

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
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A. MARPLE
CLERK

) The Honorable Karl K. Sakamoto

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR
FIRST AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER**

COME NOW Plaintiffs **REPRESENTATIVE BOB McDERMOTT**, in his capacity as a member of the State of Hawaii of Representatives and not in his individual capacity, **GARRET HASHIMOTO, WILLIAM E.K. KUMIA** and **DAVID LANGDON** (collectively the "Plaintiffs"), by and through their attorneys, the law firms of Robert K. Matsumoto and Dwyer Schraff Meyer & Green, and hereby submit their Reply Memorandum In Support of Their Motion for Temporary Restraining Order.

I. INTRODUCTION.

At the outset of this Reply Memorandum it is important to recognize that Defendants apparently believe the Plaintiffs have filed this action to prevent the Hawaii State Legislature from considering a legislative bill. Even a cursory review of the First Amended Complaint would show that such a belief is categorically wrong; although such a goal would have been proper. *See, Muneer Awad v. Paul Ziriox (Agency Head, Oklahoma State Board of Elections)*, 670 F.3d 1111 (10th Cir. 2012).

Given the arguments of the Defendants, it is also appropriate to note that the Hawaii Legislature has formally made findings that the people of Hawaii have chosen to

Preserve the tradition of marriage as a unique social institution
based upon the committed union of one man to one woman.
Jackson v. Abercrombie, 884 F.Supp.2d 1065, 1080 (D.Hawaii
2012)

The *Jackson* court went on to determine that in light of the Constitutional Amendment in 1998 (Article I, Section 23), that Section 572-1, Hawaii Revised Statutes, as amended ("HRS"), must be given full force and effect. *Id.*, at 1080.

In any event, we are not involved with a civil rights issue here, because every Hawaii citizen has an equal right to marry; but simply put, a citizen cannot marry someone of the same-sex any more than that citizen can marry more than one person of the opposite-sex. To be clear, the Plaintiffs recognize that certain activists have argued that same-sex couples have the identical “love and commitment” to each other as heterosexual couples, and thus should therefore be treated equally and receive equal benefits. That argument is fatally flawed. The fact is that society has provided certain economic benefits, status, and other incentives to heterosexual marriages, because heterosexual marriages have encouraged the stability of and have provided benefits to our society for the purpose of birthing, and the support and the raising of children, who will become the next generation of citizens, **NOT** because that heterosexual couple maintains a “love and commitment” to each other.

That is to say, even though “love and commitment” are fundamental to a strong heterosexual marriage, “love and commitment” have NOT been the basis society has provided incentives and a special status, as a matter of public policy, to traditional heterosexual marriages. Rather, the basis for those incentives and status is the long recognized irreplaceable contributions that heterosexual marriages have made to our society, social order, and personal health and welfare. Society has recognized that only a heterosexual marriage can provide the means and resources to birth and raise children to become responsible citizens.

Finally, in determining the applicability of a Temporary Restraining Order, Hawaii courts apply a “sliding scale” analysis. If the balance harm or hardships that will be suffered by the Plaintiffs tip decidedly to the Plaintiffs, the Plaintiffs are not required to show as robust a likelihood of success on the merits as Plaintiffs would otherwise be required to show. *Arakaki v. Cayetano*, 198 F.Supp.2d 1165 (D.Hawaii 2002); *Jou v. Chang*, 350 F.Supp.2d (D.Hawaii 2004). As will be explained below, the issuance of a single marriage license to a same-sex couple will

cause immediate and irreparable damage that will be virtually impossible to correct; while there will be little or no damage to the Defendants if Defendants require same-sex couples to wait a short period until there is a full hearing on this matter.

II. ARGUMENT.

A. STANDING.

The complexities of standing and ripeness standards are considered to be barriers to justice, and when a court considers removing those barriers, the emphasis is placed on the needs of justice. *E. Diamond Head Ass'n v. Zoning Bd. of Appeals*, 52 Haw. 518 (1971). More specifically, those justiciability standards are simply not applicable in declaratory judgment actions involving matters of great importance. *Brownster v. Yoshina*, 84 Haw. 179 (1997). Thus, those standards are not applicable and are not barriers in this case.

However, in spite of their inapplicability they will be addressed below, since Defendants have raised them. The Defendants' Opposition Memorandum argues that none of the Plaintiffs have the requisite standing, and that the issue is not ripe for adjudication. That is simply not the case. (See the Declaration and Supplemental Declarations of Plaintiffs submitted herein.) In a typical civil lawsuit there is a generic three-prong test that Courts consider in determining whether a plaintiff has the requisite interest to invoke a court's jurisdiction. Defendants' Opposition Memorandum (at page 10) has correctly described that three-prong test, which is applicable in those generic cases. However, that analysis is neither adequate nor appropriate, and it is not a barrier here.

As pointed out in Plaintiffs' First Amended Motion for Temporary Restraining Order, and as evidenced by the continuing and on-going Legislative hearings, because this matter is one of very significant public importance. Thus, the standing of these Plaintiffs should be viewed from the same perspective as standing in cases involving matters that raise substantial

public interest such as environmental well-being concerns or native Hawaiian rights. See, Life of the Land v. Land Use Commission, 63 Haw. 166 (1981). In fact, the Hawaii Supreme Court has

... often stated, standing barriers should not bar cases of public interest under our jurisdiction. More specifically “federal justiciability standards are inapplicable in state court declaratory judgment actions involving matters of great public importance. *Bush v. Watson*, 81 Haw. 474 at 479 (1996), quoting *Aged Hawaiians v. Hawaiian Homes Commission*, 78 Haw. 192 (1995).

The *Bush* case went on to establish that the “touchstone” of our law’s “Standing” requirement in cases involving significant public interest is the “needs of justice”. *Bush*, supra.

In Plaintiff McDermott’s situation, his Declaration indicates that he is far more than an individual legislator who is challenging the constitutionality of a law as was argued by Defendants. Plaintiff McDermott states that if the current Legislators interpret Article I, Section 23 as allowing them to proceed with the Marriage Equality Bill, then the Legislature must have convinced Hawaii citizens to vote for the Constitutional Amendment in November 1998 by outright and gross misrepresentations.

Plaintiff McDermott’s Declaration indicates that during the 1997 Session, he understood that the Legislature had chosen to give the people of Hawaii the right to decide if the existing Hawaii law (Section 572-1, HRS), (which effectively defined marriage in Hawaii as being a contract between a man and a woman), should be validated by an Amendment to the Hawaii Constitution.

Plaintiff McDermott’s understanding was well founded, because the “Notice of Hearing” of January 21, 1997 for H. B. No. 117 stated that the “AGENDA” item (being considered) “Proposes a constitutional amendment to provide that the laws which limit marriage to one man and one woman do not violate the Hawaii State Constitution”. (See, attached Exhibit A.) Further, the legislative Conference Committee Reports state that the purpose of

H. B. No. 117 was to provide the people of Hawaii with the opportunity to amend the Hawaii Constitution so that the ruling in *Baer v. Lewin* would be mooted, and that in Hawaii Section 572-1 (which reserved marriage to couples of the opposite sex) would be validated. (See, attached Exhibit B.)

Plaintiff McDermott's Declaration did not stop there, because he stated that the State's formal "Ballot Information Flyer" (See, attached Exhibit C), which was sent by the State of Hawaii to all of Hawaii's voting citizens (and published in the newspaper), expressly explained that the proposed Amendment would give the Legislature only the power to reserve marriage to opposite-sex couples, a task the Legislature had already performed; thus validating the Legislature's prior action.

That "Ballot Information Flyer" should be considered in the Court's determination, because it not only explained to all Hawaii voters that the *Baer* litigation had been filed by same-sex couples to invalidate Section 572-1, HRS, it also went on to effectively advise the people of Hawaii that a "Yes" vote would end that litigation, and that Section 572-1, HRS, which defined marriages in Hawaii as being between a man and a woman would be valid. In any event, based on the statements made in the Legislative documents and the Ballot Information Flyer circulated by the State to the Hawaii voting public, Plaintiff McDermott gave dozens of speeches explaining the proposed Amendment, and advised the public that a "Yes" vote would allow the Constitution to be amended, so that the prior law (Section 572-1, HRS) enacted by the Legislature (that reserved marriage to heterosexual couples only) would be Constitutionally established and would be valid. Thus, unless Declaratory and Temporary Injunctive Relief is granted to maintain the *status quo* pending a full hearing, he will suffer irreparable damages to his reputation and to his electability as a legislator, which is his livelihood, because his actions

and speeches prior to the 1998 vote will have been and will be deemed by the electorate to be misleading and untruthful.

The standing of Plaintiffs Hashimoto, Kumia, and Langdon, and their concrete injuries are set forth in their Declarations; and clearly they will be personally and adversely affected and damaged. The fact is, they are much more than simply concerned citizens who object on policy grounds. Further, their names ought not be stricken from this case, because the operative Complaint is the First Amended Complaint that was filed herein on November 1, 2013. As noted above, while the Standing issue or barrier is not applicable in this case, the Standing of the Plaintiffs should be viewed from the perspective that this case involves a great public interest and a very significant cultural and societal impact. Thus, the “needs of justice” must be the “touchstone”, not complex barriers to justice.

B. RIPENESS.

It has been noted above that the complex standard or barrier of ripeness is not applicable in this action. However, this issue is ripe, it is suitable for judicial resolution, and withholding review by the Court will cause Plaintiffs immediate and irreparable damage. See, Abbot Labs v. Gardner, 387 U.S. 136 (1967), and Sierra Club v. Yuetter, 911 F.2d 1405 (10th Cir. 1990).

Those damages will be irreparable, because if a single marriage license is issued to a same-sex couple, that ministerial act will immediately trigger due process and equal protection arguments in the event the State ever sought to take the alleged vested “rights” away or to deny other same-sex couples marriage licenses. Conversely, withholding marriage licenses until a full hearing on the merits will not result in any similar damage. See, Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal., 2010.)

The controversy before this Court is sufficiently concrete to warrant the intervention by the Plaintiffs, because they will suffer direct and immediate hardships that entail more than just a possible financial loss. See, Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii, 121 Hawaii 324 (2009). Unfortunately, this controversy has ripened by the very nature and substance of the on-going proceedings that started with:

- (1) The Governor initially called a five (5) day Special Session, with the clear intention that the Bill would pass quietly and swiftly;
- (2) The Senate cut-off testimony, and ignored the thousands of Hawaii citizens who wished to testify;
- (3) The House limited the testimony of each Hawaii citizen to only two (2) minutes; and
- (4) Then scheduled a second reading of the Bill for 6:00 p.m. on November 5, 2013, even though it had not been passed out of Committee.

The fact is, the Governor, and apparently the majority of the legislators (in spite of overwhelming public opposition), want to pass this Bill quickly, and are in a position to waive the Rules of the Senate and the House of Representatives to accomplish that objective. Thus, this case is ripe.

C. SUCCESS ON THE MERITS.

Defendants' argument regarding the likelihood of Plaintiffs' success on the merits suggests that the Defendants have completely misunderstood this case, and they are now mischaracterizing Plaintiffs' First Amended Complaint (the "Complaint"). Paragraph 24 of the Complaint provides that it is being brought to obtain a Declaratory Judgment under Chapter 632, HRS, Declaratory Judgments. Simply put, Plaintiffs are expressly seeking a declaration by this

Court that the Amendment of the Constitution, that was voted on and overwhelmingly approved by the people of Hawaii in 1998, was understood and intended by the people to Constitutionally validate the prior action of the Hawaii Legislature that reserved marriage in Hawaii to opposite-sex couples only; and that the people neither intended to nor gave the Legislature any other power.

Thus, the focus of this Declaratory Relief Action must be directed to Article I, Section 23 of the Hawaii Constitution and Section 572-1, HRS; and NOT on the constitutionality of the "Marriage Equality Bill" that is currently being considered by the Special Session of the Hawaii State Legislature. Consequently, Defendants' arguments that Plaintiffs are attempting to interfere with the legislative process is incorrect; thus their arguments with respect to "Success on the Merits" are inapposite and irrelevant.

III. CONCLUSION.

Because the damages to Plaintiffs will be so immediate and irreparable if a Temporary Injunction does not issue, and the Defendants will have little or no damage, this Court should grant the injunctive relief sought pending a full hearing on this matter, because it involves substantial public interest and it goes to the very heart of the cultural and societal mores of the vast majority of Hawaii's citizens.

Dated: Honolulu, Hawaii, November 6, 2013



ROBERT K. MATSUMOTO

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REPRESENTATIVE BOB McDERMOTT,

GARRET HASHIMOTO, WILLIAM E.K.

KUMIA, DAVID LANGDON

1/21/97

HOUSE OF REPRESENTATIVES
THE NINETEENTH LEGISLATURE
REGULAR SESSION OF 1997

COMMITTEE ON JUDICIARY
Rep. Terrance W. H. Tom, Chair
Rep. Brian Yamane, Vice Chair

Rep. Romy Cachola
Rep. Robert Herkes
Rep. Merwyn Jones
Rep. Ron Menor
Rep. David Pendleton

Rep. Ed Case
Rep. Ken Hiraki
Rep. Marilyn Lee
Rep. Terry Yoshinaga
Rep. Cynthia Thielen
Rep. Paul Whalen

NOTICE OF HEARING

DATE: Tuesday, January 21, 1997

TIME: 2:00 p.m. - completion

PLACE: Auditorium, State Capitol

AGENDA

✓ H.B. No. 117

PROPOSING A CONSTITUTIONAL AMENDMENT RELATING TO MARRIAGE.

Proposes a constitutional amendment to provide that laws which limit marriage to one man and one woman do not violate the Hawaii State Constitution.

✓ H.B. No. 118

RELATING TO UNMARRIED COUPLES.

Establishes the status of reciprocal beneficiaries for people who are ineligible for marriage under chapter 572. Extends certain benefits to reciprocal beneficiaries.

DECISION MAKING TO FOLLOW

Because of time constraints, both bills will be considered at the same time. Testifiers should combine their comments on the bills in a single written testimony. Each testifier will be called on once and if the testifier wishes to comment on both bills he should do so at that time. If during the course of the hearing, it appears that there will not be sufficient time to allow everyone to be heard, the chairperson reserves the right to limit the remaining testifiers to 4 minutes.

PERSONS WISHING TO TESTIFY ARE REQUESTED TO SUBMIT 3 COPIES OF THEIR TESTIMONY 24 HOURS PRIOR TO THE HEARING TO: (1) THE COMMITTEE CHAIR'S OFFICE IN ROOM 302, STATE CAPITOL; OR (2) THE CAPITOL BASEMENT PARKING LOT. TESTIMONY MAY BE FAXED TO THE HOUSE SGT.-AT-ARMS OFFICE AT: 586-6501 (OAHU) OR 1-800-535-3859 (NEIGHBOR ISLANDS). WHEN FAXING, PLEASE INDICATE TO WHOM THE TESTIMONY IS BEING SUBMITTED, THE DATE AND TIME OF THE HEARING, AND THE REQUIRED NO. OF COPIES THAT IS NEEDED FOR SUBMITTAL. LATE TESTIMONY WILL BE TAKEN AND PERSONS MAY SIGN-UP TO TESTIFY UP UNTIL 2:30 P.M. ON THE DAY OF THE HEARING. THOSE PERSONS WHO SUBMIT TESTIMONY 24 HOURS PRIOR TO THE HEARING WILL AUTOMATICALLY BE PLACED ON THE LIST OF TESTIFIERS. ALL OTHERS MUST SIGN UP TO TESTIFY BEFORE THE 2:30 P.M.

EXHIBIT A

DEADLINE. IN THE INTEREST OF FAIRNESS TO ALL TESTIFIERS NO ONE WILL BE ALLOWED TO TESTIFY UNLESS THEIR NAME APPEARS ON THE TESTIFIERS LIST BY THE 2:30 P.M. DEADLINE. THE LIST OF TESTIFIERS WILL BE POSTED AT THE HEARING ROOM PRIOR TO THE HEARING. IT IS THE RESPONSIBILITY OF EACH TESTIFIER TO CHECK THE LIST PRIOR TO 2:30 P.M. TO ENSURE THAT THEIR NAME IS ON THE LIST.

IT IS ALSO REQUESTED THAT THE COPIES BE ON ONE SIDE OF AN 8-1/2" X 11" SHEET. FOR FURTHER INFORMATION, PLEASE CALL THE JUDICIARY COMMITTEE CLERK AT 586-6490.

IF YOU REQUIRE SPECIAL ASSISTANCE OR AUXILIARY AIDS AND/OR SERVICES TO PARTICIPATE IN THE PUBLIC HEARING PROCESS OF THE STATE HOUSE (I.E., SIGN LANGUAGE INTERPRETER, WHEELCHAIR ACCESSIBILITY, OR PARKING DESIGNATED FOR THE DISABLED), PLEASE CONTACT THE COMMITTEE CLERK 24 HOURS PRIOR TO THE HEARING SO ARRANGEMENTS CAN BE MADE.



**Rep. Terrance W.H. Tom
Chair**

CONFERENCE COMMITTEE REPORTS

Conf. Com. Rep. 1 on H.B. No. 117

The purpose of the bill is to provide the people of Hawaii with the opportunity to amend the Hawaii State Constitution to expressly state that the Legislature has the power to constitutionally reserve marriage to couples of the opposite sex, thereby addressing the ruling in Beehr v. Lewin on that issue.

Your Committee has amended both the purpose clause of the bill and the language of the proposed amendment to more clearly fulfill these purposes and intentions.

Your Committee on Conference is in accord with the intent and purpose of H.B. No. 117, SD 1, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. No. 117, SD 1, CD 1.

Representatives Tom, Cachola, Herkes, Yamane and Whalen,
Managers on the part of the House.

Sensors Chumbley, Matsunaga, McCartney and Metcalf,
Managers on the part of the Senate.

Conf. Com. Rep. 2 on H.B. No. 118

The purpose of this bill is to establish the status of reciprocal beneficiaries and provide certain state governmental benefits to those with such status.

The bill represents a commitment to the provision of substantially similar government rights to those couples who are barred by law from marriage. Your Committee agrees that, while the traditional concept of marriage should be reserved as per current law, permanent commitments which bear the same burdens and share the same aspirations as legally married couples should, as a matter of fundamental fairness, be afforded the economic benefits provided by the State of Hawaii to married couples.

Among the benefits extended to reciprocal beneficiaries which are substantially equivalent to those extended to spouses are:

- (1) Survivorship rights including inheritance, workers compensation survivorship benefits, state employees retirement beneficiary benefits;
- (2) Health related benefits including hospital visitation, private and public employee prepaid medical insurance benefits, auto insurance coverage, mental health commitment approvals and notifications, family and funeral leave;
- (3) Benefits and obligations relating to jointly held property: tenancy in the entirety, disaster relief loans, and public lands leases;
- (4) Legal standing relating to wrongful death, victims rights, and domestic violence family status; and
- (5) Miscellaneous benefits such as University of Hawaii facilities use, anatomical gifts, and government vehicle emergency use.

Upon further consideration and agreement, this measure was amended by:

- (1) Deleting section 425-125, Hawaii Revised Statutes, which relates to partnership property;
- (2) Inserting language which explicitly prohibits other than limited interpretations;
- (3) Providing for a sunset of state and county prepaid health insurance provisions (June 30, 1999);
- (4) Requiring a closed claim study by the Auditor two years after the effective date of the Act;
- (5) Deleting those provisions relating to personal income tax;
- (6) Deleting the durational residency requirement;
- (7) Clarifying that the marriage of a reciprocal beneficiary terminates reciprocal beneficiary rights;
- (8) Changing the effective date to July 1, 1997; and
- (9) Making technical, nonsubstantive amendments.

Your Committee on Conference is in accord with the intent and purpose of H.B. No. 118, HD 1, SD 1, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. No. 118, HD 1, SD 1, CD 1.

Representatives Tom, Cachola, Herkes, Yamane and Thielen,
Managers on the part of the House.

EXHIBIT B

STANDING COMMITTEE REPORTS

SCRep. 1 Judiciary on H.B. No. 117

The purpose of this bill is to propose an amendment to Article I, section 5 of the Constitution of the State of Hawaii to clarify that statutes, regulations, laws, rules, orders, decrees, and legal doctrines that define or regulate marriage, the parties to marriage, or the benefits of marriage shall not be deemed in violation of that section or any other section of the Hawaii State Constitution by virtue of a limitation of the marriage relationship to the union of only one man and one woman.

Testimony in support of the measure was received by your Committee from representatives of the Hawaii Catholic Conference, Hawaii's Future Today and numerous other organizations and private citizens.

Testimony in opposition to the measure was received by your Committee from representatives of the Hawai'i Civil Rights Commission, the Gies Foundation and numerous other organizations and private citizens.

Your Committee finds that in 1994 this Legislature adopted Act 217 relating to marriage in order to firmly state the Legislature's view that marriage in the State of Hawaii is reserved exclusively for the lawful union of one man and one woman.

Act 217 was necessary because the Hawaii Supreme Court in *Baehr v. Miike* incorrectly interpreted existing state law, both statutory and constitutional, when it held that Hawaii's marriage laws discriminated on the basis of sex against same-sex couples.

Since that time the judicial branch of government has continued to assert an interpretation of our State Constitution which is both unprecedented in judicial history and clearly contradictory to the intent of the framers of our Constitution.

Your Committee finds that no serious claim can be made that the voters of this state or the authors of our Hawaii Constitution intended that the prohibition of sex discrimination in our Constitution was a mandate to the State to issue marriage licenses to couples of the same sex.

Your Committee finds that when an interpretation of the Constitution of the State of Hawaii does violence to the will of the voters who adopted it, it is necessary and proper to submit the matter to the voters for resolution.

The citizens of the State of Hawaii are the ultimate constitutional authority. The Constitution is an expression of their will, not the will of any branch of government.

Your Committee finds that the issues of whether or not to issue marriage licenses to same sex couples and whether or not to extend the benefits and obligations which have been reserved to married couples to couples of the same sex are properly the province of the legislature, and that this proposed amendment to our Constitution will, if ratified, confirm that these policy issues remain with the Legislature and not the Courts.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 117 and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Signed by all members of the Committee.
(Representative Case voted no.)

SCRep. 2 Judiciary on H.B. 116

The purpose of this bill is to create a structure to make certain rights and benefits presently available only to married couples available to couples comprised of individuals who are legally prohibited from marrying one another.

Testimony in support of the measure was received by your Committee from several members of the public.

Testimony in opposition to the measure was received by your Committee from a number of private citizens.

Your Committee finds that there are many couples comprised of individuals who are prohibited by law from marrying, yet who nonetheless maintain such a close relationship with each other that they wish to designate each other as beneficiary of a number of benefits presently available only to married couples.

Your Committee finds that when illness, death, or financial hardship strikes one party in a relationship, the parties lack the protections that long-established legal doctrines afford married couples under the same circumstances.

Your Committee finds that it is appropriate to address the concerns of those couples by creating a legal structure for reciprocal beneficiaries.

Because this structure is not available to those couples who can legally marry, it does not threaten to undermine marriage between couples of the opposite sex.

Your Committee believes that this measure, in providing for the right to hospital visitation and the right to make health care decisions for the other party, the right to hold property as tenants by the entirety, inheritance rights, and the right to sue for wrongful death, will be of substantial benefit to many people in our community.

Committee also finds that the method by which these retirees' pensions are statutorily adjusted do not compound interest. Hence, the annual pensioners' bonus that they are statutorily entitled to receive is based on their original pension. The pensioners' bonus contained in this measure would be provided in addition to the statutory bonus.

Your Committee believes that it is incumbent upon the State to ensure that its retirees are adequately provided for given the service they have provided to their community. However, understanding the current fiscal crisis the State faces, your Committee believes it more prudent to extend the pensioners' bonus program for two years, rather than four. Your Committee has amended the bill to reflect this concern.

As affirmed by the record of votes of the members of your Committee on Human Resources that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 202, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 202, S.D. 1, and be referred to the Committee on Ways and Means.

Signed by the Co-Chairmen on behalf of the Committee.
Ayes, 6. Noes, none. Excused, 1 (Levin).

SCRep. 10 (Majority) Judiciary on H.B. No. 117

The purpose of this bill, as received by your Committee, was to propose an amendment to Article I, section 5, of the Constitution of the State of Hawaii to clarify that statutes, regulations, laws, rules, orders, decrees, and legal doctrines that define or regulate marriage, the parties to marriage, or the benefits of marriage shall not be deemed in violation of this section or any other section of the Constitution by virtue of a limitation of the marriage relationship to the union of only one man and one woman.

Your Committee finds that the issue of same sex marriage has been debated in public forums through the legislative process for four years now. Your Committee further finds that the wide-range of opinions of the various members of our community have been repeatedly expressed during those four years, and, unfortunately this issue still divides our community. Thus, in what is a significant shift from the Senate position of the Eighteenth Legislature, this Committee is embracing the House of Representatives proposal to provide an opportunity for the people to vote on a constitutional amendment that would place legal restrictions upon marriage.

However, your Committee finds that there are fundamental flaws in H.B. No. 117 as received. First, the proposed amendment would alter the Due Process and Equal Protection Clause of our Constitution. Your Committee notes that this clause in our Constitution ensures that none of our citizens will be discriminated against because of "race, religion, sex or ancestry." Therefore, your Committee finds that it is unwise and inappropriate to condition our State's promise and commitment to civil rights.

Second, the proposed amendment, by conditioning judicial interpretation of and administrative determinations regarding our Constitution violates the principle of Separation of Powers. Our government is one of three co-equal branches, and this balance of powers has served the people of our State and nation well. It is a fundamental element of our democracy that this delicate balance will ultimately reflect the best of our people. Therefore, your Committee believes that this Separation of Powers principle should not be violated.

Third, the proposed amendment will have the effect of denying substantial governmental benefits and privileges to some of our citizens on the basis of sex. Your Committee believes that the legislature should not condone nor perpetuate any form of unwarranted discrimination upon any of our citizens, simply because they are involved in committed, caring relationships that the majority are not yet prepared to recognize.

Accordingly, your Committee has amended the bill by deleting its substance and substituting therefor the provisions of S.B. 1800. The Senate draft language is intended to cure the defects in H.B. No. 117 by:

- (1) Proposing an amendment to Article IX of the Constitution expressly empowering the State to regulate marriage, including the limitation of marriage to couples of the opposite sex. This provision will have the effect of constitutionally validating existing limitations in current law and protect them against interpretative challenge. It also does not in any way violate the separation of powers doctrine; and
- (2) Conditioning any reservation of marriage to couples of the opposite sex upon the passage of laws ensuring that no deprivation of civil rights on the basis of sex results from the reservation. It is your Committee's intention that this proviso effectively require that similarly situated couples who are prohibited from marriage be provided all substantial government benefits of marriage unless a substantial governmental interest supports their withholding. Your Committee finds that such a proviso will ensure equality in the application of our laws while permitting the protection of relevant substantial governmental and community interests.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 117, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 117, S.D. 1, and be placed on the calendar for Third Reading.

Signed by the Co-Chairmen on behalf of the Committee.
Ayes, 4. Noes, 2 (Bunda, Sakamoto). Excused, 1 (Anderson).

SCRep. 11 (Majority) Judiciary on H.B. No. 118

The purpose of H.B. No. 118, H.D. 1, as received by your Committee, is to establish the status of reciprocal beneficiaries and provide limited governmental benefits to those with such status.

Your Committee finds that the issue of same sex marriage has been debated in public forums through the legislative process for four years now. Your Committee further finds that the wide-range of opinions of the various members of our community have been repeatedly expressed during those four years, and, unfortunately this issue still divides our community. Thus, your Committee believes it important to acknowledge that H.B. No. 118, H.D. 1, is a heartening change from the position taken by the House of

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

1998 PROPOSED AMENDMENTS TO THE HAWAII STATE CONSTITUTION

QUESTION #1: APPOINTMENT OF A TAX REVIEW COMMISSION EVERY TEN YEARS CONSTITUTIONAL QUESTION

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

BACKGROUND

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.

In order for a proposed amendment to the State Constitution to be ratified, it must be approved by a majority of all votes cast on the question. The majority must constitute at least fifty percent of the total votes, including blank votes, cast at the election.

EXPLANATION OF PROPOSED AMENDMENT

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 review 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 its review commission recommendations.

MEANING OF A "YES" VOTE

A "Yes" vote means the tax review commission would be appointed every ten years instead of every five years.

MEANING OF A "NO" VOTE

A "No" vote means the tax review commission would continue to be appointed every five years.

PROS AND CONS

PROS:

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.

The amendment will eliminate redundant commission recommendations proposed by prior tax review commissions that are not yet considered by the Legislature.

The amendment will reduce costs since the tax review commission will meet less often.

CONS:

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.

QUESTION #2: ABOLITION OF POWER TO DENY MARRIAGE TO OPPOSITE-SEX COUPLES

CONSTITUTIONAL QUESTION

"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?"

BACKGROUND

In May of 1997 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 law and due process of law under sections 5 and 6 of Article I, State of

Hawaii Constitution. Although the case was originally dismissed before a trial was held, upon appeal in 1993, the Supreme Court of Hawaii based on 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.

The trial was put on hold for two years until 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 laws were both discriminatory and harmful and recommended that marriage licenses should be issued to couples, regardless of their gender, but no legislation was passed during the 1998 Regular Session. The trial was finally held in September 1998. In a judgment for the plaintiffs, the trial court struck down the marriage statute as being a violation of the State Constitution, essentially making it legal for couples 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.

During the 1997 Regular Session, the Legislature addressed the same-sex marriage issue with two Acts. One established a five-person Constitutional 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.

In order for a proposed amendment to the State Constitution to be ratified, it must be approved by a majority of all votes cast on the question. The majority must constitute at least fifty percent of the total votes, including blank votes, cast at the election.

EXPLANATION OF PROPOSED AMENDMENT

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

MEANING OF A "YES" VOTE

A "Yes" vote would add a new provision to the Constitution that would give the Legislature the power to reserve marriage to opposite-sex couples only. The Legislature would then have a law that would limit marriage to a man and a woman, reserving the right to marry to opposite-sex couples.

MEANING OF A "NO" VOTE

A "No" vote would leave the Constitution of the State of Hawaii, and allow the courts to decide the issue that has been brought against the State.

PROS AND CONS

PROS:

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 that giving the amendment is an important step to protect same-sex marriage in the State.

CONS:

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 now in part 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 courts to review certain marriage laws and therefore compromises the Judiciary's independence and strikes the Bill of Rights for everyone.

1998 CONSTITUTIONAL CONVENTION QUESTION

CONSTITUTIONAL QUESTION

"Shall there be a constitutional convention to propose a revision of the constitution to the State of Hawaii?"

BACKGROUND

Under the Hawaii Supreme Court's interpretation of ratifying Hawaii's first state constitution, whether in fact a constitutional convention, whether the first time or more often, the voters have the right to be heard on the question of whether the people of the State should have a constitutional convention. In voting on this question, blank ballots and over-votes will be counted as ballots cast in the negative on the constitutional convention question. Only "yes" votes will be counted as a ballot cast in the affirmative on the constitutional convention.

Article VIII, Section 2 of the Hawaii Constitution allows the Legislature to submit to the electorate at any general or special election the question of whether to convene a constitutional convention. The election then requires the Hawaiian People to vote on the question. Blank ballots and over-votes will be counted as ballots cast in the negative on the constitutional convention question. Only "yes" votes will be counted as a ballot cast in the affirmative on the constitutional convention.

Pursuant to this constitutional mandate, the Lieutenant Governor certified this question for vote at the November 3, 1998, general election. On March 24, 1997, the Hawaii Supreme Court ruled that the number of "yes" votes did not constitute a majority of the "ballots cast" on the constitutional convention question as required by the Constitution, and that the constitutional law "ballots cast" included all submitted ballots, including both blank and over-voted ballots. Even though the number of "yes" votes exceeded the number "no" votes, there were a large number of blank and over-voted ballots, which were counted along with all of the ballots cast. Since the question did not receive the requisite number of affirmative votes as required by the Hawaii Constitution, the Court ruled that the constitutional convention was rejected by the voters.

On March 28, 1998, the United States Court of Appeals for the Ninth Circuit rejected a constitutional challenge that the Hawaii Supreme Court's interpretation of ballots cast upon the question was so unreasonable that the voters' substantive due process and free speech rights were violated. In reversing a lower federal court decision that had ordered a new vote, the Ninth Circuit Court in effect agreed with the decision of the Hawaii Supreme Court that the constitutional question was rejected by Hawaii's voters in the 1998 Hawaii election. The Legislature enacted and the Governor signed Act 131, resuming the question of whether to convene a constitutional convention to report on the ballot.

EXPLANATION OF BALLOT QUESTION

The ballot question allows the voters to decide whether or not a constitutional convention should be held for the purpose of proposing a revision of the constitution to the State of Hawaii.

MEANING OF A "YES" VOICE

A "Yes" vote means that a constitutional convention will be convened at a date designated by the Legislature. The Legislature will provide the mechanism for the election of convention delegates, for their compensation and other expenses, for submission of the convention's work, and for other procedures for the convention.

MEANING OF A "NO" VOTE

A "No" vote means that a constitutional convention will not be convened.

PROS AND CONS

PROS:

A constitutional convention will give the people of Hawaii an opportunity to determine the future of the State in the next century. It is argued that the need to re-examine the history of the Constitution is so great that the need to do so is a self-evident proposition. A convention would allow the people of the State to express their views on the future of the State. While a convention may be costly, it is argued that the expense of a convention is small in comparison to the amount of money spent by the government daily and the importance of the issues involved. It has already been twenty years since the last constitutional convention, and a new convention could consider a number of issues that require constitutional amendment, such as education, healthcare, and social issues. It is further argued that it is unlikely that a convention will propose amendments that would take away the rights of minority groups, because of the great diversity of Hawaii's population. Finally, as a practical matter, if the convention produces unworkable results, the people can choose not to ratify a revision of or amendments to the Constitution.

CONS:

Convening a constitutional convention will require the expenditure of millions of dollars in ballot preparation costs, preparing and educating delegates, holding the convention itself, providing convention voter education, and related activities. It is argued that this is not a prudent use of taxpayer resources, which would be better spent on providing essential government services that have been slashed by Hawaii's weakened economy. It is further argued that holding a convention will necessarily divide the community, and pose a danger that certain groups will use the convention to target underrepresented members of the community. Some constitutional rights that may be threatened or reduced include those relating to such areas as the status of Native Hawaiians, the rights of women, and the protection of the environment. Finally, it is argued that there is no compelling need to hold a convention, and that a mechanism already exists in the Hawaii Constitution for the Legislature to propose constitutional amendments, which should be used in place of a convention.

Paid for by the Office of Elections

Rev. 10/19/98

EXHIBIT C

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER; EXHIBITS A THROUGH C; CERTIFICATE OF SERVICE was duly served upon the following by hand delivery on November 6, 2013.

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Dated: Honolulu, Hawaii, November 6, 2013.



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