

Nos. 12-16995 and 12-16998

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**NATASHA N. JACKSON**, et al.,

Plaintiffs-Appellants,

v.

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

Defendant-Appellant,

and

**LINDA ROSEN**, Director, Department of Health, State of Hawai‘i,

Defendant-Appellee,

and

**HAWAII FAMILY FORUM**,

Intervenor-Defendant-Appellee.

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On appeal from the United States District Court for the District of Hawai‘i  
Case No. CV 11-00734 ACK-KSC  
The Honorable Alan C. Kay

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**Hawaii Family Forum’s Answering Brief**

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## **CORPORATE DISCLOSURE STATEMENT**

Appellee Hawaii Family Forum states that it is a nonprofit organization, that it does not have any stock, and that it does not have any parent corporations.

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## **JURISDICTIONAL STATEMENT**

Plaintiffs raise constitutional claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. 28 U.S.C. § 1331 provided the United States District Court for the District of Hawai‘i with jurisdiction to decide these constitutional claims.

28 U.S.C. § 1291 affords this Court appellate jurisdiction to review the District Court’s final judgment and order, which granted the Hawai‘i Department of Health Director’s and Hawaii Family Forum’s summary-judgment motions, denied Plaintiffs’ and the Governor’s summary-judgment motions, and dismissed all Plaintiffs’ claims.

The District Court entered its order and final judgment on August 8, 2012. Plaintiffs and the Governor filed their notices of appeal on September 7, 2012. Those notices of appeal were timely filed in compliance with Federal Rule of Appellate Procedure 4(a)(1)(A).

## **STATEMENT OF THE ISSUES**

- 1) Whether Plaintiffs’ and the Governor’s appeals are moot.
- 2) Assuming Plaintiffs’ and the Governor’s appeals are moot, whether this Court should vacate the District Court’s final judgment and order.

## **PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The pertinent constitutional provisions and statutes are set forth in the addenda to the Governor's brief.

## **STATEMENT OF THE CASE**

Plaintiffs allege in this suit that Hawai'i's laws defining marriage as the union of one man and one woman violate their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because those laws do not allow them to marry a person of the same sex. *See* ER 6:27-28 (Am. Compl. ¶¶ 99, 104, ECF No. 6). Plaintiffs brought this action against Governor Neil S. Abercrombie (the Governor) and the Director of the Hawai'i Department of Health (the Director). ER 6:2-3 (Am. Compl. ¶¶ 5-6, ECF No. 6).

The Director filed an answer affirming that Hawai'i's man-woman marriage laws do not violate the Constitution. ER 10:6-7 (Director's Answer to First Am. Compl. ¶¶ 37, 40, ECF No. 10). The Governor, in contrast, filed an answer agreeing with Plaintiffs that a statute "allow[ing] opposite sex couples, but not same sex couples, to get married," "violates the Due Process Clause and Equal Protection Clause of the United States Constitution." ER 9:2 (Abercrombie's Answer to First Am. Compl. 1, ECF No. 9).

As an active supporter of the State's man-woman marriage laws, HFF moved to intervene and defend its significant protectable interest in those laws. *See* HFF's Mot. to Intervene 1, ECF No. 15. The District Court found that HFF had "a right to intervene in this suit" and allowed HFF to join the case as a party defendant. *See* Order Granting HFF's Mot. to Intervene 30, ECF No. 43.

Soon thereafter, Plaintiffs filed a motion for summary judgment on their claim that Hawai'i's man-woman marriage laws violate their equal-protection rights. *See* Pls. Mot. for Summ. J. 1-2, ECF No. 65. Plaintiffs did not file expert affidavits or declarations supporting their position. *See* D'Amato Decl. 2-5, ECF No. 66-1.

The Governor, who personally agrees with Plaintiffs' challenge to Hawai'i's man-woman marriage statute, did not merely refrain from moving to dismiss Plaintiffs' claims; nor did he simply file a response supporting Plaintiffs' arguments. Instead, soon after Plaintiffs filed their summary-judgment motion, the Governor filed his own countermotion for summary judgment against his co-defendants the Director and HFF. *See* ER 92:1-3 (Governor's Countermot. for Summ. J. 1-3, ECF No. 92). In that motion, he affirmatively attacked the constitutionality of Hawai'i's man-woman marriage statute, demanding that the statute be subject to heightened scrutiny, *see* ER 92:2-3 (Governor's Countermot. for Summ. J. 2-3, ECF No. 92)—a standard that he claimed the statute could not



satisfy, *see* Abercrombie's Mem. in Supp. of Countermot. for Summ. J. 81-85, ECF No. 92-1. The Governor thus asked the District Court to invalidate the State's man-woman marriage statute, relief that he surely lacks standing to request. Displaying his zeal to invalidate the law, the Governor (at substantial cost to the taxpayers of Hawai'i) filed four declarations from purported experts to support his arguments attacking the marriage statute. *See* ER 93:64 (Herek Decl., ECF No. 93-17); ER 93:164 (Chauncey Decl., ECF No. 93-20); ER 93:235 (Lamb Decl., ECF No. 93-23); ER 93:400 (Segura Decl., ECF No. 93-27).

The Director and HFF, in marked contrast, filed motions for summary judgment asking the District Court to dismiss all Plaintiffs' claims because the challenged man-woman marriage laws comport with the Constitution. *See* Fuddy's Mot. for Summ. J. 1-2, ECF No. 63; HFF's Mot. for Summ. J. 2-3, ECF No. 67.

The District Court granted Director Fuddy's and HFF's summary-judgment motions, dismissed all Plaintiffs' claims, and upheld Hawai'i's man-woman marriage laws. ER 117:4-10 (Order Granting Mot. Summ. J. 1-7, 116, ECF No. 117).

Subsequently, Plaintiffs filed a notice of appeal from the District Court's judgment and summary-judgment order, *see* ER 121:1-2 (Pls. Notice of Appeal 1-2, ECF No. 121); and that filing commenced Appeal No. 12-16995. Later that same day, the Governor filed a notice of appeal from the same judgment and order,

*see* ER 123:1-2 (Abercrombie’s Notice of Appeal 1-2, ECF No. 123); and that filing gave rise to Appeal No. 12-16998.

In late 2013, during the pendency of this appeal, the Governor called both houses of the Hawai‘i Legislature to convene in a special session to address the issue of marriage. *See* Pls.-Appellants Mot. for Further Extension of Time to File Opening Brs. 5, ECF No. 35-1, Appeal No. 12-16995. During that session, the Legislature approved S.B. 1/H.D. 1, which redefined marriage from a man-woman union to a genderless union of any two people (hereafter referred to as the “marriage-redefinition bill”). *See* S.B. 1/H.D. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013). The Governor then signed that bill into law. *See* Gov. Mot. for Vacatur 3 n.1, ECF No. 118, Appeal No. 12-16995.

Before the Legislature approved or the Governor signed the bill, a group of Hawai‘i residents filed suit in state court challenging the marriage-redefinition bill’s validity under the Hawai‘i Constitution. *See* First Am. Compl., *McDermott v. Abercrombie*, No. 13-1-2899-10 KKS (Haw. Cir. Ct. Nov. 1, 2013) (attached as Addendum 1). The plaintiffs in that case, *McDermott v. Abercrombie*, argue that the Hawai‘i Constitution removes from the Legislature the authority to redefine marriage to include same-sex couples. *See id.* at 6. In April 2014—after the Legislature approved the marriage-redefinition bill, the Governor signed it, and that new enactment went into effect—the state court dismissed the plaintiffs’

claims in *McDermott*. A notice of appeal has been filed with the state appellate court. *See* Notice of Appeal, *McDermott v. Abercrombie*, No. 13-1-2899-10 KKS (Haw. Cir. Ct. May 20, 2014) (attached as Addendum 2).<sup>1</sup>

In light of the Hawai‘i bill redefining marriage, in November 2013, this Court directed “appellants [to] move for voluntary dismissal of these consolidated appeals or [to] show cause why they should not be dismissed for lack of jurisdiction.” Order 3, ECF No. 117, Appeal No. 12-16995. The parties subsequently filed briefing addressing those issues. In March 2014, this Court discharged the order to show cause after determining that the mootness question was not “suitable for summary disposition.” Order 1-2, ECF No. 125, Appeal No. 12-16995. This Court then instructed the parties to file briefs addressing “the issue of whether the enactment of” the marriage-redefinition bill “moots these consolidated appeals.” *Id.* at 2.

### SUMMARY OF ARGUMENT

Plaintiffs and the Governor argue that the recently enacted bill that redefines marriage in Hawai‘i moots their appeals. *See* Pls. Br. at 10-15; Gov. Br. at 11-15. They also assert that this Court should vacate the District Court’s order and judgment. *See* Pls. Br. at 15-18; Gov. Br. at 15-19. This Court, however, should

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<sup>1</sup> Another Hawai‘i resident has raised similar claims in federal court; the district court dismissed those claims because the plaintiff lacked standing. *See* Order Granting Motion to Dismiss, *Amsterdam v. Abercrombie*, No. 13-00649 (D. Haw. Feb. 19, 2014) (Addendum 8 to the Governor’s Brief).

decline to dismiss these appeals or vacate the District Court's rulings while legal challenges to the marriage-redefinition bill are pending.

For if this Court were to dismiss these appeals and vacate the District Court's decisions and, subsequently, one of the pending lawsuits challenging the marriage-redefinition bill were to invalidate that law, Plaintiffs would receive a windfall, and a substantial waste of judicial resources would ensue. Plaintiffs' windfall would consist of a second bite at the apple—the ability to re-litigate their federal challenge in the District Court, with an opportunity to amend their unsuccessful claims and arguments. That re-litigation would also waste substantial judicial resources, as the District Court would be required to reassess a matter that it already resolved. Moreover, the Governor played an indispensable role in the marriage-redefinition bill's enactment, and thus he, in particular, possesses no equitable right for this Court to vacate the District Court's decision and judgment.

Rather than dismissing Plaintiffs' and the Governor's appeals and vacating the District Court's decision, this Court should stay these proceedings pending resolution of the challenges to the marriage-redefinition bill with instructions (1) for the parties to file a motion to lift the stay and proceed with briefing on the merits of the case if any of the challenges to the marriage-redefinition bill succeed, or (2) for Plaintiffs or the Governor to renew their mootness argument and vacatur request by filing a motion with this Court if the pending challenges to the

marriage-redefinition bill are rejected by the reviewing courts of last resort. Adopting this approach will maximize judicial resources, minimize the burdens to the parties, and prevent any party from unjustly benefiting at the expense of others.

## ARGUMENT

### **I. This Court Should Decline to Dismiss These Appeals as Moot or to Vacate the District Court’s Rulings While the Challenges to the Marriage-Redefinition Bill Remain Pending.**

“The party asserting mootness bears the burden of establishing that” the case is moot. *S. Or. Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1134 (9th Cir. 2004). “[I]n cases involving the amendment or repeal of a statute, ‘mootness . . . is not a jurisdictional issue; rather, [this Court] may continue to exercise authority over a purportedly moot case where the balance of interests favors such continued authority.’” *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003) (ellipses in original) (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 927 (9th Cir.1991)). In other words, “[r]evision of a statute is a matter relating to the *exercise* rather than the *existence* of judicial power.” *Id.* (alterations omitted) (quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)). Hence, “mootness is not jurisdictional in cases such as this.” *Id.* Rather, the mootness inquiry focuses on the “balance of interests” between this Court’s exercising its jurisdiction and declining to exercise that authority. *Id.*

Analysis of the vacatur question is similar. The appellant, “as the party seeking relief from the status quo of the . . . judgment,” has the burden “to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994). “[T]he touchstone of vacatur is equity[.]” *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995); thus courts considering that remedy must assess ““the consequences and attendant hardships of dismissal or refusal to dismiss.”” *Id.* at 1370-71 (quoting *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)). And “when federal courts contemplate equitable relief” like vacatur, they “must also take account of the public interest.” *U.S. Bancorp Mortg.*, 513 U.S. at 26.

The balance of the interests and the equities favors this Court’s retaining jurisdiction over these appeals and declining to vacate the District Court’s decision while the ongoing challenges to the marriage-redefinition bill remain pending. The potential consequences of declaring the appeals moot and vacating the District Court’s decision at this point threaten to harm the appellees and the public interest, and to unfairly benefit the appellants. If this Court were to dismiss the case and vacate the District Court’s rulings and, thereafter, a court were to declare the marriage-redefinition bill invalid, the public interest would suffer through the waste of significant judicial resources, as the parties would be forced to re-litigate

in the District Court a matter already resolved by that court. That scenario would unjustly benefit the appellants, providing them another bite at the apple—with the ability to amend their unsuccessful arguments. It would also unduly burden the appellees, requiring them to re-construct their legal defense and respond to Plaintiffs’ and the Governor’s renewed arguments. Dismissing this case now—and thereby risking this waste of judicial resources, unjustified benefit to the appellants, and undue harm to the appellees—would directly undermine the interests of equity.

In contrast, retaining jurisdiction over the case and declining to vacate the District Court’s rulings while the challenges to the marriage-redefinition bill are pending would not impose any hardship on the appellants, the appellees, or the public interest. Vacatur is not necessary for Plaintiffs to presently obtain the relief they sought in bringing this case. Indeed, as they have admitted, Plaintiffs have already married their same-sex partners. Pls. Br. at 11. Similarly, maintaining jurisdiction over these appeals and refusing for now to vacate the District Court’s rulings would not hinder the Governor’s personal goal of redefining marriage in Hawai‘i. Notwithstanding the District Court’s judgment, the Governor has already played an indispensable role in (at least temporarily) effectuating that desired result. Notably, neither Plaintiffs nor the Governor has identified any present adverse preclusive effects from the District Court’s rulings.

Nor does continuing to hold these appeals pose any adverse impact on the appellees or the public interest. The District Court’s decision “is not binding precedent”; it is not binding “in . . . a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (quotation marks omitted); *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996) (stating that every federal district court judge “sits alone and renders decisions not binding on the others”). That decision, therefore, does not threaten to “spawn[] any legal consequences” and thus does not implicate the primary policy justifying vacatur of district-court decisions. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). In sum, while legal challenges presently threaten the validity of the marriage-redefinition bill, the balance of equities weighs against dismissing these appeals as moot or vacating the District Court’s decision and judgment.

Plaintiffs and the Governor argue that *Miller v. Benson*, 68 F.3d 163 (7th Cir. 1995) (per curiam), and *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), support their mootness arguments. *See* Pls. Br. at 12-15; Gov. Br. at 12-13. But those cases are readily distinguishable for at least three reasons. First, in both of those cases, the litigants who argued against mootness—the plaintiffs-appellants in *Miller* and the plaintiffs-appellants’ amici in *Citizens for Responsible Government*—were parties



to the pending state-court lawsuits challenging the revising statutes. This gave rise to the overriding concern in *Miller* and *Citizens for Responsible Government* that the plaintiffs and their amici were seeking to retain “a form of collateral attack on the state decision”—that they were “play[ing] off one court system against another.” *Miller*, 68 F.3d at 165; *accord Citizens for Responsible Government*, 236 F.3d at 1184 (refusing to “allow[] parties to play off one court system against another” (quotation marks omitted)). But those concerns are absent here, where HFF is not a party to, or otherwise involved in, the pending challenges to the marriage-redefinition bill.

Second, the parties who argued against mootness in *Miller* and *Citizens for Responsible Government*—the plaintiffs-appellants and their amici—lost in the district court and thus would not have been harmed by a determination that the appeal was moot. *See Miller*, 68 F.3d at 164; *Citizens for Responsible Government*, 236 F.3d at 1184. Supposing that their appeals were dismissed as moot and the state courts subsequently invalidated the revising statutes, the plaintiffs-appellants in those cases would not have been disadvantaged by re-litigating the matter in the district court because they lost in that venue initially and would benefit from another bite at the apple. Here, in contrast, HFF prevailed below. Therefore, if these appeals were dismissed and then the marriage-redefinition bill were overturned, HFF would be forced once again to defend against Plaintiffs’

constitutional claims. Unlike in *Miller* or *Citizens for Responsible Government*, this would impose an inequitable hardship on the party arguing against mootness.

Third, this Circuit’s law establishes that in cases like this, “involving the amendment or repeal of a statute, ‘mootness . . . is not a jurisdictional issue; rather, [this Court] may continue to exercise authority over a purportedly moot case where the balance of interests favors such continued authority.’” *Jacobus*, 338 F.3d at 1103 (quoting *Coral Constr. Co.*, 941 F.2d at 927). In contrast, the Seventh and Tenth Circuits do not apply this balancing analysis; instead, they treat the question as jurisdictional. *See Citizens for Responsible Government*, 236 F.3d at 1184 (“[W]e do not believe that the mere filing of a lawsuit is sufficient to resurrect Article III jurisdiction over the repealed statutes.”); *Miller*, 68 F.3d at 164 (“Victory in the legislative forum makes judicial proceedings moot.”).<sup>2</sup>

## **II. The Governor’s Vacatur Request Is Particularly Meritless.**

An appellate court must not vacate a district-court ruling when “appellate review [is] prevented not due to happenstance, but when the appellant has by his own act caused the dismissal of the appeal.” *Dilley*, 64 F.3d at 1370 (quotation marks and citations omitted). “[T]he primary inquiry” when analyzing vacatur requests, then, “is whether the appellant caused the [dismissal] by his own

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<sup>2</sup> This Circuit’s approach to this question comports with Supreme Court precedent better than the Seventh or Tenth Circuit’s analysis. As *City of Mesquite* makes clear, *see* 455 U.S. at 289, courts may retain jurisdiction over a challenge to a statute, even after the challenged statute has been repealed.

voluntary act.” *Id.* at 1370 n.4; *see also Am. Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012). It matters not whether the appellant acted with the intent to moot his appeal or “for a purpose other than to prevent the appellate court’s review of the district court’s order.” *Dilley*, 64 F.3d at 1371.

Here, the Governor played an indispensable role in the marriage-redefinition bill’s enactment. He was not only the initiator of that bill’s introduction during the special session;<sup>3</sup> he also provided the final approval for the bill’s enactment into law.<sup>4</sup> In short, the Governor both initiated and approved the marriage-redefinition bill. It thus is beyond doubt that the Governor’s voluntary action was indispensable to the bill’s enactment.

Although, under this “voluntary action” vacatur analysis, the enactment of legislation is generally “not attributed to the executive branch[.]” *Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006), that rule does not

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<sup>3</sup> *See* Pls.-Appellants Mot. for Further Extension of Time to File Opening Brs. at 5, ECF No. 35-1, Appeal No. 12-16995 (“On September 9, 2013, Governor Abercrombie . . . called both houses of the state Legislature to convene in a special session on October 28, 2013 to address the issue of marriage” (quotation marks omitted)); Gov. Mot. for Vacatur at 3 n.1, ECF No. 118, Appeal No. 12-16995 (admitting that “the Governor called the special session, making passage of the bill possible”); Haw. Const. art. III, § 10 (“The governor may convene both houses or the senate alone in special session.”).

<sup>4</sup> *See* Gov. Mot. for Vacatur at 3 n.1, ECF No. 118, Appeal No. 12-16995 (admitting that “[t]he Governor[] sign[ed] . . . the bill”); Haw. Const. art. III, § 16 (“Every bill which shall have passed the legislature . . . shall thereupon be presented to the governor. If the governor approves it, the governor shall sign it and it shall become law. If the governor does not approve such bill, the governor may return it . . . to the legislature.”).

apply to the Governor. *See id.* (quoting *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir. 2000), which noted that although “all of [the appellants were] state executive officials, none of [them were] the Governor”); *id.* at 880 (“The strength of the rule [against attributing legislative enactments to the executive branch] may attenuate for . . . [actions] with mixed legislative and executive character”). Particularly here, where the Governor initiated and approved the marriage-redefinition bill’s passage, the Governor’s voluntary actions played a direct and indispensable role in the statute’s enactment, and thus he is not entitled to the equitable remedy of vacatur.<sup>5</sup>

### **III. Vacatur Would Be Inappropriate Even if the Pending Legal Challenges to the Marriage-Redefinition Bill Are Ultimately Unsuccessful and these Appeals Are Moot.**

Even if the pending legal challenges to the marriage-redefinition bill are ultimately unsuccessful and Plaintiffs’ and the Governor’s appeals are deemed moot, vacatur of the District Court’s rulings would still be unwarranted. Under those circumstances, Plaintiffs would not experience practical hardship from any possible preclusive effect of the District Court’s decision. Most importantly, Plaintiffs’ marriages to their same-sex partners would remain valid. The District Court’s ruling would in no way jeopardize that.

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<sup>5</sup> That S.B.1 was enacted by the Governor’s joint action with the Legislature (rather than the Governor’s action alone) does not revive his argument for vacatur. This Court has “rejected a proposed ‘unilateral/bilateral distinction’” when conducting vacatur analysis. *Dilley*, 64 F.3d at 1371.

Moreover, if it should subsequently come to pass that the Hawai‘i Legislature restores marriage to a man-woman union, even if the District Court’s decision and judgment are not vacated, Plaintiffs likely could challenge the constitutionality of that future law and, in any event, would benefit from any successful lawsuit challenging that law. Neither claim preclusion nor issue preclusion (also known as collateral estoppel) would bar Plaintiffs from filing such a lawsuit, because their complaint would challenge a different state law and thus the issue would not be “identical” to the one presented in this action. *See Bremer v. Weeks*, 85 P.3d 150, 161 (Haw. 2004) (claim preclusion); *Dorrance v. Lee*, 976 P.2d 904, 910 (Haw. 1999) (issue preclusion). Alternatively, Plaintiffs could join with at least one other litigant desiring to marry a person of the same sex, and together they could challenge the constitutionality of that future marriage law. The addition of another plaintiff would provide another basis upon which to avoid claim or issue preclusion. *See Bremer*, 85 P.3d at 161 (stating that one of the requirements of claim preclusion is that the “parties are the same or in privity with the parties in the original suit,” and that one of the requirements of issue preclusion is that “the party against whom [issue preclusion] is asserted was a party or in privity with a party to the prior adjudication” (alteration in original)). Furthermore, if any litigant (other than Plaintiffs) successfully challenged a future man-woman marriage law and sought a statewide injunction against that law’s enforcement, that

statewide injunction would directly benefit Plaintiffs, permitting them to marry a person of the same sex.

### **CONCLUSION**

For the foregoing reasons, this Court should decline to dismiss Plaintiffs' and the Governor's appeals or to vacate the District Court's decision and judgment. Rather, this Court should stay these proceedings pending resolution of the challenges to the marriage-redefinition bill with instructions (1) for the parties to file a motion to lift the stay and proceed with briefing on the merits of the case if any of the challenges to the marriage-redefinition bill succeed, or (2) for Plaintiffs or the Governor to renew their mootness argument and vacatur request by filing a motion with this Court if the pending challenges to the marriage-redefinition bill are rejected by the reviewing courts of last resort. Adopting this approach will maximize judicial resources, minimize the burdens to the parties, and prevent any party from unjustly benefiting at the expense of others.

Dated: May 27, 2014

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**CERTIFICATE OF COMPLIANCE WITH RULE 32**

**Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type-Style Requirements**

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Date: May 27, 2014

s/ *Byron J. Babione*

Byron J. Babione



### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing 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 May 27, 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.

Date: May 27, 2014

s/ *Byron J. Babione*

Byron J. Babione

### STATEMENT OF RELATED CASES

HFF agrees that the two cases identified in the Governor's Brief, *Sevcik v. Sandoval* and *SmithKline Beecham v. Abbott Laboratories*, are related to this case. HFF is not aware of any other related cases pending in this Court.

Date: May 27, 2014

s/ Byron J. Babione

Byron J. Babione

### **ADDENDA**

- 1) *McDermott v. Abercrombie*, No. 13-1-2899-10 KKS (Haw. Cir. Ct. Nov. 1, 2013)
- 2) Notice of Appeal, *McDermott v. Abercrombie*, No. 13-1-2899-10 KKS (Haw. Cir. Ct. May 20, 2014)

# **ADDENDUM 1**

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FIRST CIRCUIT COURT  
 STATE OF HAWAII  
 FILED

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

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

REPRESENTATIVE BOB	)	CIVIL NO. 13-1-2899-10 KKS
McDERMOTT, GARRET	)	
HASHIMOTO, WILLIAM E.K.	)	FIRST AMENDED COMPLAINT; EXHIBITS
KUMIA, DAVID LANGDON,	)	"A"- "B"; SUMMONS
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GOVERNOR NEIL ABERCROMBIE,	)	
SENATOR DONNA MERCADO KIM,	)	
REPRESENTATIVE JOSEPH SOUKI,	)	
SENATOR CLAYTON HEE,	)	
REPRESENTATIVE KARL RHOADS,	)	
	)	
Defendants.	)	

I do hereby certify that this is a full, true and  
 correct copy of the original on file in this office.

*H. Ching*  
 Clerk, Circuit Court, First Circuit

**FIRST AMENDED COMPLAINT**

COMES NOW PLAINTIFFS above named, through their attorneys, Robert K. Matsumoto and John R. Dwyer, Jr., and hereby files their claims against Defendants above named.

1. Plaintiff Representative BOB McDERMOTT, is a resident of the City and County of Honolulu, State of Hawaii, and is the duly elected representative of District 40, House of Representatives, State of Hawaii; Plaintiff GARRET HASHIMOTO, is a resident of the City and County of Honolulu, State of Hawaii; Plaintiff WILLIAM E.K. KUMIA, is a resident of the City and County of Honolulu, State of Hawaii; and Plaintiff DAVID LANGDON, is a resident of the City and County of Honolulu, State of Hawaii (hereinafter collectively the “Plaintiffs”).

2. Defendant Governor Neil Abercrombie, hereinafter “Governor Abercrombie”, is a resident of the City and County of Honolulu and is the duly elected governor of the State of Hawaii.

3. Defendant Senator Donna Mercado Kim, hereinafter “Senator Kim”, is a resident of the City and County of Honolulu, is the duly elected senator from Senate District 14 and the president of Senate of the State of Hawaii.

4. Defendant Representative Joseph Souki, hereinafter “Speaker Souki” is a resident of the island and County of Maui, is the duly elected representative of District 8 of the State House of Representatives and the Speaker of the House of Representatives of the State of Hawaii.

5. Defendant Senator Clayton Hee, hereinafter “Senator Hee” is a resident of the City and County of Honolulu, State of Hawaii and is the duly elected senator of Senate District 23.

6. Defendant Karl Rhoads, hereinafter “Representative Rhodes”, is a resident of the City and County of Honolulu, State of Hawaii, and is the duly elected representative of House District 29.

7. All of the Defendants are being sued in their capacities as duly elected officials of the State of Hawaii and not as individuals.

8. Plaintiff McDermott brings this action in his official capacity as a member of the State of Hawaii House of Representatives and not in his individual capacity.

9. Both Plaintiffs and Defendants are bound by Section I of the Hawaii State Constitution which states, “All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.”

10. On or about August, 2013, Governor Abercrombie called for a special session of the legislature of the State of Hawaii to consider and to act upon a “marriage equity”, i.e. a “same sex marriage” bill.

11. Plaintiffs are informed and believe and upon such information and belief allege notwithstanding the non-concurrence of both Senator Kim and Speaker Souki, Governor Abercrombie unilaterally set the start date for the special session for the week of the October 28, 2013, which special session was expected to last no more than five (5) days.

12. Plaintiffs are informed and believe, and upon such information and belief allege that the truncated special session was called to favor a selected few over the rights of the general populace of Hawaii.

13. On or about October 24, 2013, there was a public announcement made to the general public announcing the start date and time for public testimony to be heard before the

Senate Judiciary and Labor committee headed by Senator Hee with a description of the proposed bill, Senate Bill #1, together with instructions on how to submit written testimony. A true copy of Senate Bill “1” is attached hereto as Exhibit “A” and by reference is made a part hereof.

14. The instructions also noted that the deadline for submitting written testimony was 24 hours prior to start of the hearing and date and time before the Senate Judiciary and Labor committee, which commenced at 10:30 a.m., October 28, 2013.

15. Article 1, section 23 of the Hawaii State Constitution states, “The legislature shall have the power to reserve marriage to opposite sex-couples”, hereinafter “Opposite Sex Marriage Amendment.”

16. Said Opposite Sex Marriage Amendment was proposed by the Hawaii Legislature to the people of Hawaii, who overwhelmingly voted by a greater than 2/3 majority to approve the Amendment by way of a Referendum, which constitutionally validated the Hawaii Statute (Section 572-1 HRS) that permitted marriages between a man and a woman only.

17. In explaining the purpose and the meaning of the referendum and the effects of a favorable vote, the State legislature succinctly stated what the meaning of a “Yes” vote for the referendum meant, i.e. a “Yes” vote would add a new provision to the Constitution that would give the Legislature the power to reserve marriage to opposite sex couples only.” A true copy of the State legislature’s statement is attached hereto as Exhibit “B” and by reference is made a part hereof.

18. As a member of the State House of Representatives at that time in 1998, Plaintiff McDermott voted in favor of H.B. No. 117, C.D. 1, which would allow the people of Hawaii to decide for themselves whether to allow same sex marriages or to limit marriages to opposite sex couples only.



19. Plaintiff McDermott participated in meetings, caucuses, discussions and debates and concluded that if the people of Hawaii voted in favor of the said referendum, which ultimately led to Article I, section 23, marriage in Hawaii would be limited to opposite sex couples only and that another constitutional amendment would be required to allow same sex couples to marry.

20. Plaintiffs are informed and believe and upon such information and belief allege that case law provides that the intention of a Constitutional provision should be determined by the language used together with the surrounding circumstances.

21. Further Plaintiffs are informed and believe and upon such information and belief allege that because of the Opposite Sex Marriage Amendment and the understanding of the voters that approved that Constitutional Amendment, if there is a further need to amend Article I, Section 23, before any same sex marriage bills such as SB #1 can be enacted, that the State legislature has no direct Constitutional right or statutory authority, to enact any same sex marriage laws.

22. As a member of the House Judiciary committee and as a voting member at large, Plaintiff McDermott has been asked to review, consider and vote in the House Judiciary committee on said SB#1 and in the House of Representatives at large.

23. By reason of the meaning language of the Opposite Sex Marriage Amendment and Plaintiffs' position on the Opposite Sex Couple Amendment, a controversy exists and further, there is the danger of immediate and irreparable harm if a single marriage license is issued to a same-sex couple, a determination must be made on (i) the scope and breadth of the Opposite Sex Couple Amendment, and (ii) whether the State Legislature has the right to enact any laws which would allow same sex couples the right to marry notwithstanding the restrictions

of marriage as determined by the said Opposite Sex Couple Amendment and the vote of the people of Hawaii establishing such an Amendment.

24. This action is brought pursuant to Chapter 632, Declaratory Judgments, Hawaii Revised Statutes, and Plaintiffs are entitled to injunctive pursuant to Rules 7(b) and 65(b) of the Hawaii Rules of Civil Procedure.

WHEREFORE, Plaintiffs pray as follows:

1. That the Court declare that Article I, Section 23 of the Hawaii State Constitution made Section 572-1 HRS constitutionally valid and reserves marriage to opposite sex couples only; and further that an amendment to the Hawaii Constitution is necessary for the State Legislature to enact any laws which would allow same sex couples to marry in the State of Hawaii.
2. That the Court declare any bill or act which allows same sex marriage in Hawaii to be declared null and void until another State constitutional amendment is voted upon by the people of Hawaii which would allow same sex couples to marry in the State of Hawaii.
3. That the Court declare that injunctive relief is appropriate because of the possibility and existence of immediate and irreparable injury.
4. That the Court award Plaintiffs their reasonable attorney's fees and costs.

5. That the Court grant such other relief as it deems just and equitable in the premises.

DATED: Honolulu, Hawaii, October 31, 2013



---

ROBERT K. MATSUMOTO

JOHN R. DWYER, JR.

Attorneys for Plaintiffs

REPRESENTATIVE BOB McDERMOTT,

GARRET HASHIMOTO, WILLIAM E.K.

KUMIA, DAVID LANGDON

THE SENATE  
TWENTY-SEVENTH LEGISLATURE, 2013  
SECOND SPECIAL SESSION  
STATE OF HAWAII

OCT 28 2013

## S.B. NO. 1

# A BILL FOR AN ACT

RELATING TO EQUAL RIGHTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1       SECTION 1. This Act shall be known as the Hawaii Marriage  
2 Equality Act of 2013.

3       The legislature acknowledges the recent decision of the  
4 United States Supreme Court in United States v. Windsor, 133 S.  
5 Ct. 2675 (2013), which held that Section 3 of the Defense of  
6 Marriage Act, Public Law 104-199, unlawfully discriminated  
7 against married same-sex couples by prohibiting the federal  
8 government from recognizing those marriages and by denying  
9 federal rights, benefits, protections, and responsibilities to  
10 those couples. The legislature has already extended to same-sex  
11 couples the right to enter into civil unions that provide the  
12 same rights, benefits, protections, and responsibilities under  
13 state law as afforded to opposite-sex couples who marry.  
14 However, these civil unions are not recognized by federal law  
15 and will not be treated equally to a marriage under federal law.

16       Therefore, it is the intent of the legislature to:

17       (1) Ensure that same-sex couples are able to take full

18       advantage of federal rights, benefits, protections,

2014-0189 SB SMA-2.doc



EXH A

## S.B. NO. 1

1 and responsibilities granted to married opposite-sex  
2 couples by allowing same-sex couples to marry under  
3 the laws of this State;

4 (2) Ensure that there be no legal distinction between  
5 same-sex married couples and opposite-sex married  
6 couples with respect to marriage under the laws of  
7 this State by applying all provisions of law regarding  
8 marriage equally to same-sex couples and opposite-sex  
9 couples regardless of whether this Act does or does  
10 not amend any particular provision of law; and

11 (3) Protect religious freedom and liberty by:

12 (A) Ensuring that no clergy or other officer of any  
13 religious organization will be required to  
14 solemnize any marriage, in accordance with the  
15 Hawaii State Constitution and the United States  
16 Constitution; and

17 (B) Clarifying that unless a religious organization  
18 allows use of its facilities or grounds by the  
19 general public for weddings for a profit, such  
20 organization shall not be required to make its  
21 facilities or grounds available for solemnization  
22 of any marriage celebration.



## S.B. NO. 1

1 The purpose of this Act is to recognize marriages between  
2 individuals of the same sex in the State of Hawaii.

3 SECTION 2. Chapter 572, Hawaii Revised Statutes, is  
4 amended by adding six new sections to be appropriately  
5 designated and to read as follows:

6 "§572-A Continuity of rights; civil union and reciprocal  
7 beneficiary relationships. (a) Two individuals who are civil  
8 union partners or reciprocal beneficiaries with each other and  
9 who seek to marry each other shall be permitted to apply for a  
10 marriage license under section 572-6 and to marry each other  
11 under this chapter without first terminating their civil union  
12 or reciprocal beneficiary relationship; provided that the two  
13 individuals are otherwise eligible to marry under this chapter.

14 (b) The couple's civil union or reciprocal beneficiary  
15 relationship shall continue uninterrupted until the  
16 solemnization of the marriage consistent with this chapter, and  
17 the solemnization of the couple's marriage shall automatically  
18 terminate the couple's civil union or reciprocal beneficiary  
19 relationship.

20 (c) The act of seeking a license for or entering into a  
21 marriage under this chapter shall not diminish any of the  
22 rights, benefits, protections, and responsibilities that existed



## S.B. NO. 1

1 previously due to the couple's earlier status as civil union  
2 partners or reciprocal beneficiaries.

3 (d) The rights, benefits, protections, and  
4 responsibilities created by the civil union or reciprocal  
5 beneficiary relationship shall be continuous through  
6 solemnization of the marriage and deemed to have accrued as of  
7 the first date these rights existed under the civil union or  
8 reciprocal beneficiary relationship; provided that the civil  
9 union or reciprocal beneficiary relationship was in effect at  
10 the time of the solemnization of the couple's marriage to each  
11 other.

12 (e) Any rights, benefits, protections, and  
13 responsibilities created by the solemnization of a marriage that  
14 were not included within the reciprocal beneficiary relationship  
15 shall be recognized as of the date the marriage was solemnized.

16 (f) Property held by the couple in tenancy by the entirety  
17 shall be subject to section 509-3.

18 §572-B Interpretation of terminology to be gender neutral.  
19 When necessary to implement the rights, benefits, protections,  
20 and responsibilities of spouses under the laws of this State,  
21 all gender-specific terminology, such as "husband", "wife",  
22 "widow", "widower", or similar terms, shall be construed in a



## S.B. NO. 1

1 gender-neutral manner. This interpretation shall apply to all  
2 sources of law, including statutes, administrative rules, court  
3 decisions, common law, or any other source of law.

4 §572-C Right of parents. Parentage rights, benefits,  
5 protections, and responsibilities based on marriage shall be the  
6 same for all married spouses regardless of the gender of the  
7 spouses. These rights, benefits, protections, and  
8 responsibilities shall include paternity, maternity, and  
9 parentage presumptions based on marriage.

10 §572-D Reliance on federal law. Any law of this State  
11 that refers to, adopts, or relies upon federal law shall apply  
12 to all marriages recognized under the laws of this State as if  
13 federal law recognized such marriages in the same manner as the  
14 laws of this State so that all marriages receive equal  
15 treatment.

16 §572-E Refusal to solemnize a marriage. Nothing in this  
17 chapter shall be construed to require any clergy, minister,  
18 priest, rabbi, officer of any religious denomination or society,  
19 or religious society not having clergy but providing  
20 solemnizations that is authorized to perform solemnizations  
21 pursuant to this chapter to solemnize any marriage. No such  
22 person who fails or refuses to solemnize any marriage under this





## S.B. NO. 1

1 section for any reason shall be subject to any fine, penalty,  
2 injunction, administrative proceeding, or other civil liability  
3 for the failure or refusal.

4 §572-F Religious organizations and facilities; liability  
5 exemption under certain circumstances. Notwithstanding any  
6 other law to the contrary, no religious organization shall be  
7 subject to any fine, penalty, injunction, administrative  
8 proceeding, or civil liability for refusing to make its  
9 facilities or grounds available for solemnization of any  
10 marriage celebration under this chapter; provided that the  
11 religious organization does not make its facilities or grounds  
12 available to the general public for solemnization of any  
13 marriage celebration for a profit.

14 For purposes of this section, a religious organization  
15 accepting donations from the public, providing religious  
16 services to the public, or otherwise permitting the public to  
17 enter the religious organization's premises shall not constitute  
18 "for a profit".

19 SECTION 3. Section 572-1, Hawaii Revised Statutes, is  
20 amended to read as follows:

21 "§572-1 **Requisites of valid marriage contract.** In order  
22 to make valid the marriage contract, which shall be [only



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## S.B. NO. 1

1 ~~between a man and a woman,~~ permitted between two individuals  
2 without regard to gender, it shall be necessary that:

3 (1) The respective parties do not stand in relation to  
4 each other of ancestor and descendant of any degree  
5 whatsoever, [~~brother and sister~~] two siblings of the  
6 half as well as to the whole blood, uncle and niece,  
7 uncle and nephew, aunt and nephew, or aunt and niece,  
8 whether the relationship is the result of the issue of  
9 parents married or not married to each other or  
10 parents who are partners in a civil union or not  
11 partners in a civil union;

12 (2) Each of the parties at the time of contracting the  
13 marriage is at least sixteen years of age; provided  
14 that with the written approval of the family court of  
15 the circuit within which the minor resides, it shall  
16 be lawful for a person under the age of sixteen years,  
17 but in no event under the age of fifteen years, to  
18 marry, subject to section 572-2;

19 (3) [~~The man does not at the time have any lawful wife or~~  
20 ~~civil union partner living and that the woman does not~~  
21 ~~at the time have any lawful husband or civil union~~  
22 ~~partner living,~~] Neither party has at the time any



## S.B. NO. 1

1 lawful wife, husband, or civil union partner living,  
2 except as provided in section 572-A;

3 (4) Consent of neither party to the marriage has been  
4 obtained by force, duress, or fraud;

5 (5) Neither of the parties is a person afflicted with any  
6 loathsome disease concealed from, and unknown to, the  
7 other party;

8 (6) The ~~[man and woman]~~ parties to be married in the State  
9 shall have duly obtained a license for that purpose  
10 from the agent appointed to grant marriage licenses;  
11 and

12 (7) The marriage ceremony be performed in the State by a  
13 person or society with a valid license to solemnize  
14 marriages and the ~~[man and the woman]~~ parties to be  
15 married and the person performing the marriage  
16 ceremony be all physically present at the same place  
17 and time for the marriage ceremony."

18 SECTION 4. Section 572-3, Hawaii Revised Statutes, is  
19 amended to read as follows:

20 "§572-3 **Contracted without the State.** Marriages between  
21 ~~[a man and a woman]~~ two individuals regardless of gender and



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## S.B. NO. 1

1 legal [~~in the country~~] where contracted shall be held legal in  
2 the courts of this State."

3 SECTION 5. Section 572-6, Hawaii Revised Statutes, is  
4 amended to read as follows:

5 "§572-6 Application; license; limitations. To secure a  
6 license to marry, the persons applying for the license shall  
7 appear personally before an agent authorized to grant marriage  
8 licenses and shall file with the agent an application in  
9 writing. The application shall be accompanied by a statement  
10 signed and sworn to by each of the persons, setting forth: the  
11 person's full name, date of birth, social security number,  
12 residence; their relationship, if any; the full names of  
13 parents; and that all prior marriages[~~r~~] or civil unions, if  
14 any, other than an existing civil union between the persons  
15 applying for the marriage license, have been dissolved by death  
16 or dissolution. If all prior marriages or civil unions, other  
17 than an existing civil union between the persons applying for  
18 the marriage license, have been dissolved by death or  
19 dissolution, the statement shall also set forth the date of  
20 death of the last prior spouse or the date and jurisdiction in  
21 which the last decree of dissolution was entered. Any other  
22 information consistent with the standard marriage certificate as



## S.B. NO. |

1 recommended by the Public Health Service, National Center for  
2 Health Statistics, may be requested for statistical or other  
3 purposes, subject to approval of and modification by the  
4 department of health; provided that the information shall be  
5 provided at the option of the applicant and no applicant shall  
6 be denied a license for failure to provide the information. The  
7 agent shall indorse on the application, over the agent's  
8 signature, the date of the filing thereof and shall issue a  
9 license which shall bear on its face the date of issuance.  
10 Every license shall be of full force and effect for thirty days  
11 commencing from and including the date of issuance. After the  
12 thirty-day period, the license shall become void and no marriage  
13 ceremony shall be performed thereon.  
14 It shall be the duty of every person, legally authorized to  
15 grant licenses to marry, to immediately report the issuance of  
16 every marriage license to the agent of the department of health  
17 in the district in which the license is issued, setting forth  
18 all facts required to be stated in such manner and on such form  
19 as the department may prescribe."

20 SECTION 6. Section 572-13, Hawaii Revised Statutes, is  
21 amended by amending subsections (a) and (b) to read as follows:



## S.B. NO. 1

1       "(a) Recordkeeping. Every person authorized to solemnize  
2 marriage shall make and preserve a record of every marriage by  
3 the person solemnized, comprising the names of the [~~man and~~  
4 ~~woman~~] parties married, their place of residence, and the date  
5 of their marriage.

6       Every person authorized to solemnize marriage, who neglects  
7 to keep a record of any marriage by the person solemnized shall  
8 be fined \$50.

9       (b) Marriages, reported by whom. It shall be the duty of  
10 every person, legally authorized to perform the marriage  
11 ceremony, to report within three business days every marriage  
12 ceremony, performed by the person, to the agent of the  
13 department of health in the district in which the marriage takes  
14 place setting forth all facts required to be stated in a  
15 standard certificate of marriage, the form and contents of which  
16 shall be prescribed by the department of health[-]; provided  
17 that if any person who has solemnized a marriage fails to report  
18 it to the agent of the department of health, the parties married  
19 may provide the department of health with a notarized affidavit  
20 attesting to the fact that they were married and stating the  
21 date and place of the solemnization of the marriage. Upon the  
22 receipt of that affidavit by the department of health, the



## S.B. NO. 1

1 marriage shall be deemed to be valid as of the date of the  
2 solemnization of the marriage stated in the affidavit; provided  
3 that the requirements of section 572-1 are met."

4 SECTION 7. Section 572B-4, Hawaii Revised Statutes, is  
5 amended by amending subsection (c) to read as follows:

6 "(c) Nothing in this section shall be construed to require  
7 any person authorized to perform solemnizations [~~pursuant to~~  
8 ~~chapter 572 or~~] of civil unions pursuant to this chapter to  
9 perform a solemnization of a civil union, and no such authorized  
10 person who fails or refuses for any reason to join persons in a  
11 civil union shall be subject to any fine, penalty, or other  
12 civil action for the failure or refusal."

13 SECTION 8. Section 572C-2, Hawaii Revised Statutes, is  
14 amended to read as follows:

15 "[~~+~~]**\$572C-2[+]** Findings. [~~The legislature finds that the~~  
16 ~~people of Hawaii choose to preserve the tradition of marriage as~~  
17 ~~a unique social institution based upon the committed union of~~  
18 ~~one man and one woman. The legislature further finds that~~  
19 ~~because of its unique status, marriage provides access to a~~  
20 ~~multiplicity of rights and benefits throughout our laws that are~~  
21 ~~contingent upon that status. As such, marriage should be~~  
22 ~~subject to restrictions such as prohibiting respective parties~~



## S.B. NO. 1

1 ~~to a valid marriage contract from standing in relation to each~~  
2 ~~other, i.e., brother and sister of the half as well as to the~~  
3 ~~whole blood, uncle and niece, aunt and nephew.~~

4 ~~However, the legislature concurrently]~~ The legislature  
5 acknowledges that there are many individuals who have  
6 significant personal, emotional, and economic relationships with  
7 another individual yet are prohibited by [~~such~~] legal  
8 restrictions from marrying. For example, two individuals who  
9 are related to one another, such as a widowed mother and her  
10 unmarried son[, ~~or two individuals who are of the same gender~~].  
11 Therefore, the legislature believes that certain rights and  
12 benefits presently available only to married couples should be  
13 made available to couples comprised of two individuals who are  
14 legally prohibited from marrying one another."

15 SECTION 9. Section 580-1, Hawaii Revised Statutes, is  
16 amended to read as follows:

17 "§580-1 Jurisdiction; hearing. (a) Exclusive original  
18 jurisdiction in matters of annulment, divorce, and separation,  
19 subject to section 603-37 as to change of venue, and subject  
20 also to appeal according to law, is conferred upon the family  
21 court of the circuit in which the applicant has been domiciled  
22 or has been physically present for a continuous period of at





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1 least three months next preceding the application therefor[-],  
2 except as provided in subsection (b). No absolute divorce from  
3 the bond of matrimony shall be granted for any cause unless  
4 either party to the marriage has been domiciled or has been  
5 physically present in the State for a continuous period of at  
6 least six months next preceding the application therefor[-],  
7 except as provided in subsection (b). A person who may be  
8 residing on any military or federal base, installation, or  
9 reservation within the State or who may be present in the State  
10 under military orders shall not thereby be prohibited from  
11 meeting the requirements of this section. The family court of  
12 each circuit shall have jurisdiction over all proceedings  
13 relating to the annulment, divorce, and separation of civil  
14 unions entered into in this State or unions recognized as civil  
15 unions in this State in the same manner as marriages.

16 (b) An action for annulment, divorce, or separation may be  
17 commenced where neither party to the marriage meets the domicile  
18 or physical presence requirements of subsection (a) at the time  
19 the action is commenced, if:

20 (1) The marriage was solemnized under chapter 572 in this  
21 State; and



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## S.B. NO. 1

1 reciprocal beneficiary relationship in existence before the  
2 effective date of this Act. Any such civil unions or reciprocal  
3 beneficiary relationships shall continue until terminated in  
4 accordance with applicable law.

5 SECTION 11. The department of health may, in its  
6 discretion, make any changes that it deems necessary to internal  
7 procedures or forms, to aid in the implementation of this Act.

8 SECTION 12. If any provision of this Act, or the  
9 application thereof to any person or circumstance, is held  
10 invalid, the invalidity does not affect other provisions or  
11 applications of the Act that can be given effect without the  
12 invalid provision or application, and to this end the provisions  
13 of this Act are severable.

14 SECTION 13. In codifying the new sections added by section  
15 2 of this Act, the revisor of statutes shall substitute  
16 appropriate section numbers for the letters used in designating  
17 the new sections in this Act.

18 SECTION 14. Statutory material to be repealed is bracketed  
19 and stricken. New statutory material is underscored.

20



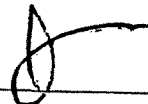
Page 17

# S.B. NO. 1

1 SECTION 15. This Act shall take effect on November 18,  
2 2013.

3

INTRODUCED BY:

  
\_\_\_\_\_

# S.B. NO. 1

**Report Title:**

Equal Rights

**Description:**

Recognizes marriages between individuals of the same sex.  
Extends to same-sex couples the same rights, benefits,  
protections, and responsibilities of marriage that opposite-sex  
couples receive. Effective 11/18/13.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*



## S.B. NO. 1

1       (2) Neither party to the marriage is able to pursue an  
2       action for annulment, divorce, or separation where the  
3       parties are domiciled because both parties are  
4       domiciled in a jurisdiction or jurisdictions that do  
5       not recognize their marriage.

6       There shall be a rebuttable presumption that a jurisdiction will  
7       not maintain an action for annulment, divorce, or separation if  
8       the jurisdiction or jurisdictions where the parties are  
9       domiciled do not recognize the parties' marriage.

10       (c) Actions brought under subsection (b) shall be  
11       commenced in the circuit where the marriage was solemnized and  
12       the law of this State shall govern. Jurisdiction over actions  
13       brought under subsection (b) shall be limited to decrees  
14       granting annulment, divorce, or separation that address the  
15       status or dissolution of the marriage alone; provided that if  
16       both parties to the marriage consent to the family court's  
17       personal jurisdiction or if jurisdiction otherwise exists by  
18       law, the family court shall adjudicate child custody, spousal  
19       support, child support, property division, or other matters  
20       related to the annulment, divorce, or separation."

21       SECTION 10. Notwithstanding any other provision of law,  
22       nothing in this Act shall invalidate any civil union or





This Time: For REAL

Call, write, email and visit our legislators

# Let the People Decide On Marriage

In 1998 the people of Hawaii overwhelmingly passed this constitutional amendment (69.2% Yes)  
**Article 1, Section 23, Hawaii State Constitution:**

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

Does this wording limit the way our lawmakers can define marriage?

The governor says it means that marriage can be defined any way he likes.

The Hawaii State Constitution provides that laws must be written in plain, understandable language.

The State itself ran newspaper ads explaining the proposed amendment and clearly stating "opposite-sex couples only."

What do you think?

Shouldn't we have the people decide now?  
For REAL?

The following information is provided to familiarize voters with the ballot sheet for the  
**General Election, Tuesday, November 3, 1998**

## 1998 PROPOSED AMENDMENTS TO THE HAWAII STATE CONSTITUTION

**QUESTION 1: APPOINTMENT OF A JUDGE TO THE SUPREME COURT EVERY TEN YEARS**  
Should the Constitution be amended to require that the Governor appoint every judge to the Supreme Court for a term of ten years, starting in 2000?

Hawaii Constitution. Although the cases are not yet decided, the Supreme Court of Hawaii found in *Barlow v. State*, 101 Haw. 633 (1993), that the Hawaii Constitution, Section 5 (2) requires that judges be elected for a term of ten years. The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years. The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years.

The State Constitution requires that the Governor appoint every judge to the Supreme Court for a term of ten years, starting in 2000. The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years. The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years.

The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years. The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years. The court's decision is based on the fact that the Constitution provides that judges be elected for a term of ten years.

**EXPLANATION OF PROPOSED AMENDMENT**  
The proposed amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples.  
**MEANING OF A "YES" VOTE**  
A "Yes" vote would add a new provision to the Constitution that would give the Legislature the power to reserve marriage to opposite-sex couples only. The Legislature could then pass a law that would limit marriage to a man and a woman, overturning the recent Supreme Court decision regarding same-sex couples.  
**MEANING OF A "NO" VOTE**  
A "No" vote will make no change in the Constitution of the State of Hawaii and allow the court to resolve the lawsuit that has been brought against the State.

OFFICIAL  
ELECTION  
RESULT

CONSENTS: LEG. POWER TO RESERVE MARRIAGE	334 of 334	100.0
LEG. TO RES. MARRIAGE TO OPP-SEX COUPLES	YES: 285,384	69.2
	NO: 117,827	28.8
Blank Votes	8,422	2.0
Over Votes	887	0.2

The amendment has received 69.2% of the vote. The amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples.

**QUESTION 2: LEGISLATIVE POWER TO RESERVE MARRIAGE TO OPPOSITE-SEX COUPLES**  
Should the Constitution be amended to require that the Legislature reserve marriage to opposite-sex couples? The amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples.

The amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples. The amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples.

The amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples. The amendment is intended to make it absolutely clear that the State Constitution gives the legislature the power and authority to reserve marriage to opposite-sex couples.

Printed for by the Office of Elections

FYH B



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

REPRESENTATIVE BOB	)	CIVIL NO. 13-1-2899-10 KKS
McDERMOTT, GARRET	)	
HASHIMOTO, WILLIAM E.K.	)	SUMMONS
KUMIA, DAVID LANGDON,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GOVERNOR NEIL ABERCROMBIE,	)	
SENATOR DONNA MERCADO KIM,	)	
REPRESENTATIVE JOSEPH SOUKI,	)	
SENATOR CLAYTON HEE,	)	
REPRESENTATIVE KARL RHOADS,	)	
	)	
Defendants.	)	

---

**SUMMONS**

TO THE ABOVE-NAMED DEFENDANTS:

GOVERNOR NEIL ABERCROMBIE, SENATOR DONNA MERCADO KIM,  
REPRESENTATIVE JOSEPH SOUKI, SENATOR CLAYTON HEE,  
REPRESENTATIVE KARL RHOADS

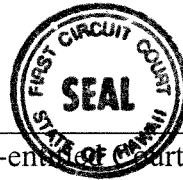
You are hereby summoned and required to file with the Court and required to serve upon Plaintiffs' attorneys ROBERT K. MATSUMOTO whose address is 345 Queen Street, Suite 701, Honolulu, HI 96813 and JOHN R. DWYER, JR., whose address is 1800 Pioneer Plaza, 900 Fort Street Mall, Honolulu, Hawaii 96813, an answer to the First Amended Complaint which is served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the First Amended Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawaii, NOV - 1 2013.

H. CHING



Clerk of the above-entitled court



# **ADDENDUM 2**

ROBERT K. MATSUMOTO #1330  
 345 Queen Street, Suite 701  
 Honolulu, HI 96813  
 Telephone: (808) 585-7244

And

SHAWN A. LUIZ (6855)  
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Attorneys for Plaintiffs-Appellants  
 REPRESENTATIVE BOB McDERMOTT;  
 GARRET HASHIMOTO, WILLIAM E.K.  
 KUMIA, DAVID LANGDON

**Electronically Filed  
 Intermediate Court of Appeals  
 CAAP-14-0000843  
 20-MAY-2014  
 03:33 PM**

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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

Plaintiffs,

vs.

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

Defendants.

) CIVIL NO. 13-1-2899-10 KKS

)

)

)

)

) **PLAINTIFFS' NOTICE OF APPEAL;**

) **EXHIBITS "1" -"3"; CERTIFICATE OF**

) **SERVICE**

)

)

) Honorable Karl K. Sakamoto

)

) No trial date set

)

)

**PLAINTIFFS' NOTICE OF APPEAL**

COMES NOW Plaintiffs-Appellants, above-named, by and through counsel, SHAWN A. LUIZ, ESQ., and ROBERT K. MATSUMOTO, ESQ., and hereby submit their appeal to the Supreme Court and Intermediate Court of Appeals of the State of Hawaii from the Judgment of the Circuit Court of the First Circuit, State of Hawaii, entered on April 21, 2014 (attached as Exhibit “1”).

The Judgment entered on April 21, 2014, is a final decision immediately appealable to the Supreme Court and Intermediate Court of Appeals of the State of Hawaii.

Plaintiffs appeal from the “Order Granting Defendants’ Motion for Summary Judgment”, filed on April 21, 2014, attached as Exhibit “2”, and the “Order Granting in Part and Denying in Part Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction Against Defendants”, filed on December 20, 2013, attached as Exhibit “3”.

This appeal is brought pursuant to Hawaii Revised Statutes §§ 602-5 and 602-57 and Rules 3 and 4 of the Hawaii Rules of Appellate Procedure.

DATED: Honolulu, Hawaii, May 20, 2014.

/s/ SHAWN A. LUIZ  
SHAWN A. LUIZ

ROBERT K. MATSUMOTO

Attorneys for Plaintiffs-Appellants

EXHIBIT “1”

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

DAVID M. LOUIE 2162  
Attorney General of Hawaii

2014 APR 21 PM 2:33

CARON M. INAGAKI 3835  
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A. MARPLE  
CLERK

Attorneys for Defendants  
GOVERNOR NEIL ABERCROMBIE,  
And LORETTA J. FUDDY, DIRECTOR,  
DEPARTMENT OF HEALTH, STATE OF HAWAII

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,

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, <sup>April 21,</sup> ~~MARCH~~ \_\_\_\_, 2014

KARL K. SAKAMOTO

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.

EXHIBIT “2”

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2014 APR 21 PM 2:33

DAVID M. LOUIE 2162  
Attorney General of Hawaii

CARON M. INAGAKI 3835  
JOHN F. MOLAY 4994  
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A. MARPLE  
CLERK

Attorneys for Defendants  
GOVERNOR NEIL ABERCROMBIE,  
And LORETTA J. FUDDY, DIRECTOR,  
DEPARTMENT OF HEALTH, STATE OF HAWAII

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



## 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?

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

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.

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.

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

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~~ <sup>April 21,</sup> 2014

KARL K. SAKAMOTO

KARL K. SAKAMOTO  
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

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,

DAVID LANGDON

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

EXHIBIT “3”

2013 DEC 20 PM 2:41

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A. MARPLE  
CLERK

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)  
)  
)  
) ORDER GRANTING IN PART AND  
) DENYING IN PART PLAINTIFFS'  
) MOTION FOR TEMPORARY  
) RESTRAINING ORDER AND  
) PRELIMINARY INJUNCTION  
) AGAINST DEFENDANTS;  
) CERTIFICATE OF SERVICE  
)  
) Hearing:  
) DATE: November 14, 2013  
) TIME: 8:15 a.m.  
) JUDGE: Hon. Karl K. Sakamoto  
)  
) No Trial Date Set  
)  
)  
)

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'  
MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION AGAINST DEFENDANTS**

Plaintiffs' Motion For Temporary Restraining Order and Preliminary Injunction Against Defendants, came on for hearing before the Honorable Karl K. Sakamoto on November 14, 2013, at 8:15 a.m. John R. Dywer, Jr., 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., Deirdre Marie-Iha, Esq., and Donna H. Kalama, 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 Motions, 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:

The Court believes that Plaintiffs, both as citizens and voters in matters of great public importance, have a personal stake in the outcome of this controversy and thereby have standing arising from what the Court believed was an attempt to expand Article I, Section 23 of the Hawaii State Constitution to include same-sex marriage.

Plaintiffs have brought Motions asking this Court to enjoin Defendants from issuing marriage licenses to same-sex couples, pursuant to the authority granted to the Department of Health by the enactment of Senate Bill 1, House Draft 1. "In passing upon requests for temporary injunctions . . . a three-element test is often applied: (1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a

temporary injunction? (3) Does the public interest support granting the injunction?” *Life of the Land v. Ariyoshi*, 59 Haw. 156, 577 P.2d 1116 (1978). As explained below, the Plaintiffs cannot prevail on the first prong of this test.

The Court believes in Hawaii the legislature can define marriage through one of two means. One is constitutionally pursuant to Article I, Section 23 of the Hawaii Constitution. Separate and apart, the legislature can secondarily address marriage through its ordinary and customary legislative power to enact laws which are statutes pursuant to Article III, Section 1 of the Hawaii Constitution.

Looking at the constitutional power under Article I, Section 23, the Court finds that it is a unique constitutional provision in that it adds to the legislature’s ordinary and customary powers to define “marriage.” This addition affords the legislature not just statutory powers, but also a constitutional power to exercise, if it so chooses, to define marriage with regard to opposite-sex couples.

In determining and interpreting the constitutional provision, the Court follows the law under *Watland v. Lingle*, 104 Hawai’i 128, 85 P.3d 1079 (2004) which states: “The general rule is that if the words used in a constitutional provision are clear and unambiguous, they are to be construed as written. In this regard the settled rule is that in the construction of a constitutional provision, the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.”

The Court also must take into consideration that “[t]he fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and to the people adopting it. This intent is to be found in the instrument itself. When the text of a



constitutional provision is not ambiguous, the Court in construing it is not at liberty to search for its meaning beyond the instrument.” *State v. Kahlbaun*, 64 Haw. 197, 638 P.2d 309 (1981).

The Court believes the plain meaning is set forth in Article I, Section 23. Specifically, it states: “The legislature shall have the power to reserve marriage to opposite-sex couples.” It does not mention marriage of same-sex couples. It does not refer to marriage in the context of same-sex couples in any fashion.

Accordingly, the Court concludes that the plain and unambiguous language of Article I, Section 23 is construed to constitutionally empower the legislature to reserve marriage to opposite-sex couples if it so chooses. It does not give the legislature the power to constitutionally recognize marriage to same-sex couples. The people of the State of Hawaii did not ratify the constitutional amendment for the expansion of the legislature’s constitutional power under Article I, Section 23 to include same-sex marriage.

The second avenue to define marriage is through the legislature's ordinary and customary legislative power, as argued by the State, under Article III, Section 1 of the Hawaii Constitution. In that context, in looking at Article I, Section 23, it is clear that the legislature could reserve marriage to opposite-sex couples, as it has. However, it is also clear in Article I, Section 23 that the legislature could choose not to exercise the power to reserve marriage to opposite-sex couples.

If the legislature chooses to exercise the constitutional power under Article I, Section 23 to reserve marriage to opposite-sex couples, then it is undeniably able to exercise that power. If the legislature chooses not to exercise its constitutional power under Article I, Section 23 to reserve marriage to opposite-sex couples, then it is still capable of exercising its ordinary and customary power under Article III, Section 1 to define marriage to include same-sex couples.

In looking at Article I, Section 23 it does not divest, prohibit, or infringe upon the legislature's inherent and customary power to define marriage. The legislature does not need authority from Article I, Section 23 to recognize same-sex marriage. The legislature already has authority under its ordinary lawmaking power as set forth in Article III, Section 1. Article III, Section 1 reads: "The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." This power is very broad and encompasses the statutes governing marriage.

That point is supported by the recent United States Supreme Court case of *United States v. Windsor*, 133 S.Ct. 2675 (2013). There the United States Supreme Court stated that by history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate states. "State laws defining and regulating marriage, of course, must respect the constitutional rights of the persons . . . . But subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states . . . . The definition of marriage is the foundation of the state's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities."

In *Maynard v. Hill*, 125 U.S. 190, 8 S.Ct. 723 (1888) the United States Supreme Court also articulated that "[m]arriage . . . has always been subject to the control of the legislature. That body proscribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both present and prospective, and the acts which may constitute grounds for its dissolution." Under this case law, the State has the longstanding authority to regulate marriage.

Accordingly, the Court finds that the legislature has the power to define and regulate marriage in the State of Hawaii consistent with the findings of the United States Supreme Court and through the exercise of the general legislative power to enact statutes, as conferred by Article III, Section 1 of the Hawaii Constitution. Thus, the legislature can statutorily define marriage to include same-sex couples, which it has done through the passage of Senate Bill 1, House Draft 1. The enactment of Senate Bill 1, House Draft 1, therefore falls within the authority conferred by Article III, Section 1 of the Hawaii Constitution.

The question now becomes one of judicial review of the constitutionality of Senate Bill 1, House Draft 1, as shown under *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993). This Court looks to *Baehr v. Lewin*, *supra*, where the Hawaii Supreme Court examined whether a statute limiting marriage to opposite-sex couples was constitutional. 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. 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.

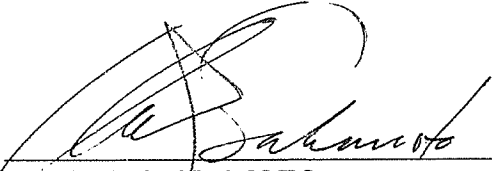
The *Baehr* decision went on to hold that “[s]ex is a ‘suspect category’ for the purposes of equal protection analysis under Article 1, Section 5 of the Hawaii Constitution.” In reviewing the new law, Senate Bill 1, House Draft 1, under *Baehr v. Lewin*, *supra*, the Court finds that it is in compliance with Article I, Section 5, the Equal Protection provision of the Hawaii Constitution.

Accordingly, the Court will conclude that same-sex marriage in Hawaii is legal.

Because Plaintiffs cannot prevail on the merits, for the reasons set forth above, the Court finds it is unnecessary to consider the second and third prongs of the test for injunctive relief.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction Against Defendants is GRANTED to the extent of Plaintiffs' declaratory relief, as Article I, Section 23 empowers the legislature to reserve marriage to opposite-sex couples, but does not give the legislature the power to constitutionally recognize marriage to same-sex couples under Article I, Section 23; and DENIED to the extent Plaintiffs sought injunctive relief.

DATED: Honolulu, Hawaii DEC 20 2013.

  
\_\_\_\_\_  
(KARL K. SAKAMOTO  
Judge of the Above-Entitled Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document will be served on the date indicated below to the following into their respective court jackets or by way of U.S. Mail today:

	<u>U.S. Mail</u>	<u>Court Jacket</u>
ROBERT K. MATSUMOTO 345 Queen Street, Suite 701 Honolulu, HI 96813		X

Attorney for Plaintiffs

SHAWN A. LUIZ 1132 Bishop Street Suite 1520 Honolulu, HI 96813		X
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Attorneys for Defendants

DEC 20 2013

DATED: Honolulu, Hawaii, \_\_\_\_\_.

  
CLERK OF THE ABOVE-ENTITLED COURT

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

REPRESENTATIVE BOB	)	CIVIL NO. 13-1-2899-10 KKS
McDERMOTT, GARRET	)	
HASHIMOTO, WILLIAM E.K.	)	
KUMIA, DAVID LANGDON,	)	
	)	
Plaintiffs,	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
GOVERNOR NEIL ABERCROMBIE,	)	
LORETTA J. FUDDY, DIRECTOR	)	
DEPARTMENT OF HEALTH, STATE	)	
OF HAWAII,	)	
	)	
Defendants.	)	
	)	

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of the foregoing was duly served upon the below-identified parties at their respective address by means of JEFS on May 20, 2014.

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DATED: Honolulu, Hawaii, May 20, 2014.

/s/ SHAWN A. LUIZ  
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