundamental Right to Marry under the Due Process Clause extends to Same-Sex Couples").[4]

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[4] Plaintiffs understand the phrase "same-sex marriage" – used throughout the Governor's brief – as a convenient shorthand for referring to marriages entered by same-sex couples. Plaintiffs sought the same right to marry that opposite-sex couples enjoy. *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013).

2. Plaintiffs' Constitutional Challenge to The Marriage Amendment

Hawai`i excluded same-sex couples from marriage by means of the Marriage Amendment – which granted the legislature "the power to reserve marriage to opposite sex couples" – and former HRS § 572-1– which restricted marriage to opposite-sex couples.

As noted in the Governor's Opening Brief, he disagreed with Plaintiffs' challenge to the Marriage Amendment "because it does not ban same-sex marriage, but merely leaves the matter up to the legislature." (Governor's Opening Brief at 5, n. 4.) At a minimum, however, there can be no dispute that Hawai`i adopted the Marriage Amendment as a means of validating HRS § 572-1 and thereby excluding same-sex couples from marriage. (*See id.* at 22.)

Indeed, the Marriage Amendment deprived same-sex couples alone of existing legal rights related to marriage. Prior to its 1998 passage, the Hawai`i Supreme Court had conclusively held that same-sex couples were: (1) protected against invidious sex discrimination pursuant to article I, section 5 of the Hawai`i Constitution and, therefore, (2) presumptively entitled to access to the legal status of marriage afforded by HRS § 572-1. *See Baehr v. Lewin*, 74 Haw. 530, 580-81, 852 P.2d 44 (1993). The subsequent Marriage Amendment stripped same-sex couples of these state constitutional rights by "plac[ing] HRS § 572-1 on a **new footing**" and "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." *Jackson v. Abercrombie*, 2012 WL 2053204 (D. Haw. May 2, 2012) (quoting *Baehr v. Miike*¸ No. 20371, 1999 Haw. LEXIS 391, *7 (Haw. Dec. 9, 1999)) (emphasis added).

In that context, the Marriage Amendment denied "equal protection of the laws in the most literal sense," because it carved out an "exception" to Hawai`i's equal protection clause, by removing equal access to the status of marriage from the scope of the state's constitutional guarantee against sex discrimination and depriving same-sex couples of the right to enforce that guarantee in state court. *Romer v. Evans*, 517 U.S. 620, 633, 116 S. Ct. 1620 (1996)). The Marriage Amendment "by state decree . . . put [same-sex couples] in a solitary class with respect to" an important aspect of human relations and accordingly "impose[d] a special disability upon [same-sex couples] alone." *Id*. at 627, 631.

Moreover, as the Governor rightly argues, excluding same-sex couples from marriage violates the equal protection and due process guarantees of the Fourteenth Amendment. Accordingly, the Hawai`i legislature could not constitutionally have been granted the power to **withhold** those couples' fundamental rights. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624,

638, 63 S. Ct. 1178 (1943) ("fundamental rights may not be submitted to vote; they depend on the outcome of no elections").

Finally, the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), reveals yet another constitutional defect in the Marriage Amendment. Like DOMA, the Marriage Amendment demeans the dignity of same-sex couples – here, by purportedly giving state legislators the authority to deprive only those couples of the fundamental right to marry. Had the Hawai`i Constitution been amended to provide the legislature with "the power to reserve marriage to **same-sex** couples" – giving state legislators the authority to strip only opposite-sex couples of the right to marry – the constitutional defect would presumably be more obvious.

VIII. CONCLUSION

For the reasons set forth above, this Court should: (1) vacate the district court's Order and Judgment with a direction to dismiss the case; and (2) subsequently dismiss these appeals.

Dated: Honolulu, Hawai`i, April 25, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, Plaintiffs' Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 4,848 words, excluding those parts of Defendant-Appellant Neil S. Abercrombie's (the "Governor's") Opening Brief that have been adopted by reference. When the adopted parts of the Governor's Opening Brief are included in the word count, Plaintiffs' Opening Brief contains 21,717 words. Plaintiffs therefore have filed a motion to exceed the 14,000 word type-limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B).

Dated: Honolulu, Hawai`i, April 25, 2014.

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STATEMENT OF RELATED CASES

These consolidated *Jackson* appeals (Nos. 12-16995 and 12-16998) are related to *Sevcik v. Sandoval*, No. 12-17668, which is pending in this Court. If the *Jackson* appeals are not moot, they raise the same or closely related constitutional issues as the *Sevcik* appeal.

Dated: Honolulu, Hawai`i, April 25, 2014.

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