FIRST CIRCUIT COURT
STATE OF HAWAII
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REPRESENTATIVE KARL RHOADS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

REPRESENTATIVE BOB McDERMOTT,

Plaintiff,

vs.

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

Defendants.

Civil No. 13-1-2899-10 KKS

STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER AGAINST DEFENDANTS; EXHIBITS "A" THROUGH "D"; DECLARATION OF SCOTT NAGO; EXHIBITS "E" THROUGH "F"; CERTIFICATE OF SERVICE

Hearing:
DATE: November 7, 2013
TIME: 8:30 a.m.
JUDGE: Hon. Karl K. Sakamoto

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## INTRODUCTION

This case is about a bill, not a law. Plaintiff has not sued alleging that a *law* is unconstitutional.[1] Plaintiff has sued trying to prevent a *bill* from being considered further by the Hawaii State Legislature and to prevent Governor Abercrombie from signing that bill should it pass both the House and the Senate. Compl. Plaintiff makes arguments regarding Art. I, section 23 of the Hawaii Constitution. ***But this Court need not even consider those arguments, because this Court lacks the authority to grant Plaintiff's requested relief.*** This Court cannot enjoin the legislative branch from legislating. Nor can it enjoin the Governor from considering any bill presented to him. Plaintiff's motion must be rejected, for each of these reasons:

- Enjoining the Legislature from considering a bill, or the Governor from signing a bill, would violate the doctrine of separation of powers. And the political question doctrine deprives this Court of jurisdiction to interfere with the inherently political policy debates currently taking place at the Capitol.
- Assertions of unconstitutionality are premature and therefore not ripe, because only ***laws***—*not bills*—are properly subject to requests for declaratory relief.
- Plaintiff McDermott and the three individuals listed on the motion do not have standing.
- Article I, section 23 of the Hawaii Constitution allows but ***does not require*** the Legislature to limit marriage to opposite-sex couples, and the Legislature unquestionably has the constitutional authority to enact laws regarding domestic relations, including marriage. Plaintiff has completely failed to demonstrate that the bill, if enacted, would be unconstitutional *beyond a reasonable doubt.*

Plaintiff's request for a temporary restraining order must therefore be immediately rejected. This Court should entertain the constitutional question Plaintiff seeks to raise if—*and only if*—a proper party with standing sues *after* a law is enacted. As detailed below, Plaintiff's case is improper, his argument regarding Art. I, section 23 is meritless, and he has no standing. The motion for a temporary restraining order must be denied.

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[1] Plaintiff refers to Rep. McDermott, who has sued in his official capacity as a State legislator. Compl. at 2. The other three individuals named in the motion for temporary restraining order are not plaintiffs, as they are not named in the complaint. Neither Plaintiff nor the individuals have standing to bring this suit. This is addressed below. Defendant Governor Abercrombie is referred to as Governor. The four named Senators and Representatives named in the complaint, all sued in their official capacities only, are referred to as the Legislature.

## FACTUAL BACKGROUND

### A. Background of this Suit

We start with two central principles underlying the American structure of government: (1) how a bill becomes a law and (2) the division of responsibility between the three branches of government. Both of these are relevant to show how misplaced Plaintiff's suit is.

First, Plaintiff ignores how a bill becomes a law. Plaintiff has sued to enjoin the further consideration or signing of S.B. 1, which is presently being considered by the Hawaii State Legislature. Compl.; see Ex. "A". This bill—***if it becomes law***—would recognize marriages between two individuals regardless of gender in the State of Hawaii. Id. This is *not* a law: it is a bill. "No law shall be passed except by bill." Haw. Const. Art. III § 14. "No bill shall become law unless it shall pass three readings in each house on separate days." Haw. Const. Art. III § 15. If a bill passes the legislature, it "shall thereupon be presented to the governor." Haw. Const. Art. III § 16. "If the governor approves it, the governor shall sign it and it shall become law." Id. None of that has happened yet. No one can say with certainty that the bill will become law until it does. Any prediction about the exact contents of the bill, if enacted, are speculative. Plaintiff has sued over something he *thinks* is likely to occur, not over something that *has* occurred, that is, a law actually enacted consistent with the Hawaii constitution.

Second, Plaintiff misunderstands this Court's authority under the principle of separation of powers. This Court owes great deference to the other branches of government:

> [L]ike the federal government, ours is one in which the sovereign power is divided and allocated among three co-equal branches. See Haw. Const. art. III, art. V, and art. VI. Thus, we have taken the teachings of the [U.S.] Supreme Court to heart and adhered to the doctrine that the use of judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. And, ***we have admonished our judges that even in the absence of constitutional restrictions, they must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.***

Trustees of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170-71, 737 P.2d 446, 456 (1987) (emphasis added; citations, internal quotation marks, footnote and brackets omitted). This is the other overarching problem with Plaintiff's suit: he asks this Court to encroach on the specific authority conferred on the Legislature and the Governor *by the Hawaii constitution.*

## B. Background To Art. I, Section 23 and *Baehr V. Lewin*

In 1991, three same-sex couples sued the State of Hawaii, alleging that limiting marriage licenses to opposite-sex couples violated the Hawaii Constitution. In Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), a plurality of the Hawaii Supreme Court held that restricting marriages to opposite-sex couples discriminated on the basis of sex. The Court held that the trial court erred by applying a rational basis review of the constitutionality of the law because discrimination on the basis of sex constitutes a suspect classification. On remand, the trial court ruled that the traditional definition of marriage did not meet strict scrutiny and violated the Hawaii Constitution. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996). The trial court's ruling was stayed pending appeal.

In 1994, the Legislature amended the marriage licensing statute to confirm that marriage is limited to opposite-sex couples. As amended, Hawaii Revised Statutes (HRS) § 572-1, read (and still reads): "In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that . . . ." 1994 Haw. Sess. Laws Act 531. Article I, section 23, of the Hawaii Constitution was proposed by the Legislature as House Bill No. 117, and was approved by the electorate in 1998. Article I, section 23 provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." Following the amendment, the Supreme Court issued an order concluding that in light of the amendment, the underlying case was moot. Baehr v. Miike, No. 20371 (Haw., Dec. 9, 1999) (SDO). It reversed the trial court's decision and directed it to enter judgment for the State.

In September 2013, following the United States Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013) Governor Abercrombie called the Hawaii State Legislature into special session to consider a marriage equality bill. See Ex. "A" (proclamation). That bill is now being considered in the State Legislature, as S.B. 1.

## ARGUMENT

### A. This Court Lacks Authority To Enjoin The Legislative And Executive Branches Of Government In Enacting A Law And The Claim Is Not Ripe

Plaintiff asks this Court to do something that is beyond its authority: to interfere with the constitutional powers of the legislative and executive branches of government. The Legislature exercises the legislative power and considers bills under Art. III. Art. III, section 1 confers the legislative power, and sections 14 and 15 govern the passage of bills. Art. III, section 16 governs how the Governor reviews bills presented to him. These powers are constitutional in origin and

scope. The Hawaii Supreme Court has cautioned that "judicial intrusion into matters which concern the political branch of government" is "inappropriate[]" and that "[t]oo often, courts in their zeal to safeguard their prerogatives ***overlook the pitfalls of their own trespass on legislative functions***." Yamasaki, 69 Haw. at 172, 737 P.2d at 456-57 (emphasis added). Whether to pass or sign a bill is an *inherently* political matter, and this Court may not "trespass."

There are two related doctrines that bar this Court from interfering with the political branches' consideration of S.B. 1. First, the doctrine of separation of powers, and second, the political question doctrine. Both have been adopted by the Hawaii Supreme Court. Yamasaki. The doctrine of separation of powers explains why this Court cannot enjoin the Legislature or the Governor as Plaintiff requests now. The political question doctrine explains why this Court *lacks jurisdiction* to enter Plaintiff's requested relief. Each doctrine independently bars Plaintiff's requested relief. In this case, these doctrines share the same central premise: ***this Court may not interfere with the political decisions being made now at the Capitol.***[2]

1. The Principle of Separation of Powers Bars this Court from Enjoining the Consideration or Signing of Legislation

Plaintiff's requested relief is barred by the doctrine of separation of powers. This doctrine is implicit in the structure of government created by the constitution.[3] Biscoe v. Tanaka, 76 Hawai'i 380, 383, 878 P.2d 719, 722 (1994). It prohibits any branch from unduly interfering with the constitutional functions of the other branches. This Court may not overstep its bounds:

> [W]e have taken the teachings of the Supreme Court to heart and adhered to the doctrine that the use of judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. And, we have admonished our judges that even in the absence of constitutional restrictions, they must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.

Yamasaki, 69 Haw. at 170-71, 737 P.2d at 456. Following the doctrine of separation of powers, courts around the country have rejected calls to review the constitutionality of proposed bills:

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[2] This conclusion would be the same for *any* proposed bill. It is not the *subject* of S.B. 1 that leads to this conclusion, but its very nature as a bill that has yet to become law. Plaintiff's request for this Court to interfere has no boundaries: would he invite this Court to step in on each of the *hundreds* of bills that are introduced during each regular legislative session?

[3] Some States have explicit separation of powers provisions in their State constitutions. The central principles of the doctrine are the same regardless of whether the doctrine is explicit in the state constitution or implicit.

- "We could not, and will not, try to elaborate on the ramifications the initiated legislation might have on existing laws, ***because to express a view as to the future effect and application of proposed legislation would involve us at least indirectly in the legislative process, in violation of the separation of powers*** mandated by Article III, Section 2, of the Maine Constitution." Wagner v. Secretary of State, 663 A.2d 564, 567 (Me. 1995) (emphases added; brackets, internal quotation marks and citation omitted).
- The "acts [of legislative bodies] are not to be controlled by nor subjected to the coercive influence of the courts, and *may not be questioned until the courts are called upon to expound or enforce them as completed acts*. The restraint operates although our constitution does not contain an express prohibition against one department of government exercising the powers of another. . . . ***A court cannot deal with the question of constitutionality until a law has been duly enacted and some person has been deprived of his constitutional rights by its operation***." . . . [I]t is not within the power of the judiciary to enjoin the legislature from passing a proposed statute or compel it by mandamus to do so." Rose Manor Realty Co. v. City of Milwaukee, 75 N.W.2d 274, 277 (Wis. 1956) (emphases added; citations, internal quotations marks omitted).
- The "***legislative action has not been completed***. Certainly the Bill has not been enacted. . . . ***To grant the relief here prayed would be plain interference with legislative action*** which is forbidden by [the Maryland constitution]. . . . It could hardly be contended that after one House had passed a bill the courts could enjoin the submission of that bill to the other House on the allegation that the bill as passed by the one House was unconstitutional or unlawful. That is essentially what we are asked to do here." Maryland-Nat'l Capital Park and Planning Comm'n v. Randall, 120 A.2d 195, 199 (Md. 1956) (emphases added).
- "This court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution; but it cannot say what laws shall or shall not be enacted. . . . ***To issue an injunction in this action would be to enjoin the legislature and electors in the exercise of their legislative duty***. Suppose a bill, having passed the legislature, is in possession of the governor, or, to make the analogy more nearly complete, suppose it is being conveyed to the executive by an officer of the legislature, would any one imagine the progress of the messenger could be arrested by an injunction? The inquiry

answers itself." State ex rel. Evans v. Riiff, 42 N.W.2d 887, 888 (S.D. 1950) (emphasis added; internal quotation marks and citation omitted).

***These cases uniformly hold that this Court may not enjoin the process by which a bill becomes a law.*** This Court must categorically reject Plaintiff's invitation to do so now. The process of enacting a law is undoubtedly a legislative function. "The making of the laws belongs to a co-ordinate branch of the government, and the courts have nothing to do with the making, but must deal altogether with the finished product." Power v. Ratliff, 72 So. 864, 867 (Miss. 1916). There is, as yet, no "finished product" here. Under the principles of separation of powers, this Court must stay its hand. The motion must be denied.

2. The Political Question Doctrine Deprives this Court of Jurisdiction to Enjoin the Consideration or Signing of Legislation

For many of the same reasons, the political question doctrine deprives this Court of jurisdiction to enjoin the legislative or executive branches in their political functions. A court lacks jurisdiction if the dispute is not justiciable. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." 16A Am. Jur. 2d Constitutional Law § 268 (2009). This doctrine turns in part on "whether a matter has in any measure been ***committed by the Constitution to another branch of government***[.]" Yamasaki, 69 Haw. at 169, 737 P.2d at 455 (emphasis added; citation and internal quotation marks omitted). There are "several formulations" of this doctrine, which is "essentially a function of the separation of powers." Id. at 169-70, 737 P.2d at 455. Among these are cases that "involve a political question [where there] is found a textually demonstrable constitutional commitment of the issue to a coordinate political department" or cases presenting "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" Id. at 170, 737 P.2d at 455.[4]

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[4] The Hawaii Supreme Court "adopted the test enunciated by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962) as its own test in Yamasaki." Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 194, 277 P.3d 279, 288 (2012). The full test is:

> [i]t is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political

Both of these elements are present here; either shows that this Court lacks jurisdiction.[5] The passage and signing of bills is "demonstrably" (even obviously) "committ[ed]" by the "constitution[]" "to a coordinate political department[.]" Yamasaki, 69 Haw. at 170, 737 P.2d at 455. The Hawaii constitution vests the Legislature and the Governor—***and them alone***—with the authority to pass and sign bills. Haw. Const. Art. III §§ 14, 15, 16. This authority is at the heart of the roles the two other branches serve under our system of government. "A challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature presents a non[-]justiciable 'political question.'" Mental Health Ass'n in Penn. v. Corbett, 54 A.3d 100, 104 (Pa. Cmwlth. Ct. 2012). To attempt to enjoin the Legislature and the Governor from further considering or signing a bill would create "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" Yamasaki, 69 Haw. at 170, 737 P.2d at 455.

Under the political question doctrine, therefore, an attempt to enjoin an unenacted *bill* is *nonjusticiable*. See, e.g., Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Sup'rs, 501 P.2d 391, 393 (Ariz. 1972) (Without "express statutory power, the courts are without jurisdiction to interfere, whether by injunction or otherwise, with the exercise of the legislative function or with the enactment of legislation."); In re McConaughy, 119 N.W. 408, 417 (Minn. 1909) ("[T]he Legislature may in its discretion determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have no judicial control over such matters, not merely because they involve political questions, but because they are matters which the people have by the Constitution delegated to the Legislature."); Hughes v. Hosemann, 68 So.3d 1260, 1266 (Miss. 2011) (assertion that unenacted initiative is unconstitutional is "a nonjusticiable political question. . . . We cannot invade the territory of the Legislature or the

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> department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Yamasaki, 69 Haw. at 169-70, 737 P.2d at 455 (quoting Baker).

[5] The Yamasaki/Baker list is in the alternative. A case need not meet all of the factors to fall under the political question doctrine. Yamasaki, 69 Haw. at 170, 737 P.2d at 455.

electorate to review the substantive validity of a proposed initiative[.]") (citations omitted). The doctrine of separation of powers and the political question doctrine both hold that this Court does not have the authority or jurisdiction to enjoin either the Legislature or the Governor in their consideration and enactment of S.B. 1. The motion must be denied.

3. An Action for Declaratory Judgment is Not Ripe Because Plaintiff Challenges a Bill, Not a Law

The Hawaii Supreme Court has admonished that our courts do not rule on cases prematurely. Ripeness is a justiciability issue. See Yamasaki, 69 Haw. at 169, 737 P.2d at 455 (1987) ("When the litigation seems premature or subject to unresolved contingencies, the courts speak of the justiciability question in terms of 'ripeness.'"). At present, *there is no law that could be the subject of this suit.* Plaintiff's request for declaratory relief is therefore not ripe. "***No court to our knowledge has ever held that a declaratory judgment regarding the validity of a legislative act can be declared before the statute's enactment.***" City of North Las Vegas v. Cluff, 452 P.2d 461, 462 (Nev. 1969) (emphasis added).

No one can be certain that any bill will pass, or what its content will be, until it becomes a law. "Declaratory judgment will not be rendered based on a possible or probable contingency." Atlanta Cas. Co. v. Fountain, 413 S.E.2d 450, 452 (Ga. 1992). Issuing an opinion on the constitutionality of an unenacted bill would be an advisory opinion. ***Hawaii's courts are "prohibit[ed]" from ruling on "abstract or hypothetical question[s]," as it would be an "advisory opinion[.]"***). Yamasaki, 69 Haw. at 171, 737 P.2d at 456 (emphasis added).[6] Courts around the country have declined to render advisory opinions on proposed legislation:

- "[T]his dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact *legislation that may be under consideration but has not yet shaped up into an enactment.*" Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 245 (1952) (emphasis added).
- "[T]his Court has found that advance opinions will not be issued to remove alleged clouds or uncertainties from proposed statutes or constitutional amendments. It is not within the province of this Court to render advisory opinions." Hughes, 68 So.3d at 1263.

[6] The prohibition on advisory opinions also stems from separation of powers concerns. Id.

- Action for declaratory relief not ripe because "[a]t this stage, ***the court must speculate as to what legislation, if any***, the City might adopt[.]"). Stonehouse Homes v. City of Sierra Madre, 84 Cal.Rptr.3d 223, 231 (Cal. App. 2 Dist. 2008) (emphasis added).
- "This argument concerns the future effect, enforceability, and constitutionality of the initiative *if enacted*. We agree with the Superior Court that this issue is not ripe for judicial review. . . . In this instance, the initiative may never become effective. Thus, *we are not presented with a concrete, certain, or immediate legal problem*."). Wagner v. Sec'y of State, 663 A.2d 564, 567 (Me. 1995) (emphases added).
- "Here *there is no ordinance in existence* by which a person could be affected so as to give rise to the jurisdictional prerequisite for invoking declaratory judgment relief. We therefore hold that the trial court could not properly entertain jurisdiction to declare ***the validity of this proposed ordinance***, prior to its actual adoption." Citizens for Orderly Development and Environment v. City of Phoenix, 540 P.2d 1239, 1242 (Ariz. 1975) (emphases added).

Under these cases, Plaintiff's suit is not ripe. He is requesting an advisory opinion, which are prohibited by the Hawaii Supreme Court. Yamasaki, 69 Haw. at 171, 737 P.2d at 456. The motion should be rejected.

4. Legislators Are Absolutely Immune from Suit For Any Actions Taken as State Legislator

The separation of powers and political question arguments apply to both the Legislature and the Governor. The complaint names Sen. Mercado Kim, Sen. Hee, Rep. Souki and Rep. Rhoads, in their official capacities, as Defendants (referred to in this section as the "Legislators"). As to these defendants, there is a separate, independent reason why this Court may not grant Plaintiff's requested relief. Plaintiff McDermott asserts that he has been asked to consider S.B. 1. Compl. ¶ 22. The Complaint claims that "a controversy exists" regarding "the scope and breadth of [Article I, section 23] and *whether the State legislature has the right to enact any laws which would allow same sex couples the right to marry*[.]" Id. ¶ 23 (emphasis added). The complaint asks for a declaration that any bill or act which allows same-sex marriage in Hawaii is null and void until the Constitution is amended. Id. at ¶ 24, Prayer ¶ 2. It thus appears that Plaintiff names the Legislators as Defendants in order to hail them before this Court to answer for actions taken as part of their legislative functions. ***But this is categorically barred by the Hawaii constitution, which provides the Legislators with absolute immunity***.

"No member of the legislature shall be held to answer before any other tribunal for any statement made *or action taken in the exercise of the member's legislative functions* . . . ." Haw. Const. Art. III § 7 (emphasis added.) The Hawaii Supreme Court has held that Art. III § 7 provides *absolute immunity* to legislators for their legislative acts. Abercrombie v. McClung, 55 Haw. 595, 525 P.2d 594 (1974).[7] In Abercrombie, the plaintiff brought suit against a legislator for statements made to the media to clarify a speech the legislator had given to the Senate earlier that day. The Court opined that such clarifying statements were made in the exercise of the member's legislative functions and were therefore absolutely privileged, even if erroneous and even if given outside a legislative hearing. Id. at 600-01, 525 P.2d at 596.

Art. III, section 7 does not define the term "legislative functions," but it undoubtedly includes introducing, voting on, and passing legislation, the core functions of the legislature. Haw. Const. Art. III, § 1 (the legislative power is vested in the legislature); Kerttula v. Abood, 686 P.2d 1197, 1202 (Alaska 1984) (interpreting constitutional provision modeled after Hawaii's legislative immunity provision; legislative acts necessarily include activities internal to the legislature such as voting, speaking on the floor of the house or in committee, and introducing legislation). Here, the Legislators are being sued for actions taken in the exercise of their legislative functions: the introduction and consideration of legislation. But under the Hawaii constitution, ***the Legislators are absolutely immune from suit for such actions, and any and all claims against them must be dismissed***. Any claims against the Legislators cannot serve as the basis for any request for injunctive relief. The motion must be denied.

**B. Plaintiff Lacks Standing And The Other Individuals Listed Are Not Parties And Would Lack Standing Even If They Were**

1. Rep. McDermott Lacks Standing in His Official Capacity as a State Legislator.

"Standing is concerned with whether the parties have the right to bring suit." Hanabusa v. Lingle, 119 Hawai'i 341, 347, 198 P.3d 604, 610 (2008).

> [T]he crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's remedial powers on his or her behalf. In deciding whether the plaintiff has the requisite interest in the outcome of the litigation, we employ a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) is the injury fairly

[7] At the time Abercrombie was decided, the constitutional provision in question was numbered Article III, section 8. It was subsequently amended (non-substantively) and renumbered as a result of amendments made during the 1978 constitutional convention.

> traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury. With respect to the first prong of this test, the plaintiff must show a distinct and palpable injury to himself [or herself.] The injury must be distinct and palpable, as opposed to abstract, conjectural, or merely hypothetical.

Id. (citations and internal quotation marks omitted). The requirement of a "distinct and palpable injury" requires a plaintiff to have suffered an "injury in fact." Id.

Plaintiff McDermott is a member of the Hawaii State House of Representatives and sues in his official capacity. Compl. at 2, ¶8. Setting aside the fact that S.B. 1 is a bill, not a law, the United States Supreme Court has rejected the contention that an individual legislator has standing to challenge the constitutionality of a law. In Raines v. Byrd, 521 U.S. 811 (1997), six members of Congress sought to argue that the Line Item Veto Act was unconstitutional. Id. at 814-16. The Supreme Court held that "***these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established . . . standing.***" Id. at 830 (emphasis added).

The one exception to the general rule that individual legislators lack standing is when a legislator's vote is nullified by the defendants. In Coleman v. Miller, 307 U.S. 433 (1939), 20 Kansas state senators voted in favor of a proposed amendment to the federal constitution while 20 voted against. Id. at 435-36. Ordinarily, this would not have been sufficient to ratify the amendment. Id. The Kansas lieutenant governor then cast the deciding vote. Id. The Supreme Court held that the legislators who sued had standing because their votes had been "overridden and virtually held for naught." Id. at 438. The Court subsequently explained that:

> [O]ur holding in Coleman stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

Raines, 521 U.S. at 823. In Raines, legislators did not have standing because "[t]hey have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. ***They simply lost that vote.***" Id. at 824 (emphasis added). Therefore, unless individual legislators can show that their votes have been denied or completely nullified, they lack sufficient standing to sue. The same principles show that McDermott lacks standing here.

This case clearly falls within the ambit of Raines rather than Coleman. If S.B. 1 becomes law, as long as Rep. McDermott was allowed to vote and his vote was not completely nullified,

he does not have standing to challenge the law in his official capacity. The complaint does not even allege that the defendants are depriving him of his right to vote on S.B. 1. Moreover, even if Plaintiff McDermott could show that ***his own*** vote was denied or nullified, that would not be enough. See Raines, 521 U.S. at 822, 824 (explaining that under Coleman, legislators have to "su[e] as a bloc" and they have to show that they "voted [against] [the] bill, that there were sufficient votes to [defeat] the bill, and that the bill was nonetheless [approved].") As long at McDermott's vote is given full effect and he "simply [loses] that vote" ***he does not have standing to sue***. See id. at 824. See also Baird v. Norton, 266 F.3d 408, 411-13 (6th Cir. 2001); Common Cause of Penn. v. Pennsylvania, 558 F.3d 249, 265-67 (3d. Cir. 2009); Bennett v. Napolitano, 81 P.3d 311, 316-18 (Ariz. 2003) (*en banc*).

Plaintiff McDermott is not suing on behalf of the Legislature or one house of the Legislature, nor does he have the authority to do so. He names only himself in his official capacity. Compl. at 2. Under some circumstances, *presiding legislative officers* may bring suit on behalf of the entire Legislature or one house of the Legislature. See Karcher v. May, 484 U.S. 72 (1987) (Speaker of the New Jersey General Assembly and President of the New Jersey Senate pursued lawsuit on behalf of the Legislature, but were not allowed to continue the suit after they lost their leadership positions.). Here, not only is Rep. McDermott ***not*** a presiding officer of the Legislature: he is *suing those who are*. See Bennett, 81 P.3d at 318; Compl. at 2.

Hawaii law is consistent with federal law on these issues.[8] In Hanabusa, the President of the Senate and the Chair of the Senate Committee on Education sued because then-Governor Lingle violated their right under the Hawaii Constitution to confirm members of the University of Hawaii Board of Regents. Hanabusa, 119 Hawai'i at 342, 198 P.3d at 605. The legislators in that case were presiding officers of the state Senate who were contesting the Governor's denial of their ability to vote on those confirmations. Id. at 348, 198 P.3d at 611. The legislators in Hanabusa were acting on behalf of one house of the Legislature and they were contesting the denial or nullification of their votes, consistent with Coleman. McDermott presents no such issues here: he sues on his own, in his official capacity only. Under Raines, this is insufficient to create standing. McDermott's motion for a temporary restraining order is plainly misplaced.

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[8] Hawaii courts are not bound by the federal "case or controversy" requirement, so federal cases are not dispositive on standing issues. But federal standing cases are highly persuasive and the Hawaii Supreme Court relies on them. See Corboy v. Louie, 128 Hawai'i 89, 104, 283 P.3d 695, 710 (2011).

2. The Three Additional Individuals Listed in the Motion Are Not Plaintiffs, And Do Not Have Standing Even if They Were

Plaintiff's motion lists three new plaintiffs. However, the operative complaint filed on October 30, 2013 lists *only* McDermott. Because the additional plaintiffs are not listed on the complaint, they are not parties to this case. Their names should be stricken from the motion. *Even if* these individuals were plaintiffs, they too lack standing to sue:

> [U]nless [a plaintiff] [can] show some concrete injury, ***[the party] [is] merely asserting a "value preference" and not a legal right. The proper forum for the vindication of a value preference is in the legislature, the executive, or administrative agencies, and not the judiciary. For it is in the political arena that the various interests compete for legal recognition***.

Mottl v. Miyahira, 95 Hawai'i 381, 392, 23 P.3d 716, 727 (2001) (emphasis added).

The three individuals cannot show a concrete injury in fact. They appear to be concerned citizens who object to the recognition of same-sex marriages on policy grounds. Decs. This is not enough. The ability of same-sex couples to marry does not affect them. Assuming that these individuals are heterosexuals, the ability of same-sex couples to marry does not harm existing opposite-sex marriages or prevent opposite-sex couples from marrying. The individuals are asserting a "value preference." The proper place to assert it is in the Legislature, just as the Hawaii Supreme Court held in Mottl. By filing this case, they are, in fact, seeking to obstruct the resolution of this issue in the ***proper*** forum: the Legislature.

These individuals raise arguments similar to those in Alons v. Iowa District Court for Woodbury County, 698 N.W.2d 858 (Iowa 2005). In Alons, the lower court granted dissolution of a civil union celebrated in Vermont. Id. at 862-63. Several outside parties filed a petition for a writ of certiorari to the Iowa Supreme Court challenging the dissolution. Id. At the time, Iowa did not recognize same-sex marriages or civil unions and Vermont recognized civil unions but not same-sex marriages.[9] The plaintiffs argued that they had standing because they had an interest in promoting traditional marriage and that recognizing a civil union was detrimental to that aim. Id. at 869. They also argued that the public had an interest in avoiding the erosion of marriage and that treating same-sex relationships as marriages denigrated traditional, opposite-sex marriage. Id. They claimed that "[l]oss of . . . exclusive endorsement [of opposite-sex marriage] will de-emphasize the importance of traditional opposite-sex marriage to society,

[9] Both Iowa and Vermont now recognize same-sex marriages.

weakening this vital institution, and placing our entire democratic system in jeopardy by eroding its foundation."[10] Id. They argued the same value-based arguments the individuals raise here.

***The Iowa Supreme Court rejected all of these arguments.*** The court held that the plaintiffs failed to show that they were injured in a manner different from that of the public. Id. at 870. The plaintiffs alleged an injury in the abstract, not in fact. Id. The court also held that the plaintiffs also did not have standing as married persons, taxpayers, legislators, or as a pastor or a church. Id. at 870-74. Personal opinions were insufficient to confer standing:

> [m]any people have strong opinion about marriage, as they do about divorce, child custody, zoning, and many other issues, but if everyone were allowed to petition for certiorari simply because of ideological objections or strongly held philosophical beliefs . . . then there would be no limits to the petitions brought. Iowa law has never permitted such unwarranted interference in other people's cases. ***Simply having an opinion does not suffice for standing.***

Id. at 874 (emphasis added).

The three individuals cannot show that they have suffered an injury in fact *for the exact same reason.* They have an opinion on this issue just like any member of the public. "They have not alleged any 'personal stake in the outcome of the controversy,' inasmuch as they have not alleged that they had personally suffered any 'distinct and palpable injury.'" Mottl, 95 Hawai'i at 392, 23 P.3d at 727. Instead they seek to litigate their own "value preference," which was specifically forbidden in Mottl. Id. See Mot. at 5 (opining that "same-sex marriage bill will become a hammer in the hands of activists to force the practice of homosexuality and other behaviors, such as cross-dressing and transexuality, as norms in Hawaiian society and appropriate behavior.").[11] Our system of government has a proper place for such policy arguments: the State Legislature. See Lee v. Corregedore, 83 Hawai'i 154, 171, 925 P.2d 324, 341 (1996) ("broad based policy decisions" are "best left to the branch of government vested with the authority . . . to make" them.). These policy debates do not create standing *in court.*

### C. Even If The Case Was Properly Brought, Plaintiff Cannot Show A Likelihood Of Success On The Merits Because Art. I, Section 23 Of The Hawaii Constitution Does Not Ban The Marriage Equality Bill

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[10] Same sex-marriage was later recognized in Iowa by Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). To our knowledge, Iowa retains a democratic system despite these fears.

[11] Defendants note that Hawaii law *already* bans discrimination on the basis of either sexual orientation or gender identity. See, e.g., HRS §§ 489-3 (public accommodations code); 378-2 (employment practices); 515-3 (real property transactions).

1. Plaintiff Must Demonstrate Unconstitutionality Beyond a Reasonable Doubt

*Even if* this case raised a challenge to a law, not a bill, and *even if* any party had standing, Plaintiff cannot meet his heavy burden in demonstrating that the statute is unconstitutional:

> [E]very enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing ***unconstitutionality beyond a reasonable doubt***. . . . [T]he infraction should be ***plain, clear, manifest, and unmistakable***.

Schwab v. Ariyoshi, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977) (emphases added). "In cases of doubt, the doubts must be resolved in favor of constitutionality and validity." Koike v. Bd. of Water Supply, City & Cnty. of Honolulu, 44 Haw. 100, 102, 352 P.2d 835, 838 (1960).

2. Article I, Section 23 of the Hawaii Constitution Allows, But Does Not Require, the Legislature to Limit Marriage to Opposite-Sex Couples

"The legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const. Art. I § 23. By its clear and unambiguous language, this provision ***does not require*** that marriages be limited to opposite-sex couples. Instead, under this section, the Legislature *possesses the authority* to limit marriages to opposite-sex couples, should it choose to do so.[12]

If the words in a constitutional provision are "clear and unambiguous" they "must be construed as written." Watland v. Lingle, 104 Hawai'i 128, 140, 85 P.3d 1079, 1091 (2004). "[I]n 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]." Pray v. Judicial Selection Comm'n, 75 Haw. 333, 341, 862 P.2d 723, 727 (1993). ***There is no ambiguity in Article I, section 23.*** Its plain meaning allows, but does not require, the Legislature to limit marriages to opposite-sex couples.[13]

Even if there was any ambiguity in Art. I § 23, *the legislative history confirms this interpretation*. See State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314 (1981) (if a

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[12] Other States' constitutional amendments expressly ban marriage between individuals of the same sex. In contrast, Hawaii's electorate instead chose to give the *Legislature* the authority to make this determination. This conclusion is supported by comparing article I, section 23, with the provisions that have been enacted elsewhere. See, e.g., Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); Colo. Const. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); Va. Const. art. I, § 15-A ("[O]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth[.]").

[13] This issue was addressed in Atty. Gen. Op. 13-1. See Ex. "C". The Attorney General's formal opinions are entitled to deference: the Hawaii Supreme Court considers them "highly instructive" but not binding. Kepo'o v. Watson, 87 Hawai'i 91, 99, 952 P.2d 379, 387 (1998).

constitutional provision is ambiguous, "extrinsic aids may be examined to determine the intent of the framers"). The conclusion that the provision was designed to maintain the Legislature's discretion is inescapable based on the statement in section 1 of House Bill No. 117, which proposed the amendment:

> 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. ***This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.***

1997 Haw. Sess. L. 1246-47 (emphasis added) (attached as Ex. "D")

Article I, section 23 permits the Legislature to choose whether to restrict marriage to opposite-sex couples. Marriages are currently limited to opposite-sex couples. The marriage equality bill, should it become law, will recognize marriages between two persons regardless of gender. Because article I, section 23 ***by its plain terms*** does not restrict the Legislature's ability to consider and enact S.B. 1, Plaintiff's constitutional argument is meritless.[14]

3. The Factual Circumstances Surrounding the 1998 Enactment of Art. I, Section 23 Fully Support This Conclusion

Plaintiff claims that Art. I, section 23 does not allow the Legislature to amend chapter 572 to allow marriages to occur between same-sex couples. Mem. at 3-5. This is based on Plaintiff's erroneous belief that "[t]he obvious intent of the citizens of Hawaii in 1998 was to do exactly what the State's formal Ballot Information said: to give the Legislature the power to "reserve marriage to opposite-sex couples only." Id. at 4 (emphasis in original).

This statement is factually inaccurate, as can easily be seen from the factsheet and the ballot for the 1998 Proposed Amendments to the Hawaii Constitution. See Ex. "E", Ex. "F" at 2. After explaining Baehr v. Lewin, 74 Haw. 520 (1993), and noting that the trial court had struck

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[14] Plaintiff does *not* claim that the Legislature lacks the authority as a general matter to pass the bill; he claims only that the bill is inconsistent with Art. I, section 23. Compl.; Mot. As detailed in Op. 13-1, the legislative authority conferred by Art. III, section 1 of the Hawaii constitution *unquestionably* extends to the marriage equality bill. See United States v. Windsor, 133 S. Ct. 2675, 2691-92 (2013) ("In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. ***These actions were without doubt a proper exercise of its sovereign authority within our federal system***[.]") (emphasis added; brackets and internal quotation marks omitted).

down the marriage license statute as being in violation of the Hawaii Constitution, the Office of Elections explained the meaning of the vote on the amendment as follows:

> The proposed amendment is intended to make absolutely clear that the State Constitution ***gives the Legislature*** the power and authority to reserve marriage to opposite-sex couples. 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, overruling the recent Supreme Court decision regarding same-sex couples.
> A "no" vote will make no change to the Constitution of the State of Hawaii, and to allow the court to resolve the lawsuit that has been brought against the State.

Ex. "F" at 2 (emphases added).

It is beyond reasonable dispute that a voter reviewing the ballot materials would conclude that if the amendment passed, the Legislature would have the power to decide if marriage should be reserved to opposite-sex couples, or would be opened up to same-sex couples. ***Had the amendment been designed to prohibit same-sex marriages, or to require the Legislature to reserve marriages to opposite-sex couples, it would have simply said so, and not given the Legislature the option to do otherwise.***

Plaintiff claims that (1) what individual voters thought at the time Art. I, section 23 was ratified should control, Compl. at 3, and (2) the Legislature had already codified the opposite-sex limitation beforehand. Mot. at 3-5. These arguments are specious. First, the interpretation of a constitutional provision is a question of law, and personal opinions are not relevant to that inquiry. See, e.g., Barabin v. AIG Hawai`i Ins. Co., Inc., 82 Hawai'i 258, 264, 921 P.2d 732, 738 (1996) (finding personal opinion "irrelevant" in statutory interpretation question). Isolated individuals do not decide what the law means for everyone. Only a court can do that.[15] And, as discussed above, if voters believed Art. I, section 23 to be a *ban* on same-sex marriage, that belief was plainly mistaken. The voter factsheet has *only one reasonable meaning in plain English*: the same legal meaning of Art. I, section 23 as explained above. Individuals' mistaken personal opinions do not change this question of law.

Second, the timing of the legislation to limit marriage to opposite-sex couples and the constitutional amendment is irrelevant. Mot. at 4. Defendants are all aware that current Hawaii law limits marriage to opposite-sex couples. Whether the statute preceded the constitutional amendment is not relevant. ***What is relevant is where the power rests to change that law.*** Art.

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[15] This determination could only be made in a case brought by proper parties at the proper time.

I, section 23 allows *but does not require* the Legislature to reserve marriages to opposite-sex couples. Plaintiff argues: "The Legislature finally told the citizens that a "Yes" vote would cause a new provision to be added to the Constitution that would give the Legislature the power to reserve marriage to opposite-sex couples only." Mot. at 2-3. But the word "only" is not the relevant part. The relevant part is "***give the Legislature***." Plaintiff does not contend that Art. I, section 23 removed that power from the Legislature: they admit the power was given *to* the Legislature. Mot. at 3. As explained above, the Legislature possesses the authority, should it so choose, to allow individuals of the same sex to marry. Art. I, section 23 is no bar to the constitutionality of S.B. 1, should it become law. Plaintiff's arguments contradict the plain language, legislative history, and unmistakable meaning of the public factsheet.

**D. Plaintiff Cannot Meet Any Of The Other Factors For Injunctive Relief**

A temporary restraining order preserves the status quo until there is an opportunity to hold a hearing on a preliminary injunction. See Charles A. Wright et al., 11A *Federal Practice and Procedure: Civil 2d* § 2951 (2d ed. Westlaw 2013). Like any injunction, a TRO is an extraordinary remedy that should only be granted in limited circumstances. AT&T v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1426-27 (3d Cir. 1994). Injunctive relief is to be used sparingly, and only in a clear and plain case. See Rizzo v. Goode, 423 U.S. 362, 378 (1976). The person or entity seeking the injunction has the burden of proving the facts that entitle it to relief. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987).

The standard for issuing temporary injunctive relief is the familiar three-part test: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction. Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). As explained above, Plaintiff has no likelihood of succeeding on the merits because (a) the doctrines of separation of powers and political question preclude this Court from granting the relief Plaintiff seeks, (b) Plaintiff and the three individuals lack standing, and (c) his reading of Article I, section 23 is completely incorrect as a matter of both law and logic.

1. Neither Plaintiff Nor the Individuals Will Suffer Irreparable Harm If the Injunction is Denied

Plaintiff has provided no evidence of any harm to himself – much less irreparable harm – if the Court declines to issue a restraining order to enjoin the Legislature from doing its job. The individuals likewise provide no evidence of any irreparable harm, and instead rely solely on their

own value preferences against same-sex marriage.[16] As already noted, neither Plaintiff nor the individuals have standing to bring a suit to enjoin the legislative process. Their value preferences regarding same-sex marriage may be, and probably have been, expressed to the Legislature in the ongoing special session. That is the proper place for such expression.

By contrast, the irreparable harm to the State and its people should this Court stop the legislative process, even for a moment, cannot be overstated. A ruling that this Court has authority to tell the Legislature what bills it can and cannot consider would be contrary to the most fundamental notions of the State's tripartite structure, would violate the Constitution (see Art. III, section 1 – the legislative power is vested in the legislature), and would turn the legislative process on its head. See discussion above; North Dakota ex rel. Aamoth v. Sathre, 110 N.W.2d 228, 230 (N.D. 1961) (stating that it is no part of the judicial function to interfere with the constitutional processes of legislation and that courts will not entertain a suit to test the constitutionality of a proposed act of the legislature on the ground that, if such act is enacted, it will interfere with the constitutional rights of the litigant).

If this Court enjoins the Legislature and Governor from carrying out their constitutionally mandated duties because certain individuals don't like the pending bill, this would be a truly dangerous slippery slope. ***Every bill*** would potentially be subject to suit by those who oppose a bill's intent. The courts would become super-legislators, providing advisory opinions on the hundreds of proposed bills introduced every session before they become law. The Legislature and the courts would come to a grinding halt. Same-sex marriage, the environment, taxes, government employees, appropriations—issue after issue—where will it end? Infringement of the legislative process by this Court would constitute harm that could never be remedied. On the other hand, Plaintiff will suffer no harm at all should the temporary restraining order be denied. The balance of harm falls clearly on the side of denial of the restraining order.

2. The Public Interest Also Favors Denying an Injunction

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[16] The individuals assert that alleged and unsubstantiated speculative harms will befall the State should the Legislature pass a same-sex marriage bill. See Alons (discussed above). At the same time they ignore the real and substantial harms happening to same-sex couples *now* because Hawaii does not recognize same-sex marriages. See Garden State Equality v. Dow, 2013 WL 5687193 (N.J. Oct. 18, 2013) (denying New Jersey's request for an injunction pending appeal and stating that "same-sex couples who cannot marry are not treated equally under the law today. The harm to them is real, not abstract or speculative.").

Plaintiff and the individuals argue that the public interest favors granting an injunction because the public has a vested interest in knowing that Hawaii's cultural norms will be forever changed. This makes no sense. A restraining order would halt the legislative process; it would not provide a means of communicating what "cultural norms" are supposedly going to be changed. There is no public interest in enjoining the Legislature from doing its job. On the contrary, the public interest favors ensuring the legislative process remains unmolested by the courts so that the Legislature may perform its duties under the constitution. Only if and when a law is enacted should a person with proper standing be allowed to challenge the law *as enacted.*

## CONCLUSION

Public policy debates are the heart of the political process. That process is playing out now at our State Capitol, with exactly the sort of "uninhibited, robust, and wide-open" debate that American democracy envisions and celebrates. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Plaintiff asks this Court to short-circuit that debate, and interfere with the two elected branches of government as they exercise authority granted to them—and them alone—by the Hawaii Constitution. A court enjoining the two other branches of government from undertaking these functions would be akin to banning this Court from "say[ing] what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). This is what the Legislature does: *legislate*. Haw. Const. Art. III § 1. This is what the Governor does: he signs bills into law. Haw. Const. Art. III § 16. This Court may not usurp those roles.

Even if all the defects detailed above could be cured, Plaintiff is fundamentally mistaken about the interpretation of Art. I, section 23. The provision clearly ***allows but does not require*** the Legislature to limit marriages to opposite-sex couples. This is crystal clear from the text and the history of the provision. Plaintiff's contention to the contrary is baseless. The motion for temporary restraining order must be denied.

DATED: Honolulu, Hawaii, November 5, 2013.

DEIRDRE MARIE-IHA
Deputy Attorney General
Attorney for State Defendants

THE SENATE
TWENTY-SEVENTH LEGISLATURE, 2013
STATE OF HAWAII

S.B. NO. 1

JAN 17 2013

# A BILL FOR AN ACT

RELATING TO THE PUBLIC LAND DEVELOPMENT CORPORATION.

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

SECTION 1. Act 55, Session Laws of Hawaii 2011 (Act 55), codified as chapter 171C, Hawaii Revised Statutes, created the public land development corporation. Section 171C-1, Hawaii Revised Statutes, states in pertinent part:

"The purpose of this chapter is to create a vehicle and process to make optimal use of public land for the economic, environmental, and social benefit of the people of Hawaii. This chapter establishes a public corporation to administer an appropriate and culturally-sensitive public land development program. The corporation shall coordinate and administer programs to make optimal use of public land, while ensuring that the public land is maintained for the people of Hawaii."

The legislature finds that Act 55 has engendered significant public concern and scrutiny due in part to the fact that projects undertaken pursuant to Act 55 are exempt from state and county laws regarding land use, zoning, and construction standards for subdivisions, development, and



EXHIBIT A

improvement of land. In addition, concerns have been raised regarding inadequate notice given to the public to testify on the exemption provisions. The exemptions, coupled with the manner in which Act 55 was passed, have led to distrust and uncertainty of the corporation's intentions and development plans. Despite efforts to allay concerns, many individuals and organizations, particularly environmental and Native Hawaiian organizations, have expressed support for legislation to repeal Act 55.

The legislature further finds that the implementation of Act 55 falls short of "ensuring that the public land is maintained for the people of Hawaii." The intent of the legislature is to ensure that the public lands of Hawaii are used and administered in an equitable and transparent manner that should not necessarily be relegated to administrative decision-making or rule making on an ad hoc basis. While the optimization of the use of public lands is a meritorious goal with the potential to significantly benefit the people of Hawaii, the means of achieving this goal requires a greater respect for existing laws and procedures and greater assurance that the corporation is the vehicle that will produce economic, environmental, and social benefit for the people of Hawaii.



The legislature further finds that the county councils of Kauai and Maui have adopted resolutions urging the legislature to abolish the public land development corporation by repealing chapter 171C, Hawaii Revised Statutes. The Honolulu city council has considered a similar resolution, but has failed to adopt such resolution at this time.

The purpose of this Act is to repeal chapter 171C, Hawaii Revised Statutes, the public land development corporation.

SECTION 2. Section 171-2, Hawaii Revised Statutes, is amended to read as follows:

"§171-2 **Definition of public lands.** "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including lands accreted after May 20, 2003, and not otherwise awarded, submerged lands, and lands beneath tidal waters that are suitable for reclamation, together with reclaimed lands that have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;



(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the state constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the Hawaii housing finance and development corporation in its corporate capacity holds title;

(7) Lands to which the Hawaii community development authority in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;



(9) Lands that are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity;

(10) Lands that are set aside by the governor to the agribusiness development corporation; lands leased to the agribusiness development corporation by any department or agency of the State; or lands to which the agribusiness development corporation in its corporate capacity holds title; and

(11) Lands to which the high technology development corporation in its corporate capacity holds title[~~;~~ ~~and~~

~~(12) Lands which are set aside by the governor to the public land development corporation; lands leased to the public land development corporation by any department or agency of the State; or lands to which the public land development corporation holds title in its corporate capacity~~]."

SECTION 3. Section 171-64.7, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) This section applies to all lands or interest therein owned or under the control of state departments and agencies classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or any other manner, including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, including:

(1) Land set aside pursuant to law for the use of the United States;

(2) Land to which the United States relinquished the absolute fee and ownership under section 91 of the Organic Act prior to the admission of Hawaii as a state of the United States;

(3) Land to which the University of Hawaii holds title;

(4) Land to which the Hawaii housing finance and development corporation in its corporate capacity holds title;

(5) Land to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

(6) Land that is set aside by the governor to the Aloha Tower development corporation; or land to which the Aloha Tower development corporation holds title in its corporate capacity;

(7) Land that is set aside by the governor to the agribusiness development corporation; or land to which the agribusiness development corporation in its corporate capacity holds title; and

(8) Land to which the high technology development corporation in its corporate capacity holds title[~~; and~~

~~(9) Land that is set aside by the governor to the public land development corporation or land to which the public land development corporation holds title in its corporate capacity~~]."

SECTION 4. Section 173A-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) The board shall, in consultation with the senate president and the speaker of the house of representatives, require as a condition of the receipt of funds that state and county agencies receiving funds under this chapter provide a conservation easement under chapter 198, or an agricultural easement or deed restriction or covenant to the department of land and natural resources; the department of agriculture; the agribusiness development corporation; [~~the public land development corporation;~~] an appropriate land conservation organization; or a county, state, or federal natural resource conservation agency, that shall run with the land and be recorded with the land to ensure the long-term protection of land having value as a resource to the State and preserve the interests of the State. The board shall require as a condition of the receipt of funds that it be an owner of any such conservation easement."

SECTION 5. Section 173A-5, Hawaii Revised Statutes, is amended by amending subsection (i) to read as follows:

"(i) Based on applications from state agencies, counties, and nonprofit land conservation organizations, the department, in consultation with the senate president and speaker of the house of representatives, shall recommend to the board specific



parcels of land to be acquired, restricted with conservation easements, or preserved in similar fashion. The board shall review the selections and approve or reject the selections according to the availability of moneys in the fund. To be eligible for grants from the fund, state and county agencies and nonprofit land conservation organizations shall submit applications to the department that contain:

(1) Contact information for the project;

(2) A description of the project;

(3) The request for funding;

(4) Cost estimates for acquisition of the interest in the land;

(5) Location and characteristics of the land;

(6) The project's public benefits, including but not limited to where public access may be practicable or not practicable and why;

(7) Results of the applicant's consultation with the staff of the department, the department of agriculture, and the agribusiness development corporation[~~, and the public land development corporation~~] regarding the maximization of public benefits of the project, where practicable; and



(8) Other similar, related, or relevant information as determined by the department."

SECTION 6. Section 206E-4, Hawaii Revised Statutes, is amended to read as follows:

"§206E-4 **Powers; generally.** Except as otherwise limited by this chapter, the authority may:

(1) Sue and be sued;

(2) Have a seal and alter the same at pleasure;

(3) Make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this chapter;

(4) Make and alter bylaws for its organization and internal management;

(5) Make rules with respect to its projects, operations, properties, and facilities, which rules shall be in conformance with chapter 91;

(6) Through its executive director appoint officers, agents, and employees, prescribe their duties and qualifications, and fix their salaries, without regard to chapter 76;

(7) Prepare or cause to be prepared a community development plan for all designated community development districts;

(8) Acquire, reacquire, or contract to acquire or reacquire by grant or purchase real, personal, or mixed property or any interest therein; to own, hold, clear, improve, and rehabilitate, and to sell, assign, exchange, transfer, convey, lease, or otherwise dispose of or encumber the same;

(9) Acquire or reacquire by condemnation real, personal, or mixed property or any interest therein for public facilities, including but not limited to streets, sidewalks, parks, schools, and other public improvements;

(10) By itself, or in partnership with qualified persons, acquire, reacquire, construct, reconstruct, rehabilitate, improve, alter, or repair or provide for the construction, reconstruction, improvement, alteration, or repair of any project; own, hold, sell, assign, transfer, convey, exchange, lease, or otherwise dispose of or encumber any project, and in the case of the sale of any project, accept a purchase



money mortgage in connection therewith; and repurchase or otherwise acquire any project which the authority has theretofore sold or otherwise conveyed, transferred, or disposed of;

(11) Arrange or contract for the planning, replanning, opening, grading, or closing of streets, roads, roadways, alleys, or other places, or for the furnishing of facilities or for the acquisition of property or property rights or for the furnishing of property or services in connection with a project;

(12) Grant options to purchase any project or to renew any lease entered into by it in connection with any of its projects, on such terms and conditions as it deems advisable;

(13) Prepare or cause to be prepared plans, specifications, designs, and estimates of costs for the construction, reconstruction, rehabilitation, improvement, alteration, or repair of any project, and from time to time to modify such plans, specifications, designs, or estimates;

(14) Provide advisory, consultative, training, and educational services, technical assistance, and advice



to any person, partnership, or corporation, either public or private, to carry out the purposes of this chapter, and engage the services of consultants on a contractual basis for rendering professional and technical assistance and advice;

(15) Procure insurance against any loss in connection with its property and other assets and operations in such amounts and from such insurers as it deems desirable;

(16) Contract for and accept gifts or grants in any form from any public agency or from any other source;

(17) Do any and all things necessary to carry out its purposes and exercise the powers given and granted in this chapter; and

(18) Allow satisfaction of any affordable housing requirements imposed by the authority upon any proposed development project through the construction of reserved housing, as defined in section 206E-101, by a person on land located outside the geographic boundaries of the authority's jurisdiction; provided that the authority shall not permit any person to make cash payments in lieu of providing reserved housing, except to account for any fractional unit that results



after calculating the percentage requirement against residential floor space or total number of units developed. The substituted housing shall be located on the same island as the development project and shall be substantially equal in value to the required reserved housing units that were to be developed on site. The authority shall establish the following priority in the development of reserved housing:

(A) Within the community development district;

(B) Within areas immediately surrounding the community development district;

(C) Areas within the central urban core;

(D) In outlying areas within the same island as the development project.

The Hawaii community development authority shall adopt rules relating to the approval of reserved housing that are developed outside of a community development district. The rules shall include, but are not limited to, the establishment of guidelines to ensure compliance with the above priorities[~~; and~~

~~(19) Assist the public land development corporation established by section 171C-3 in identifying public~~

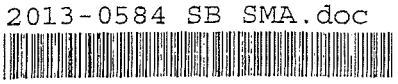
~~lands that may be suitable for development, carrying on marketing analysis to determine the best revenue-generating programs for the public lands identified, entering into public-private agreements to appropriately develop the public lands identified, and providing the leadership for the development, financing, improvement, or enhancement of the selected development opportunities; provided that no assistance shall be provided unless the authority authorizes the assistance~~]."

SECTION 7. Chapter 171C, Hawaii Revised Statutes, is repealed.

SECTION 8. (a) Any funds appropriated to the department of land and natural resources pursuant to Act 55, Session Laws of Hawaii 2011, that are unexpended and unencumbered as of the effective date of this Act shall be deposited into the land conservation fund established pursuant to section 173A-5, Hawaii Revised Statutes, on the effective date of this Act.

(b) Any proceeds generated and deposited into the stadium facilities special fund pursuant to Act 282, Session Laws of Hawaii 2012, that are unexpended and unencumbered as of the





effective date of this Act shall be deposited into the general fund on the effective date of this Act.

(c) Any proceeds generated and deposited into the school facilities special fund pursuant to Act 309, Session Laws of Hawaii 2012, that are unexpended and unencumbered as of the effective date of this Act shall be deposited into the general fund on the effective date of this Act.

(d) The planner and project-related development specialist hired for purposes of Act 55, Session Laws of Hawaii 2011, shall be transferred to the department of land and natural resources without loss of salary, seniority, prior service credit, vacation, sick leave, or other employee benefit or privilege as a consequence of this Act.

SECTION 9. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 10. This Act shall take effect upon its approval.

INTRODUCED BY: Clayton Hee

S.B. NO. 1

**Report Title:**
Public Land Development Corporation

**Description:**
Repeals chapter 171C, HRS, relating to the public land development corporation. Repeals requirement that Hawaii community development authority assist the public land development corporation in certain specified areas.

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

# PROCLAMATION

WHEREAS, under Section 10 of Article III of the Constitution of the State of Hawaii, the Governor may convene both houses of the Legislature or the Senate alone in special session; and

WHEREAS, the Governor believes that, in keeping with the United States Supreme Court's recent decision in United States v. Windsor, 133 S. Ct. 2675 (2013), the State of Hawaii should extend to same-sex couples the right to marry and receive all the same rights, benefits, protections, and responsibilities of marriage as opposite-sex couples receive under the laws of this State;

NOW, THEREFORE, I, NEIL ABERCROMBIE, Governor of the State of Hawaii, pursuant to the power vested in me by Section 10 of Article III of the Constitution of the State of Hawaii, do hereby convene both houses of the Twenty-seventh Legislature of the State of Hawaii in special session on the 28th day of October, 2013, at 10 o'clock a.m., primarily for the consideration of legislation to provide for marriage equality in the State of Hawaii.

DONE at the State Capitol, Honolulu, State of Hawaii, this 9th day of September, 2013.

Neil Abercrombie

NEIL ABERCROMBIE
Governor of Hawaii

APPROVED AS TO FORM:

David M. Louie
Attorney General

EXHIBIT B

NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

October 14, 2013

The Honorable Les Ihara, Jr.
Senator, Tenth District
The Twenty-Seventh Legislature
State of Hawaii
State Capitol, Room 220
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Senator Ihara:

Re: Constitutional Authority of the Hawaii State Legislature to Enact Legislation Recognizing Marriages Between Two Individuals of the Same Sex

This letter responds to your written request, dated September 25, 2013, in which you asked for an Attorney General opinion on the three questions presented below.

You informed us that your questions arise from arguments made by opponents of the marriage equality bill circulated by the Governor's Office on September 9, 2013 (the Proposed Bill). According to your request, you note that opponents to the Proposed Bill contend that it cannot be enacted without an amendment to the Hawaii Constitution that specifically authorizes the Legislature to pass the Proposed Bill. More specifically, you informed us that opponents to the Proposed Bill base their position on their conclusion that article I, section 23, of the Hawaii Constitution merely gives the Legislature the power to reserve marriage to opposite-sex couples and does not grant it power to enact a law recognizing the right of same-sex couples to marry.

## I. QUESTIONS PRESENTED

A. Whether the Legislature may enact legislation that would recognize marriages between two individuals of the same sex without the electorate or the Legislature amending article I, section 23, of the Hawaii Constitution;

B. Whether the Hawaii State Legislature has the authority, under the Hawaii Constitution, to pass the Proposed Bill; and

C. Whether the Proposed Bill is consistent with the federal and state constitutions, given the Legislature's authority as described in article I, section 23, and article III, section 1, of the Hawaii Constitution.

## II. SHORT ANSWER

The answer to all three questions is an unqualified yes. The authority to enact legislation recognizing marriages between two individuals of the same sex is vested in the Hawaii State Legislature. As detailed below, the plain language of article I, section 23, does not compel the Legislature to limit marriages to one man and one woman; it gives the Legislature the option to do so. No amendment to the Hawaii Constitution is necessary to give the Legislature the authority to enact the Proposed Bill, should the Legislature choose to pass it. And the subject matter of the Proposed Bill is consistent with the Legislature's authority "over all rightful subjects of legislation" as described in article III, section 1, of the Hawaii Constitution. Each of these points is discussed in more detail below.

## III. BACKGROUND

In 1991, three same-sex couples sued the State of Hawaii, complaining that the State's refusal to issue marriage licenses to same-sex couples violated the Hawaii Constitution. In 1993, the case reached the Hawaii Supreme Court. Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), reconsideration granted in part, 74 Haw. 645, 852 P.2d 225 (1993). A plurality of the Hawaii Supreme Court held that restricting marriages to opposite-sex couples discriminated on the basis of sex: "on its face and as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5 [of the Hawaii Constitution]." Baehr, 74 Haw. 530, 581, 852 P.2d 44, 67. Because discrimination on the basis of sex constitutes a suspect classification, the Hawaii Supreme Court determined that the trial court erred by applying a rational basis review of the constitutionality of the law. The Supreme Court remanded the case to the trial court for review based on a standard of strict scrutiny. Id.

On remand, the trial court ruled that adhering to the traditional definition of marriage did not meet strict scrutiny and violated the Hawaii Constitution. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996). Implementation of the trial court's ruling was stayed while an appeal of the ruling was pending.

In 1994, the Legislature amended the marriage licensing statute to clarify and confirm that marriage is limited to opposite-sex couples. Section 3 of act 217, Session Laws of Hawaii 1994, amended section 572-1, Hawaii Revised Statutes (HRS), so that its introductory language read (and still reads): "In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that . . . ." 1994 Haw. Sess. Laws Act 531 (emphasis added).

Act 217 was the first of several legislative actions taken in response to Baehr, culminating with the passage and ratification of an amendment to the Hawaii Constitution that empowers the Legislature to reserve marriage to opposite-sex couples. Article I, section 23, of the Hawaii Constitution was proposed by the Legislature as House Bill No. 117, 1997 Haw. Sess. Laws 1246, and approved by the electorate on November 3, 1998.[1] The marriage amendment succinctly provides: "The legislature shall have the power to reserve marriage to opposite-sex couples."

Shortly after article I, section 23, was ratified in November 1998, the Hawaii Supreme Court in Baehr directed the parties to provide additional briefing with respect to the impact of the marriage amendment on the case. A year later, the Supreme Court issued a four-page summary disposition order concluding that in light of the marriage amendment, the case was moot. Baehr v. Miike, No. 20371 (Haw. Dec. 9, 1999)(SDO). It reversed the trial court's decision and directed it to enter judgment for the State.

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[1] During the 1997 session of the Hawaii State Legislature and as a companion to House Bill No. 117, the Legislature established reciprocal beneficiary relationships in Hawaii to make certain rights available to couples who were legally prohibited from marrying one another. House Bill No. 118 was enacted as Act 383, 1997 Haw. Sess. Laws 1211 (codified in part at chapter 572C, HRS).

During the legal and legislative events occurring in Hawaii and with the possibility of marriages between same-sex couples being recognized in some states but not others, Congress in 1996 enacted the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996). The effects of DOMA were to confirm the individual states' rights to define marriage and refuse to recognize marriages from other states that define it differently, and to define marriage for federal purposes as between one man and one woman.

In 2011, the Legislature added to the HRS a new chapter, chapter 572B, to allow two individuals of the same sex or opposite sex to enter into a civil union, which is defined in section 572B-1 as "a union between two individuals." Individuals entering into a civil union are required to meet the same requirements as individuals entering into a marriage pursuant to chapter 572, HRS, except that individuals entering the civil union must be at least eighteen years of age pursuant to section 572B-2(3) (as opposed to fifteen years of age pursuant to section 572-1(2) to enter into a marriage). Pursuant to section 572B-9, all couples who enter into a civil union "shall have all of the same rights, benefits, protections, and responsibilities under law . . . as are granted to those who contract, obtain a license, and are solemnized pursuant to chapter 572 [marriage law]."

In June 2013, in United States v. Windsor, 133 S. Ct. 2675 (2013), the United States Supreme Court overturned section 3 of DOMA (codified at 1 U.S.C. § 7), holding that DOMA's definition of marriage was unconstitutional as a deprivation of the liberty of the person as protected by the Fifth Amendment of the U.S. Constitution. Since that decision was announced, several federal departments have determined that same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for purposes of federal benefits wherever they reside.[2]

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[2] See, e.g., Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (U.S. Internal Revenue Service ruling that same-sex couples, legally married in jurisdictions that recognize their marriage, will be treated as married for federal tax purposes); U.S. Department of Labor Technical Release 2013-04, at 1 (Sept. 18, 2013) (recognizing "marriages to include same-sex marriages that are legally recognized as marriages under any state law"); Memorandum for Secretaries of the Military Departments Under Secretary of

On September 9, 2013, the Honorable Neil Abercrombie, Governor of Hawaii, called a special session of the Legislature to consider the Proposed Bill. The Proposed Bill provides marriage equality to all couples by amending section 572-1, HRS, to change the reference to marriage "between a man and a woman" to read "between two individuals." Changes and additions to other relevant sections of the HRS are also proposed. If the Legislature chooses to enact the Proposed Bill, all couples in Hawaii will have the choice to enter into a marriage and obtain the benefits and responsibilities flowing from both state and federal law.

## IV. ANALYSIS

### A. Article I, Section 23, Allows But Does Not Require the Legislature to Limit Marriages to Opposite-Sex Couples

Article I, section 23, of the Hawaii Constitution provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." By its plain language, this provision does not require that marriages be limited to opposite-sex couples. Instead the section provides that the Legislature possesses the authority to limit marriages to opposite-sex couples by statute, should it choose to do so.[3]

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Defense for Personnel and Readiness, dated August 13, 2013 (extending benefits to same-sex spouses of military members).

[3] Unlike other states that have passed constitutional amendments expressly banning marriage between individuals of the same sex, Hawaii's electorate instead chose to give the Legislature the authority to make this determination. This conclusion is made even clearer by comparing article I, section 23, with the constitutional provisions that have been enacted in some other states. Some other states' constitutions clearly ban their legislatures from recognizing marriages between two individuals of the same sex. See, e.g., Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); Colo. Const. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); Kan. Const. art. XV, § 16 ("Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void."); Va. Const. art. I, §

In interpreting constitutional provisions, the Hawaii Supreme Court has expressly stated that if the words used are "clear and unambiguous" they "must be construed as written." Watland v. Lingle, 104 Haw. 128, 140, 85 P.3d 1079, 1091 (2004). "In this regard, the 'settled rule' is that '[i]n 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].'" Pray v. Judicial Selection Comm'n, 75 Haw. 333, 341, 862 P.2d 723, 727 (1993) (quoting Cobb v. State, 68 Haw. 564, 565, 722 P.2d 1032, 1033 (1986)) (some internal quotations and citations omitted, alterations in original). Article I, section 23, of the Hawaii Constitution is unambiguous. Here, the plain meaning of article I, section 23, allows but does not require the Legislature to limit marriages to one man and one woman.

The intent behind article I, section 23, was also unambiguous; the legislative history confirms this interpretation. See State v. Kahlbaun, 64 Haw. 197, 201-02, 638 P.2d 309, 314 (1981) (stating that if a constitutional provision is ambiguous, "extrinsic aids may be examined to determine the intent of the framers"). That the constitutional amendment was designed to maintain the Legislature's discretion is manifest from the Legislature's stated finding in section 1 of House Bill No. 117, which proposed the amendment:

> 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. This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.

1997 Haw. Sess. L. 1246-47 (emphasis added).

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15-A ("[O]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.").

Article I, section 23, therefore leaves it to the Legislature to choose whether to restrict marriage to opposite-sex couples. Under current Hawaii law, marriages under chapter 572, HRS, are limited to opposite-sex couples. The Proposed Bill, if the Legislature enacts it, will reflect a new choice: to recognize marriages between two individuals of the same sex in the same manner as marriages are presently recognized between two individuals of the opposite sex. Because it confirms that this choice remains with the Legislature, article I, section 23, is not a bar to the Legislature's consideration and enactment of the Proposed Bill. No amendment to the Hawaii Constitution is necessary for the Proposed Bill to be effective if enacted.

B. Recognizing Marriages Between Two Individuals of the Same Sex Is Not Inconsistent with the Hawaii Constitution

Under article III, section 1, of the Hawaii Constitution, the Hawaii State Legislature exercises the legislative power:

> 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. [Emphasis added.]

As explained above, article I, section 23, does not prevent the Legislature from considering or enacting the Proposed Bill. No other provisions of the Hawaii Constitution address this particular subject. Enacting the Proposed Bill is therefore "not inconsistent" with the Hawaii Constitution.

The grant of authority to the Legislature in article III, section 1, empowering it to address "all rightful subjects of legislation," is extremely broad. Under our federal system, state governments may enact any legislation that they determine is in the public interest, as long as the legislation is consistent with the federal and state constitutions. See 1 Ronald D. Rotunda et al., Treatise on Constitutional Law at 467 (4th ed. 2007) ("[S]tate governments . . . are not creatures of limited powers: they have a general 'police power'—the intrinsic power to protect the health, safety, welfare or morals of persons within their jurisdiction.").

The Legislature exercises this authority in myriad ways.[4] Most importantly for present purposes, defining the prerequisites and rights of marriage is an area of law traditionally reserved to the states. The United States Supreme Court has recognized that the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." Sosna v. Iowa, 419 U.S. 393, 404 (1975). The Supreme Court recently confirmed this authority, noting that the states have the authority to define who may enter into a marriage:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. . . . 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.

Windsor, 133 S. Ct. at 2691 (citations, internal quotation marks, and brackets omitted). Before Windsor, the federal government defined marriage as a "legal union between one man and one woman as husband and wife." DOMA § 3, 1 U.S.C. § 7. Windsor concerned the effect of this definition on marriages between two individuals of the same sex that were recognized by various states. The United States Supreme Court specifically noted that a state that chooses to recognize marriages between two individuals of the same sex is unquestionably acting within its authority to regulate the subject of domestic relations: "In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system[.]" Id. at 2691-92 (emphasis added; citation, brackets, and internal quotation marks omitted).

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[4] For example, Hawaii regulates various industries, see, e.g., HRS titles 15 and 27 (regulating public utilities, transportation planning, insurance companies, telemarketing, and product warranties); sets standards for behavior with civil sanctions and crimes, see, e.g., HRS titles 17 and 37 (traffic code and penal code); and describes standards for conservation of natural resources, see, e.g., HRS title 12 (public lands, aquatic resources, and other matters).

The Hawaii Constitution grants the necessary power to the Legislature to enact the Proposed Bill, and the United States Supreme Court has very recently confirmed that it is within the State of Hawaii's power to do so. The Legislature is fully empowered to consider and enact the Proposed Bill.

C. The Proposed Bill Is Consistent with Article I, Section 23, and Article III, Section 1, of the Hawaii Constitution, as well as the Federal Constitution

Article III, section 1, of the Hawaii Constitution grants the Legislature the power to enact legislation "not inconsistent with this constitution or the Constitution of the United States." As explained above, the Proposed Bill is consistent with article I, section 23, article III, section 1, and the rest of the Hawaii Constitution.

Enacting legislation to allow same-sex couples to marry is not inconsistent with the U.S. Constitution either. Under the federal system, generally a State government may choose by its own laws to recognize rights greater than those required by the U.S. Constitution. See, e.g., Mills v. Rogers, 457 U.S. 291, 300 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."). Passing the Proposed Bill, should the Legislature choose to do so, would therefore not be "inconsistent" with the U.S. Constitution. See Windsor, 133 S. Ct. at 2692. Consequently, the Legislature has authority under article III, section 1, of the Hawaii Constitution to consider and to possibly enact the Proposed Bill.

## V. CONCLUSION

In sum, we answer all three of the questions listed above in the affirmative. Article I, section 23, leaves the choice of recognizing marriages between two individuals of the same sex to the Legislature. No amendment to the Hawaii Constitution is necessary to enact the Proposed Bill, because consideration and passage of the Proposed Bill is clearly within the Legislature's authority as described in article III, section 1, of the Hawaii Constitution.

Please do not hesitate to contact me if you have additional questions.

Very truly yours,

David M. Louie
Attorney General

# SESSION LAWS

OF

# HAWAII

PASSED BY THE

NINETEENTH STATE LEGISLATURE

STATE OF HAWAII

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## REGULAR SESSION

## 1997

Convened on Wednesday, January 15, 1997
and
Adjourned sine die on Thursday, May 1, 1997

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Published under Authority of
Section 23G-13, Hawaii Revised Statutes
by the
Revisor of Statutes
State of Hawaii
Honolulu, Hawaii

# PROPOSED CONSTITUTIONAL AMENDMENTS

## S.B. NO. 209

A Bill for an Act Proposing an Amendment to Article VII, Section 3, of the Constitution, to Provide for the Appointment of a Tax Review Commission Every Ten Years.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The purpose of this Act is to propose an amendment to Article VII, section 3, of the Constitution of the State of Hawaii, to change the appointment of a tax review commission from every five years to every ten years starting in the year 2005, in order to give the legislature sufficient time to consider its recommendations.

SECTION 2. Article VII, section 3, of the Constitution of the State of Hawaii is amended to read as follows:

"TAX REVIEW COMMISSION

**Section 3.** There shall be a tax review commission, which shall be appointed as provided by law on or before July 1, [1980,] 2005, and every [five] ten years thereafter. The commission shall submit to the legislature an evaluation of the State's tax structure, recommend revenue and tax policy and then dissolve."

SECTION 3. The question to be printed on the ballot shall be as follows:

"Shall a tax review commission be appointed every ten years, instead of every five years, starting in the year 2005?"

SECTION 4. Constitutional material to be repealed is bracketed. New constitutional material is underscored.

SECTION 5. This Act shall take effect upon its approval,[1] upon compliance with Article XVII, section 3, of the Constitution of the State of Hawaii.

Note

1. So in original.

## H.B. NO. 117

A Bill for an Act Proposing a Constitutional Amendment Relating to Marriage.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The purpose of this Act is to propose an amendment to article I of the Constitution of the State of Hawaii, to clarify that the legislature has the power to reserve marriage to opposite-sex couples.

The legislature finds that the unique social institution of marriage involving the legal relationship of matrimony between a man and a woman is a protected relationship of fundamental and unequaled importance to the State, the nation, and society. 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. This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.

SECTION 2. Article I of the Constitution of the State of Hawaii is amended by adding a new section to be designated and to read as follows:

"MARRIAGE

Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples."

SECTION 3. The question to be printed on the ballot shall be as follows:

"Shall the Constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?"

SECTION 4. New constitutional material is underscored.[1]

SECTION 5. This amendment shall take effect upon compliance with article XVII, section 3, of the Constitution of the State of Hawaii.

Note

1. Edited pursuant to HRS §23G-16.5.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

| | |
|---|---|
| REPRESENTATIVE BOB MCDERMOTT, GARRET HASHIMOTO, WILLIAM E.K. KUMIA, DAVID LANGDON,<br><br>Plaintiffs,<br><br>vs.<br><br>GOVERNOR NEIL ABERCROMBIE, SENATOR DONNA MERCADO KIM, REPRESENATIVE JOSEPH SOUKI, SENATOR CLAYTON HEE, REPRESENTATIVE KARL RHOADS,<br><br>Defendants. | Civil No. 13-1-2899-10 KKS<br><br>DECLARATION OF SCOTT T. NAGO |

DECLARATION OF SCOTT T. NAGO

I, SCOTT T. NAGO, declare under penalty of law that the following is true and correct.

1. I am the Chief Election Officer for the State of Hawaii and the administrator of the Office of Elections;

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein;

3. Attached hereto as Exhibit E is a true and correct copy of the two amendments to the Hawaii State Constitution proposed by the Nineteenth Hawaii State Legislature that appeared on the 1998 General Election Ballot; and

4. Attached hereto as Exhibit F is a true and correct copy of the factsheet entitled "1998 Proposed Amendments to the Hawaii State Constitution to Appear on the General Election Ballot" that was prepared by the Legislative Reference Bureau and disseminated by the Office of Elections, pursuant to HRS § 11-2.

Dated: Pearl City, Hawaii, November 1, 2013.

SCOTT T. NAGO

# OFFICIAL BALLOT
## GENERAL ELECTION
## TUESDAY, NOVEMBER 3, 1998
## GENERAL ELECTION AND SPECIAL ELECTION(S) VOTING INSTRUCTIONS

1. Vote on all ballots.
   NOTE: If you are qualified and registered to vote in the Office of Hawaiian Affairs (OHA) Special Election and do not receive an OHA ballot, please remind the precinct official to issue you an OHA ballot.
2. Vote for not more than the number of candidates/choices allowed in each contest.
   NOTE: If you vote for more candidates/choices than allowed in a contest, your vote(s) for that contest will not be counted.
3. Vote by completely blackening the oval (●) to the right of your choice.
4. Direct any questions you may have to a precinct official.

## 1998 OFFICIAL GENERAL ELECTION BALLOT

STATE OF HAWAII | COUNTY OF HAWAII | NOVEMBER 3, 1998

### AMENDMENTS TO THE STATE CONSTITUTION PROPOSED BY THE NINETEENTH LEGISLATURE

The full text of the constitutional amendments covered by this ballot is available for inspection at your polling place. Ask an Election Official for it, if you wish to see it.

**1** Shall a tax review commission be appointed every ten years, instead of every five years, starting in the year 2005?

| | |
|---|---|
| YES | ⬭ |
| NO | ⬭ |

**2** Shall the Constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?

| | |
|---|---|
| YES | ⬭ |
| NO | ⬭ |

### PROPOSED CONSTITUTIONAL CONVENTION

The full text of the constitutional convention question covered by this ballot is available for inspection at your polling place. Ask an Election Official for it, if you wish to see it.

**1** Shall there be a convention to propose a revision of or amendments to the Constitution?

| | |
|---|---|
| YES | ⬭ |
| NO | ⬭ |

### PROPOSED ORDINANCE BY INITIATIVE COUNTY OF HAWAII

The full text of the charter amendments covered by this ballot is available for inspection at your polling place. Ask an Election Official for it, if you wish to see it.

**1** Should Article 8, Chapter 14 of the Hawaii County Code be amended to prohibit the storage or transportation of radioactive material used in commercial irradiation facilities and commercial devices, processes or facilities.

| | |
|---|---|
| FOR | ⬭ |
| AGAINST | ⬭ |

### PROPOSED AMENDMENTS TO THE HAWAII COUNTY CHARTER

The full text of the charter amendments covered by this ballot is available for inspection at your polling place. Ask an Election Official for it, if you wish to see it.

**2** Should a Data Systems Department be established as a separate agency in the Executive Branch to operate the County's data processing systems and coordinate and oversee operations of all county departmental data processing systems, except for those systems maintained by the Department of Water Supply?

IF YOU AGREE WITH COUNTY PROPOSAL 2, VOTE "YES"

IF YOU DISAGREE WITH COUNTY PROPOSAL 2, VOTE "NO"

| | |
|---|---|
| YES | ⬭ |
| NO | ⬭ |

**3** Should the terms of Hawaii County Council members be amended from two years to four years beginning in the year 2000 without altering the present eight year term limit?

IF YOU AGREE WITH COUNTY PROPOSAL 3, VOTE "YES"

IF YOU DISAGREE WITH COUNTY PROPOSAL 3, VOTE "NO"

| | |
|---|---|
| YES | ⬭ |
| NO | ⬭ |

**4** Should the County Charter be amended to:

a. Require that the Planning Commission membership be constituted of one member from each of the nine council districts, and each member be a legal resident and registered voter of the council district the member represents?

b. Require each member of the Board of Appeals be a legal resident and a registered voter of the County?

c. Designate the Board of Appeals as the only County body to hear appeals of final decisions of the Planning Director and the Chief Engineer and no longer have the Board of Appeals hear appeals of decisions of the Planning Commission?

d. Clarify and simplify the language of the Charter relating to planning to make it consistent with other sections of the Charter?

IF YOU AGREE WITH COUNTY PROPOSAL 4, VOTE "YES"

IF YOU DISAGREE WITH COUNTY PROPOSAL 4, VOTE "NO"

| | |
|---|---|
| YES | ⬭ |
| NO | ⬭ |

VOTE BOTH SIDES (OVER)

**OFFICE OF ELECTIONS**
**State of Hawaii**

**DWAYNE D. YOSHINA**
**Chief Election Officer**

FACTSHEET

## 1998 PROPOSED AMENDMENTS TO THE HAWAII STATE CONSTITUTION TO APPEAR ON THE GENERAL ELECTION BALLOT

| Constitutional Question | Background | Explanation of Proposed Amendment | Meaning of a "Yes" Vote | Meaning of a "No" Vote | Pros and Cons |
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| QUESTION #1: APPOINTMENT OF A TAX REVIEW COMMISSION EVERY TEN YEARS | | | | | |
| "Shall a tax review commission be appointed every ten years, instead of every five years, starting in the year 2005?" | Article VII, section 3, of the state constitution requires the appointment of a tax review commission every five years to evaluate the State's tax structure and to recommend revenue and tax policy to the Legislature. Commissioners are appointed by the Governor and confirmed by the Senate. Each commission is discharged after it has made its recommendations. Article VII, section 3, was proposed by the 1978 Constitutional Convention that found at that time that a systematic review of the tax structure had not been made for two decades. The convention also found that a periodic and independent review of the State's tax system would be helpful to the executive and legislative branches, as well as provide the public with a framework to assess executive and legislative actions on taxation and revenue policy.<br><br>In order for a proposed amendment to the State Constitution to be ratified, it must be approved by a majority of all votes tallied upon the question. This majority must constitute at least fifty percent of the total votes, including blank votes, cast at the election. | The proposed amendment would change the appointment of a tax review commission from every five years to every ten years. The problem expressed by the Legislature has been the lack of time to adequately assess and implement, if appropriate, the recommendations of the commission. Under the proposed amendment, if the tax review commission is appointed every ten years, then the Legislature will have more time between appointments to consider tax review commission recommendations. | A "Yes" vote means the tax review commission would be appointed every ten years instead of every five years. | A "No" vote means the tax review commission would continue to be appointed every five years. | *Pros:*<br><br>If the amendment is adopted and the tax review commission is appointed every ten years, then the Legislature will have more time to consider the recommendations of the tax review commission.<br><br>The amendment will eliminate redundant commission recommendations proposed by prior tax review commissions that are not yet considered by the Legislature.<br><br>The amendment will reduce costs since the tax review commission will meet less often.<br><br>*Cons:*<br><br>If the amendment is not adopted, then the Legislature will continue to have the benefit of recommendations from the tax review commission every five years, and need not wait ten years for their recommendations. |



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| QUESTION #2: LEGISLATIVE POWER TO RESERVE MARRIAGE TO OPPOSITE-SEX COUPLES | | | | | |
| "Shall the Constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?" | In May of 1991 three couples of the same sex who were denied marriage licenses because they were the same sex sued the State claiming violations of right to privacy, equal protection of the laws and due process of law under sections 5 and 6 of Article 1, State of Hawaii Constitution. Although the case was originally dismissed before a trial was held, upon appeal in 1993, the Supreme Court of Hawaii issued an opinion (*Baehr v. Lewin*, 74 Haw. 530 (1993)), stating that the Hawaii statute (section 572-1) requiring marriage licenses to be issued only to couples of the opposite sex was discriminatory and the case should go to trial. Further, the court required the State to show a "compelling state interest" in denying these same-sex couples a marriage license.<br><br>The trial was put on hold for two years while the Legislature set up a Commission on Sexual Orientation on the Law in an attempt to resolve these issues out of court. In December 1995, The Report of the Commission found that marriage bestowed both responsibilities and benefits and recommended that marriage licenses should be issued to couples, regardless of their gender, but no legislation was passed during the 1996 Regular Session. The trial was finally held in September 1996. In a judgment for the plaintiff, the trial court struck down the marriage statute as being a violation of the State Constitution, essentially making it legal for people of the same sex to be married in the State. The State appealed the trial court's decision and the Supreme Court review is still pending. | 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. | 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, overruling the recent Supreme Court decision regarding same-sex couples. | A "no" vote will make no change to the Constitution of the State of Hawaii, and allow the court to resolve the lawsuit that has been brought against the State. | *Pros:*<br><br>People who want the proposed amendment to pass believe the Legislature, and not the Supreme Court, should decide who is eligible to marry in the State. If the proposed amendment is adopted, then it will be clear that the Legislature can legally reserve marriage for opposite sex couples. People in support of the proposed amendment believe passing this amendment is an important step to prohibit same-sex marriage in the State.<br><br>*Cons:*<br><br>People who oppose the proposed amendment believe the amendment will start to erode civil rights for all minorities not just same-sex couples. People who oppose the proposed amendment believe that adding the proposed amendment to the Constitution has the potential to take away rights and benefits won in court by same-sex couples and is a bad precedent for a document that stands to protect individuals. They say the proposed amendment limits the ability of the court to review certain marriage issues and |



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| | During the 1997 Regular Session, the Legislature addressed the same-sex marriage issue with two Acts. One established a Reciprocal Beneficiaries Act which gave limited rights and benefits to people who are ineligible to be married, including same-sex couples as well as other couples such as a mother and son, or a daughter and father. The other Act is the subject of this proposed Constitutional amendment.<br><br>In order for a proposed amendment to the State Constitution to be ratified, it must be approved by a majority of all votes tallied upon the question. This majority must constitute at least fifty percent of the total votes, including blank votes, cast at the election. | | | | therefore compromises the Judiciary's independence and dilutes the Bill of Rights for everyone. |

VS - Revised 10/14/98



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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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| REPRESENTATIVE BOB McDERMOTT,<br><br>Plaintiff,<br><br>vs.<br><br>GOVERNOR NEIL ABERCROMBIE,<br>SENATOR DONNA MERCADO KIM,<br>REPRESENTATIVE JOSEPH SOUKI,<br>SENATOR CLAYTON HEE,<br>REPRESENTATIVE KARL RHOADS,<br><br>Defendants. | Civil No. 13-1-2899-10 KKS<br><br>CERTIFICATE OF SERVICE |

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 5, 2013, a copy of the foregoing document was duly served upon the following party listed below via Hand Delivery.

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DATED: Honolulu, Hawaii, November 5, 2013.

STATE OF HAWAII

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