

## EIGHTH DAY

**Wednesday, November 6, 2013**

The House of Representatives of the Twenty-Seventh Legislature of the State of Hawaii, Second Special Session of 2013, convened at 10:09 o'clock a.m., with Vice Speaker Mizuno presiding.

The invocation was delivered by Representative Dee Morikawa.

At this time, the Chair stated:

"Members of the audience, in order to maintain decorum in this Chamber, I will ask that the audience refrain from any outbursts or demonstrations which may disrupt the deliberations and proceedings on the Floor."

The Roll was then called showing all Members present with the exception of Representatives Cachola, Choy and Nishimoto, who were excused.

By unanimous consent, reading and approval of the Journal of the House of Representatives of the Seventh Day was deferred.

## SENATE COMMUNICATIONS

The following communication from the Senate (Sen. Com. No. 4) was received and announced by the Clerk:

Sen. Com. No. 4, transmitting H.B. No. 3, HD 1, entitled: "A BILL FOR AN ACT MAKING AN APPROPRIATION TO THE HAWAII HEALTH SYSTEMS CORPORATION," which passed Third Reading in the Senate on November 5, 2013.

## INTRODUCTIONS

The following introductions were made to the Members of the House:

Representative Ohno introduced Pastor Paul Schuler of City Church of Honolulu.

Representative Awana introduced her friends from Hope Chapel Nanakuli.

Representative Tokioka introduced his constituent, Ms. Annette Oda.

Representative Ward introduced people who testified on S.B. No. 1.

At this time, the Chair stated:

"Members, we will be in recess until 11:00 a.m."

At 10:15 o'clock a.m., the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 12:32 o'clock p.m., with Speaker Souki presiding.

## ORDER OF THE DAY

## SUPPLEMENTAL CALENDAR #1

## REPORTS OF STANDING COMMITTEES

Representatives Rhoads and Luke, for the Committee on Judiciary and the Committee on Finance, presented a report (Stand. Com. Rep. No. 4) recommending that S.B. No. 1, HD 1 pass Second Reading and be placed on the calendar for Third Reading.

Representative Saiki moved that the report of the Committees be adopted, and that S.B. No. 1, HD 1 pass Second Reading and be placed on the calendar for Third Reading, seconded by Representative Cabanilla.

At this time, Representative Oshiro offered Floor Amendment No. 5, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1, H.D. 1, is amended by deleting its contents and inserting the following provisions:

"SECTION 1. The legislature finds that the issue of legalizing same-sex marriage is the most contentious issue of this generation. After receiving Senate Bill No. 1, during the second special session of 2013, the joint house committee on judiciary and finance conducted a public hearing on the measure, which began on October 31, 2013, and lasted until November 4, 2013. No other issue has ever precipitated as much public testimony at a single public hearing in the history of the house of representatives. After receiving more than forty hours of oral testimony from 5,184 individuals, memorialized in over fifteen thousand pages of documents (or the equivalent of thirty reams of paper), it is immediately evident that the issue of legalizing same-sex marriage has divided Hawaii's community and raised compelling points both in support of and opposition to this monumental legislation.

Be that as it may, however, in a very short amount of time, the house of representatives has learned that:

- (1) The majority of federal benefits that are available to same-sex couples may already be obtained by Hawaii citizens who get married in a state that authorizes same-sex marriage and return to Hawaii to reside;
- (2) Because many federal agencies are still trying to determine how the United States Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013), would affect their operations, the total number of benefits and services, as well as the obligations that would apply to married same-sex couples have not yet been determined;
- (3) Couples who are situated in loving, committed relationships have been denied access to federal benefits for a period much longer than same-sex couples because the State of Hawaii does not recognize common-law marriage;
- (4) The bill, as received from the senate, may contravene domiciliary requirements for divorce and may pose questions on the validity of Hawaii state judicial decisions as they are recognized in other states. In Williams v. North Carolina, 317 U.S. 287 (1942), the United States Supreme Court held that the federal government determines marriage and divorce status between state lines, and that the State of North Carolina was not required to recognize a Nevada divorce decree because the State of Nevada did not require either spouse to be domiciled in the State. By allowing any same-sex couple married in Hawaii not domiciled here to access our courts for purposes of obtaining a divorce decree, it is arguable that the bill, as received from the senate, will jeopardize the validity of all divorce decrees issued in the State of Hawaii as they are recognized in other states;
- (5) The bill, as received from the senate, may extinguish parental rights and entitlements of children. In the senate version, the bill does not take into account that existing law takes gender into consideration regarding paternity, maternity, and parentage. While the policy goal of eliminating gender discrimination is a worthwhile and noble goal, the application of a blanket definitional statutory change that does not take into account the context of how these terms are used, may precipitate enormous difficulties in the application and implementation of family law. This is clearly evident by its potential impacts on parentage rights insofar as the rights of a same-sex parent might supersede, or even extinguish the parental rights of the biological parent. Likewise, the blanket definitional statutory change may raise questions on the manner in which the race of the child of a same-sex couple will be determined, and whether such a determination would effectively bar the child from receiving entitlements regardless of the child's genetic makeup;

- (6) Because the legal recognition of same-sex couples will require employers to provide certain benefits to employees and their spouses differently in accordance with a statutory change, it is unclear whether the enactment of the senate version of this bill would constitute a material change to the application of the prepaid health care act, chapter 393, Hawaii Revised Statutes, and result in the State of Hawaii losing its exemption from preemption under the federal Employee Retirement Income Security Act (ERISA) in accordance with 29 U.S.C. §1144(b)(5)(B)(ii); and
- (7) Lastly, the bill, as received from the Senate, would fundamentally alter religious freedoms and denigrate First Amendment rights. This bill, as received from the Senate, would provide the Hawaii civil rights commission with broad authority to determine whether an activity of a religious organization is protected under the First Amendment or subject to the Hawaii public accommodations law, chapter 489, Hawaii Revised Statutes. Not only will this create a chilling effect that will interfere with religious exercise, the senate version of this bill might not provide any protections whatsoever for individual religious and conscientious beliefs. While the house of representatives has considered broader religious exemptions modeled after the State of Connecticut's public accommodations law, the house of representatives acknowledges that the State of Connecticut, which is nicknamed "the Constitution State" because its constitution is one of the oldest in North America (1662), has a long history of protecting religious freedom, and that these protections are embedded throughout its constitution, statutes, and common law. Founded by Congregationalists who split away from the Massachusetts colony because of religious persecution, Connecticut enacted strong protections within its laws to protect religious and conscientious beliefs. In particular, article seven of the Constitution of the State of Connecticut states:

*"It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the State. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship."*

As such, while it is true that the religious exemption found in the Connecticut public accommodations law appears to be broader than what is proposed in the bill received from the senate, Connecticut might not be a suitable model because unlike that state, Hawaii does not have these additional constitutional, statutory, and common law protections for religious and conscientious liberty that would be applicable to not only religious organizations, but to individuals as well.

In light of these findings, and to afford the house of representatives with the maximum flexibility to review the enormous and unprecedented volume of testimony received, the purpose of this Act is to facilitate continued discussions on the issue of legalizing same-sex marriage during the remainder of the second special session of the twenty-seventh legislature of the State of Hawaii, 2013.

SECTION 2. The Hawaii Revised Statutes are amended to implement the purpose of this Act.

SECTION 3. This Act shall take effect on July 1, 2030."

At 12:33 o'clock p.m., Representative Saiki requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 12:33 o'clock p.m.

Representative Oshiro moved that Floor Amendment No. 5 be adopted, seconded by Representative Say.

Representative Jordan rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. Hopefully I can speak up loud enough. I will do my best, Mr. Speaker.

"Mr. Speaker, after deliberating over, I think by the time we got done, about 57 hours of testimony, more than 5,100 testifiers, and I think according to one of the media releases from this House of Representatives, up to 22,000 written testimonies that have been received by this Joint Committee on Judiciary and Finance on our House side. I sat through many of those hours."

At 12:35 o'clock p.m., the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 12:36 o'clock p.m.

Representative Jordan continued, stating:

"Thank you very much, Mr. Speaker. Mr. Speaker, after all those many hours of testimony with my fellow members on Finance and Judiciary, trying to absorb almost 23,000 pieces of written testimony, trying to just be able to sleep a little bit and get back here to the Capitol for the next hearing. I found it very compelling to absorb all that within five days.

"We only had the opportunity to read Senate Bill 1 when it was passed over to us the day of our hearing. We vetted it, we heard from many..."

At this time, the Chair stated:

"Excuse me, the door is supposed to be closed. okay, please proceed. I'm sorry for the disruption."

Representative Jordan continued, stating:

"Thank you, Mr. Speaker. That's quite alright, Mr. Speaker, I totally understand the passion. And I think, Mr. Speaker, they might be speaking louder than I am at this point in time. This is what this measure is about.

"I myself have been involved with this issue since the 1990's. I have been watching it. And here we come to hearings on one particular measure that we only had on Monday, or by time we had a hearing on Thursday, to start hearing from the people, to start hearing from the experts on these different intricate pieces of this measure.

"I found myself even a little absorbed with all this, and trying just to have a clear mind after 10, 12 hours of hearing, Mr. Speaker. It became a little foggy after a while, and I'm hoping my other 30 members on that committee would attest to that.

"I too watched in June as the Windsor case was handled by the Supreme Court, and I too understood that the Windsor case provided benefits for individuals that weren't receiving them on federal levels.

"Currently our state doesn't have marriage. I understand that. We have civil unions, which the federal doesn't recognize. But the Windsor case did not say our marriage law was incorrect and needed to be corrected. The Windsor case did not say we were denying anybody at any point in time. The Windsor case did not say we needed to rush to this at this point in time.

"Mr. Speaker, no, I was not pleased coming in to special session. I did not support our Governor's stance on bringing us back here. I felt that individuals in this Body needed the opportunity to vet these measures as we have just heard in our private caucus. There's a lot of components to this particular measure. Not just about saying we need to provide opportunities to same-gender couples as traditional couples.

"Mr. Speaker, I wholeheartedly support equal opportunities for same-gender couples. Because I may afford that opportunity at some point in time, Mr. Speaker. That was not my problem with this. My problem with this is vetting all this material, absorbing it, putting a great piece of legislation forward where I can feel confident to vote 'yay' on, and move

forward, to where we would have a bright line, completed by legislation, not by judicial review. And I think we should be providing that guidance.

"So, Mr. Speaker, I had proposed this during our vetting of our House Draft 1 of SB 1, and it was refuted, we don't want to discuss it. I understand that. So I thank the great Representative from Wahiawa for bringing this back for discussion on this Floor. And I would appreciate the discussion and maybe the opportunity to even look at this.

"This provides some explanation of the Connecticut law that we are placing slivers of in SB 1, HD 1. This also would ask we continue this discussion during this second special session on this measure so we can properly vet it. We passed out a measure yesterday, out of our committee. The public will not be able review that HD 1 of SB 1."

Representative Say rose to yield his time, and the Chair "so ordered."

Representative Jordan continued, stating:

"Thank you very much, Representative. So Mr. Speaker, all this measure is asking is for us to be able to afford the opportunity to vet this information a little bit more during this second special session. Because of course we have up to 30 days in special session, and possibly an extension of another 15 days.

"I would clearly like to hear some more dialogue with my constituents, and for me to review all these many, many laws that we have to see if we are truly moving a measure forward.

"That's all I'm asking, Mr. Speaker, and I truly thank the Representative from Wahiawa for bringing this forward to us today."

At 12:42 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 12:47 o'clock p.m.

Representative Oshiro rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I'm rising in support of the floor amendment. Thank you. I just wish the active members practicing their First Amendment freedom of speech would be a little bit quieter, but that's okay. It's beautiful to some.

"I support this floor amendment, Mr. Speaker. What it does is have the effect and cause of creating a short form type bill to allow the discussion to continue. Given that there's a lot of questions on what's in and what's out of the current House draft on the Senate bill.

"I think the chairs did a great job in maintaining the committees' work on this very important issue. However, I think it's humanly impossible to expect that they would be able to turn it around in less than 24 hours and masticate and review and consider and reflect upon the volume of testimony that was submitted both orally and in the written format.

"So I think this vehicle here as a floor amendment will allow them, and allow the members, to really understand the draft we have before us that we received less than an hour ago.

"There are several items that this floor amendment highlights, and I want to just go through it very briefly, Mr. Speaker. First of all, the majority of federal benefits that are available to same-sex couples may already be obtained by Hawaii citizens who get married in a state that authorizes same-sex marriage and return to Hawaii to reside.

"It's not the perfect solution, Mr. Speaker, and I certainly do not believe it is the best solution, but it is a solution in the meantime, should the existent circumstances present themselves to a Hawaii citizen to get married.

"Number two, because many federal agencies are still trying to determine how the United States Supreme Court's decision in the United States v. Windsor case, 133 Supreme Court 2675; 2013, would affect their operations, the total number of benefits and services, as well as the obligations that are applied to married same-sex couples. They have yet to be determined.

"I think most of the literature you have been receiving, to testimony from the Attorney General's office, speak to the Office of Veteran's Affairs, Social Security, Medicaid, Medicare, maybe the Department of Housing, and of course, the Internal Revenue Code. But there are over a thousand different benefits, programs and services that have yet to be determined by the Obama administration and the various agencies and departments.

"Number three, couples who are situated in loving, committed relationships, have been denied access to federal benefits for a period much longer than same-sex couples, because the State of Hawaii right now does not recognize common-law marriage, Mr. Speaker. That's something I knew, I learned that actually we don't do that, but there are common-law marriages in the State of Hawaii that I think you might want to reconsider, or have the Governor consider, at this point in time.

"Number four, the bill as received from the Senate as passing on in the House Draft 1 may contravene domiciliary requirements for divorce, and may pose questions on the validity of Hawaii's State judicial decisions as they're recognized in other states.

"In the Williams v. North Carolina case, 317, US 287 (1942), the United States Supreme Court held that the federal government determines marriage and divorce status between state lines, and that the State of North Carolina was not required to recognize a Nevada divorce decree because the State of Nevada did not require either spouse to be domiciled in the state.

"By allowing any same-sex couple married in Hawaii, but not domiciled here, to access our courts, either six months or three months residency requirement, for the purposes of obtaining a divorce decree, separation decree, or annulment, it is arguable that the bill, as received from the Senate, will jeopardize the validity of all divorce decrees issued in the State of Hawaii as they are recognized in other states.

"Number five, Mr. Speaker, because the legal recognition of same-sex couples will require employers to provide certain benefits to employees and their spouses differently, in accordance with statutory change, it is unclear whether the enactment of the Senate version of this bill, which is contained within the present House Draft 1, will constitute a material change to the application of the Prepaid Health Care Act, Chapter 393, Hawaii Revised Statutes, and result in the State of Hawaii losing its exemption from preemption under the Federal Employee Retirement Income Security Act, otherwise known as ERISA, in accordance with 29 USC, Section 1144, Subsection b, Sub-subsection 5, Subsection B, Sub-subsection 2.

"Lastly, Mr. Speaker, this bill as received from the Senate would fundamentally alter religious freedom and denigrate First Amendment rights. This bill as received and passing from this Body would provide the Hawaii Civil Rights Commission with broad authority to determine whether an activity of a religious organization is protected under the First Amendment, or subject to the Hawaii Public Accommodations Law, Chapter 49, Hawaii Revised Statutes."

Representative Awana rose to yield her time, and the Chair "so ordered."

Representative Oshiro continued, stating:

"Thank you very much, Representative from Nanakuli. Not only will this create a chilling effect that will interfere with religious exercise, the Senate version, and now the House draft, might not provide any protections whatsoever for individual religious and conscientious beliefs. The conscientious objectors, well, the House of Representatives have considered broader religious exemptions modeled after the State of Connecticut's public accommodations law, the House of Representatives

acknowledges that the State of Connecticut, which is nicknamed the 'Constitution State' because its constitution is one of the oldest in North America, 1662, has a long history of protecting religious freedom, and these protections are imbedded throughout its constitution statutes and common law decisions.

"Founded by congregations that split away from the Massachusetts colony because of religious persecution, Connecticut enacted strong protections within its laws to protect religious and conscientious beliefs, in particular, Article 7 of the Constitution of the State of Connecticut states: 'It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the state. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship.'

"As such, Mr. Speaker, while it is true that the religious exemption found in the Connecticut public accommodations law appears to be broader than what's proposed in the bill before us, Connecticut might not be a suitable model, because unlike that state, Hawaii does not have these additional constitution and statutory and common law protections for religious and conscientious liberty that will be applicable to not only religious organizations, but to individuals as well.

"It is in light of these findings to afford the House of Representatives with the maximum flexibility to review the enormous and unprecedented volume of testimony received, the purpose of this measure is to facilitate continued discussion on the important issue of legalizing same-sex marriage through the remainder of the Special Session of the 27th Legislature. Thank you, Mr. Speaker."

Representative McDermott rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I support the intent of this amendment. Mr. Speaker, the intent is we need more time to digest the testimony we received. The intent is we had thousands of people come and testify. We heard them. Did we listen? That's the intent. But more importantly, Mr. Speaker, and I'm troubled. Although the chairs ran a very open and wonderful process where everyone got to speak and never cut it off, and I thank your chairs for doing that, and I guess I bear some responsibility for this, Mr. Speaker, our committee was the victim of a fraud last week.

"That fraud was, we had a molecular biologist come and testify before us, I won't mention his name, but he is a public figure. His information that he shared with members was actually used in some of the comments of members reporting it out of the committee. Now this gentleman was on Nightline, he was on the Tonight Show, and he was also on the cover of Time Magazine back in 1993 and '94.

"Members don't know that, he's a public figure, but I'm not going to mention his name. But members don't know this, this guy has made a living putting out false information. He came out with this study that, quote, 'there is a gay gene' in 1993-94. His research was subsequently debunked. Let me say that again, debunked.

"Now I can't talk to a molecular biologist in his language. Makes me look like a fool. Harvard meets Ewa Beach, I can't do it. So I went home and researched, but I can't read, I said, 'where is this guy from? Why didn't the media pick this up?' Oh, the media did pick it up. He's a fraud.

"Now what is science, Mr. Speaker? Science can be replicated. His research and experiments, which he shared with the members, Mr. Speaker, which they used to make their decisions, which is why they need more time."

The Chair addressed Representative McDermott, stating:

"Representative, are you speaking to the merits of the amendment or are you expanding a little bit?"

Representative McDermott continued, stating:

"Mr. Speaker, the merits are that we need more time. And I'm saying that the members were duped. And I'm explaining to you, sir, how they were duped. Mr. Speaker, it's embarrassing to actually have members quoting this fraud, and he is a fraud under investigation by the National Institutes of Health Research Integrity Office, go look at it folks, Google him up. And they quoted him coming out of committee."

The Chair addressed Representative McDermott, stating:

"Again, will you speak to the merits of the amendment, please? Speak to the merits of the amendment."

Representative McDermott continued, stating:

"Mr. Speaker, the merits are we need more time. This is an example of why we need more time, and I'm trying to explain to you why we need more time."

The Chair addressed Representative McDermott, stating:

"You have not been speaking on the merits of the amendment."

At 12:58 o'clock p.m., Representative McDermott requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 1:00 o'clock p.m.

Representative McDermott continued, stating:

"Thank you, Mr. Speaker, I'll wrap it up in 30 seconds or less. The amendment asks that we have more time to consider testimony and such. And sir, I was trying to point out that our members, a fraud was perpetrated upon them, and I want to protect them, because if they had more time to investigate the testimony, because the guy was very impressive, and I don't want our members to be harmed by fraudulent testimony. So that was my purpose sir, and I wanted to get it on the record. Thank you, sir."

Representative Carroll rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I'd like to talk in support of this floor amendment. Just a comment. Yesterday in committee, this floor amendment was actually requested to be considered by our Representative from Waianae, and I'd like to support this because yesterday when I did vote no it was based on process, and I agreed that we need more time in deliberating the bill and the issue as well. So, for that reason, I'm supporting the amendment."

Representative Har rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in support of the floor amendment. Thank you, Mr. Speaker. Before I begin, may I please have the words of the speaker from Wahiawa entered into the Journal as if they were my own? Thank you, Mr. Speaker.

"In addition, I won't say any additional comments other than the fact that this language in the findings section would, in fact, assist this bill, if it were to pass, in the event we have continued legal problems. That's all this amendment is being offered for, is to assist in the event of any additional legal problems that may assist.

"It talks about all of our legislative intent, Mr. Speaker. So Mr. Speaker, while I know you are not looking at me right now, I'd appreciate it if you would. Thank you, Mr. Speaker. So that being said, I do believe that this language is important because it could, in fact, assist us with respect to any

lawsuits that may ensue. Thank you very much. For those reasons I stand in support. Thank you, Mr. Speaker."

Representative Ward rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in support of the measure. Mr. Speaker, what we're doing is what you do all the time. You hit the gavel, you say recess, time out, there's a rush going, we want to slow things down, we want to stop it, we want to get the momentum to take a contemplative view.

"This is equivalent to the time out, the recess, the time when you stop the momentum in the House and you say, let's take a deep breath. This amendment says, let's take a deep breath. Let's be contemplative. My colleague from Ewa Beach says, let's look at some of the stuff that came out pretty loosey-goosey, pretty otherwise not true.

"Another case in point, this Body has been sold on the La Croix study. If we had time to contemplate what the Chinese economist said, he said there is 755 million dollars per year coming from the Chinese, coming from the Vietnamese, coming from the Indonesians, the Malaysians, the Asian equivalent of our tourist dollar is very important from that part of the world. He's saying if you take away 10 percent of that, you've got 75 million dollars per year, which is equal to what La Croix said, which was 71 million dollars per year, which we said, well the gay rights marriage is going to make a lot of money.

"My point is, Mr. Speaker, this is a time out, it's time to huddle. This amendment gives us that time to contemplate, *kuka kuka*, otherwise do stuff deliberately rather than rushing through. And I don't know how those people got the stamina to do that, but this is just the beginning of what I think is going to happen if we continue on our present plan without a deep breath, without a time out. Thank you, Mr. Speaker."

Representative Saiki rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition to this floor amendment. I don't understand what relief is sought specifically in this floor amendment. I know that it calls for continued discussions on this issue, but I'm not sure what form is being requested.

"If the proponent is requesting that the committees conduct more public hearings, I'd like to note that what has happened over the past week is extraordinary in terms of the public hearing process at the Capitol. The joint committees received more than 23,000 pieces of written testimony, they heard from over 1,000 persons who testified at their hearing. This lasted for 55 hours over five days.

"I'm not sure if this floor amendment is requesting that more hearings be held. It does request that the discussion continue throughout the remainder of the special session. I would note to members that under the constitution, the special session is set for a maximum of 30 days with a 15 day extension. I'm not sure if the proponent is requesting that the special session be extended for 45 days for the purpose of discussing this issue. I'm also not sure in what form or in what manner this discussion should take place.

"Accordingly, I oppose this floor amendment, and I call for the question."

At this time, Representative Saiki called for the previous question.

The motion to end debate was put to vote by the Chair and carried, with Representatives Cachola, Choy and Nishimoto being excused.

The motion that Floor Amendment No. 5, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representative Saiki voting no, and with Representatives Cachola, Choy and Nishimoto being excused.

At 1:08 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 1:09 o'clock p.m.

Representative Oshiro rose, stating:

"Thank you, Mr. Speaker. I appreciate it very much. I understand that the debate was cut off by the proper motion, so I appreciate that. I simply wanted to have permission to submit additional written comments into the Journal in support of that particular floor amendment, Mr. Speaker. Thank you."

Representative Oshiro's written remarks are as follows:

"Mr. Speaker, I rise in support of Floor Amendment No. 5.

"During the more than fifty hours of hearings on Senate Bill No. 1, and the receipt of over twenty-eight thousand pages of documents, your Joint Committee on Judiciary and Finance spent little more than two hours deliberating on it before reporting the measure to this Floor for Second Reading. As you know, that decision was not well received by many testifiers and observers and only added to the perception that this whole affair was a grand 'dog and pony' show – that those five days and nights of receiving public comment and testimony was a farce or big *shibai*. Certainly, why one would not even take a day or two to review the vast record and consult with the members of the Joint Committee suggest the fix was already in.

"And, if to add insult to injury, despite hearing experts from various fields identify major substantive and technical problems with the bill, your Committee recommended passage of a draft that seemingly does not address any of these concerns.

"Given the monumental shift in public policy that this bill will have, and the apparent lack of any meaningful analysis and discussion at the Committee level, the good Representative from Waianae, Makaha, Makua, and Maili offered an amendment for the Committee's consideration. Despite its good intentions, the amendment was summarily dismissed by the Co-Chairs without any discussion.

"Floor Amendment No. 5, which is presently before us, is the draft that was offered by the Representative from Waianae. It models the approach taken by this House during the Regular Session of 2012 when it approved on Third Reading Senate Bill No. 2429, RELATING TO FORECLOSURES. For Senate Bill No. 2429, this House took the extraordinary step of approving a 'short-form' bill on Third Reading to facilitate continued discussions among various stakeholders on a comprehensive codification of statutory foreclosure procedures to ensure the thorough legal and technical review of the statutory amendments offered to the Legislature. This step was taken to provide both the House of Representatives and the Senate with maximum flexibility during the remainder of the 2012 Regular Session to facilitate a meaningful resolution to the issue.

"During the public hearing on Senate Bill No. 1, this House learned that numerous problems existed with the bill. These problems would lead to serious complications to other laws and pose grave danger to the welfare of our People. From my perspective, to do nothing to address them while it is still within our power to fix them is nothing less than gross negligence on our part. As enumerated in the floor amendment:

"**Number 1.** The basic premise of this bill is faulty. The majority of federal benefits that are available to same-sex couples may already be obtained by Hawaii citizens who get married in a state that authorizes same-sex marriage and return to Hawaii to reside. Admittedly, this is not a perfect solution nor one that any may find feasible or financially viable, but it is a less-intrusive approach given the equities of the circumstance and irreversible general interests at stake. It is not irrational nor without merit and it is certainly not suggestive of any ill-will or animus. For a remedy, even temporary in scope and affect, is better than none. Moreover, the present known and readily available remedy does not preclude a more

satisfying resolution in the near future and does not curtail future benefits due to retroactive application of federal laws and services.

"Insofar as same-sex marriage is distinguishable from civil unions, so too must we approach legalizing same-sex marriage with the same careful and dispassionate analysis and reflection needed for such a weighty decision. For instance, the approval of House Bill No. 444, House Draft 1, Senate Draft 1, RELATING TO CIVIL UNIONS, began with the pre-filing of the bill on January 23, 2009. The bill did not pass Final Reading in the House until April 29, 2010, or about 400 days and two Regular Legislative Sessions later.

"Compare what we have before us in this Special Session and how much time has elapsed since we convened on October 28, 2013, and one can appreciate how quickly and expediently we are proceeding. Indeed, it is as if we are hell-bent on racing through this Special Session to fulfill the Governor's request regardless of any harm to our people it may cause and without any sign of legislative independence and restraint.

"Doesn't prudence scream out for a temporary delay in making any wholesale change to the definition of marriage that will have such far-reaching and irreversible effects on all people, both gay and straight?"

"**Number 2.** We don't know what the total impacts of this policy change will be. Because many federal agencies are still trying to determine how the United State Supreme Court's decision in United States v. Windsor, 133 S. Ct. 2675 (2013), would affect their operations, the total number of benefits and services, as well as the obligations that would apply to married same-sex couples, have not yet been determined. Have we considered the fiscal ramifications of additional federal benefits to same-sex couples and whether the federal government could shift some of these costs to the states through federal mandates? Has anyone considered that not all same-sex couples will choose to be married, as marriage may not be the most financially advantageous classification for their particular needs? And, how many of the approximate 2,000 civil union partners will be seeking to change their status to married couple?"

"**Number 3.** There are other similarly situated couples that currently are denied federal benefits. In Parke v Park, 25 Haw. 397 (1920), the Hawaii Supreme Court held that a license was prerequisite to a valid marriage, and as such all rights, benefits, and obligations that were previously recognized in common law marriage were extinguished.

"Yet, since 1958, the federal Internal Revenue Service (IRS) has stated that a couple would be treated as married for purposes of federal income tax filing status and personal exemptions if the couple entered into a common-law marriage in a state that recognizes that relationship as a valid marriage. The IRS further concluded that its position with respect to a common-law marriage also applies to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship. The IRS therefore held that a taxpayer who enters into a common-law marriage in a state that recognizes such marriages shall, for purposes of federal income tax filing status and personal exemptions, be considered married notwithstanding that the taxpayer and the taxpayer's spouse are currently domiciled in a state that requires a ceremony to establish the marital relationship.

"This is especially pertinent since this ruling, Revenue Ruling 58-66, was cited in Revenue Ruling 2013-17, which was promulgated shortly after the Windsor Decision, and held that same-sex couples married in states that legalize same-sex marriage shall be considered married for purposes of federal income tax filing status and personal exemptions, regardless of whether they are currently domiciled in a state that requires a ceremony to establish the marital relationship.

"So couples who are situated in loving, committed relationships have been denied federal benefits for over seven decades. If, as the Governor says, 'benefits delayed are benefits denied', shouldn't this Legislature legalize common-law marriages? After all, same-sex couples have been denied these federal benefits for just a few months.

"**Number 4.** This bill may contravene domiciliary requirements for divorce and may pose questions on the validity of Hawaii State judicial decisions as they are recognized in other states. In Williams v. North Carolina, 317 U.S. 287 (1942), the United States Supreme Court held that the federal government determines marriage and divorce status between state lines, and that the State of North Carolina was not required to recognize a Nevada divorce decree because the State of Nevada did not require either spouse to be domiciled in the state. By allowing any same-sex couple married in Hawaii not domiciled here to access our courts for purposes of obtaining a divorce decree, it is arguable that the bill, as presently drafted, will jeopardize the validity of all divorce decrees issued in the State of Hawaii as they are recognized in other states. At a minimum, we should obtain clarification before we proceed.

"**Number 5.** Hawaii might lose its ERISA preemption exemption. Because the legal recognition of same-sex couples will require employers to provide certain benefits to employees and their spouses differently in accordance with a statutory change, it is unclear whether the enactment of this bill would constitute a material change to the application of the Prepaid Health Care Act, Chapter 393, Hawaii Revised Statutes, and result in Hawaii losing its exemption from preemption under the federal Employee Retirement Income Security Act (ERISA) in accordance with 29 U.S.C. §1144(b)(5)(B)(ii). Should that happen, Hawaii may no longer be able to require employers to provide health insurance for its full-time employees by law. At the very least, one should obtain a federal ruling or opinion letter before proceeding further. It is only reasonable.

"Mr. Speaker, ask yourself, If Hawaii was no longer able to require employers to follow this law, don't you think many of Hawaii's citizens and their families will be harmed?"

"**Number 6.** This bill will fundamentally alter First Amendment rights. As presently drafted, this bill would ostensibly provide the Hawaii Civil Rights Commission with broad authority to determine whether an activity of a religious organization is protected under the First Amendment or subject to the Hawaii Public Accommodations Law, Chapter 489, Hawaii Revised Statutes. Not only will this create a chilling effect that will interfere with religious exercise, the bill might not provide any protections whatsoever for individual religious and conscientious beliefs. Emmanuel Temple v. Abercrombie, Civ. No. 11-00790 JMS-KSC (U.S. District Court, District of Hawaii, 2011) is a case-in-point of how these laws may affect the day-to-day functions of a church and affect the religious practices and actions of its adherents.

"While the Joint Committee on Judiciary and Finance considered broader religious exemptions modeled after the State of Connecticut's Public Accommodations Law, this language might not be suitable because of that state's very different history.

"Connecticut is nicknamed the 'Constitution State' because it has one of the oldest constitutions in North America. It was founded by colonists escaping Massachusetts because of religious persecution. Because of this, the people of Connecticut have long revered religious freedom and provided protections for their beliefs throughout their constitution, statutes, and common law.

"In particular, Article Seven of the Constitution of the State of Connecticut states:

*"It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the State. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship."*

"**Number 7.** It should be noted that another problem identified – that the blanket application of non-gender terms in statutes relating to paternity, maternity, and parentage might cause the rights of a same-sex parent to

supersede or even extinguish the parental rights of a biological parent – was eliminated in the House Draft 1. And, that change to Senate Bill No. 1, is appreciated and demonstrates the knowledge that such amendments can be made in spite of or even in opposition to the unequivocal proclamations of the Attorney General who opined on SB 1, on October 31, 2013, that:

*“In the Department's view, no amendments are necessary for the bill to accomplish the bills stated intent and purpose.”* [Emphasis Added.]

“Yet, clearly, there are many, many problems with this bill that need to be fixed before it should be approved on Third and Final Readings. And, I for one have little confidence in our Attorney General whose consistent legal analysis of every draft, from the Governor's same-sex marriage bill, AG.8.22.13 and AG.9.9.13 and AG 8/15/13 through Senate Bill No. 1, House Draft 1, have been akin to Bobby McFerrin's 'Don't Worry, Be Happy'.

“In our reckless zeal to ensure the equal protection of the laws to same-sex couples, this bill has the potential of doing irreparable harm to all of our people. We must not proceed foolishly any further. And, we should take pause to make sure that we do this in the right way and for the right reason.

“I beg my colleagues to support this floor amendment.”

At this time, Representative Oshiro offered Floor Amendment No. 7, amending S.B. No. 1, HD 1, as follows:

“SECTION 1. Senate Bill No. 1, H.D. 1, is amended by deleting its contents and inserting the following provisions:

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

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

The legislature further finds that, while same sex marriage would be a great advancement for human liberty, this change, could have serious implications if steps are not taken to protect the liberties and equal rights of those religious organizations and believers who cannot conscientiously recognize or facilitate same-sex civil marriages. There will be no net gain for human liberty and equal rights if same-sex couples are permitted to oppress religious dissenters in the same way that those dissenters, when they had the power to do so, oppressed same-sex couples. There is no reason to let either side oppress the other. Same-sex couples should not be denied the right to marriage, and the State should not force dissenting religious believers or organizations to recognize or facilitate same-sex marriage.

Therefore, it is the intent of the legislature to:

- (1) Ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State; and
- (2) Protect religious freedom and liberty by:
  - (A) Ensuring that no clergy or other officer of any religious organization will be required to solemnize any marriage, in accordance with the Hawaii State Constitution and the United States Constitution; and
  - (B) Clarifying that unless a religious organization allows use of its facilities or grounds by the general public for weddings for a profit, such organization shall not be required to make its

facilities or grounds available for solemnization of any marriage celebration; and

- (3) Harmonize the right to equal protection under the law for same-sex couples with the equally important right to the free exercise of religion.

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

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

#### "CHAPTER

#### RELIGIOUS FREEDOM RESTORATION ACT

§ -1 **Findings.** (a) The legislature finds that:

- (1) The authors of the Bill of Rights secured the free exercise of religion as an unalienable right under the First Amendment of the United States Constitution;
- (2) The free exercise of religion is also guaranteed under article I, section 4 of the Constitution of the State of Hawaii;
- (3) Laws neutral toward religion may substantially burden religious exercise as surely as laws intended to interfere with religious exercise;
- (4) Government should not substantially burden religious exercise without compelling justification;
- (5) The United States Supreme Court in a recent decision virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (6) The compelling interest test in the free exercise of religion established by the United States Supreme Court is a workable test for striking sensible balances between religious liberty and competing government interests.

(b) The legislature declares its intent that:

- (1) It shall be the policy of the State that the compelling interest test in the free exercise of religion, as established by the United States Supreme Court under *Shubert v. Verner*, 374 U.S. 398 (1963), shall be the standard applicable by the courts of this State in all cases where religious exercise is substantially burdened; and
- (2) This chapter shall provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ -2 **Free exercise of religion protected.** (a) The State and its political subdivisions shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Neither the State nor its political subdivisions shall burden a person's exercise of religion unless it demonstrates that imposition of the burden on the person both:

- (1) Furthers a compelling government interest; and
  - (2) Is the least restrictive means of furthering that compelling interest.
- (c) Notwithstanding any law to the contrary, a person whose religious exercise has been substantially burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the State or its political subdivisions.

(d) Nothing in this chapter shall be construed to authorize the State or its political subdivisions to substantially burden any religious belief.

(e) Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of article I, section 4 of the Constitution of the State of Hawaii, prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under article I, section 4 of the Constitution of the State of Hawaii, shall not constitute a violation of this chapter."

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

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

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

(c) The act of seeking a license for or entering into a marriage under this chapter shall not diminish any of the rights, benefits, protections, and responsibilities that existed previously due to the couple's earlier status as civil union partners or reciprocal beneficiaries.

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

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

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

**§572-B Interpretation of terminology to be gender neutral.** When necessary to implement the rights, benefits, protections, and responsibilities of spouses under the laws of this State, all gender-specific terminology, such as "husband", "wife", "widow", "widower", or similar terms, shall be construed in a gender-neutral manner. This interpretation shall apply to all sources of law, including statutes, administrative rules, court decisions, common law, or any other source of law.

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

**§572-D Refusal to solemnize a marriage.** Nothing in this chapter shall be construed to require any clergy, minister, priest, rabbi, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnizations pursuant to this chapter to solemnize any marriage. No such person who fails or refuses to solemnize any marriage under this section for any reason shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil liability for the failure or refusal.

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

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

SECTION 4. Section 572-1, Hawaii Revised Statutes, is amended to read as follows:

**"§572-1 Requisites of valid marriage contract.** In order to make valid the marriage contract, which shall be [~~only between a man and a woman~~] permitted between two individuals without regard to gender, it shall be necessary that:

- (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, [~~brother and sister~~] two siblings of the half as well as to the whole blood, uncle and niece, uncle and nephew, aunt and nephew, or aunt and niece, whether the relationship is the result of the issue of parents married or not married to each other or parents who are partners in a civil union or not partners in a civil union;
- (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be

lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2;

- (3) [~~The man does not at the time have any lawful wife or civil union partner living and that the woman does not at the time have any lawful husband or civil union partner living;~~] Neither party has at the time any lawful wife, husband, or civil union partner living, except as provided in section 572-A;
- (4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;
- (5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;
- (6) The [~~man and woman~~] parties to be married in the State shall have duly obtained a license for that purpose from the agent appointed to grant marriage licenses; and
- (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the [~~man and the woman~~] parties to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony."

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

**"§572-3 Contracted without the State.** Marriages between [~~a man and a woman~~] two individuals regardless of gender and legal [~~in the country~~] where contracted shall be held legal in the courts of this State."

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

**"§572-6 Application; license; limitations.** To secure a license to marry, the persons applying for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent an application in writing. The application shall be accompanied by a statement signed and sworn to by each of the persons, setting forth: the person's full name, date of birth, social security number, residence; their relationship, if any; the full names of parents; and that all prior marriages[~~;~~] or civil unions, if any, other than an existing civil union between the persons applying for the marriage license, have been dissolved by death or dissolution. If all prior marriages or civil unions, other than an existing civil union between the persons applying for the marriage license, have been dissolved by death or dissolution, the statement shall also set forth the date of death of the last prior spouse or the date and jurisdiction in which the last decree of dissolution was entered. Any other information consistent with the standard marriage certificate as recommended by the Public Health Service, National Center for Health Statistics, may be requested for statistical or other purposes, subject to approval of and modification by the department of health; provided that the information shall be provided at the option of the applicant and no applicant shall be denied a license for failure to provide the information. The agent shall indorse on the application, over the agent's signature, the date of the filing thereof and shall issue a license which shall bear on its face the date of issuance. Every license shall be of full force and effect for thirty days commencing from and including the date of issuance. After the thirty-day period, the license shall become void and no marriage ceremony shall be performed thereon.

It shall be the duty of every person, legally authorized to grant licenses to marry, to immediately report the issuance of every marriage license to the agent of the department of health in the district in which the license is issued, setting forth all facts required to be stated in such manner and on such form as the department may prescribe."

SECTION 7. Section 572-13, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

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

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

(b) Marriages, reported by whom. It shall be the duty of every person, legally authorized to perform the marriage ceremony, to report within three business days every marriage ceremony, performed by the person, to the agent of the department of health in the district in which the marriage takes place setting forth all facts required to be stated in a standard certificate of

marriage, the form and contents of which shall be prescribed by the department of health[-]; provided that if any person who has solemnized a marriage fails to report it to the agent of the department of health, the parties married may provide the department of health with a notarized affidavit attesting to the fact that they were married and stating the date and place of the solemnization of the marriage. Upon the receipt of that affidavit by the department of health, the marriage shall be deemed to be valid as of the date of the solemnization of the marriage stated in the affidavit; provided that the requirements of section 572-1 are met."

SECTION 8. Section 572B-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

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

SECTION 9. Section 572C-2, Hawaii Revised Statutes, is amended to read as follows:

"[~~§572C-2~~] Findings. [~~The legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman. The legislature further finds that because of its unique status, marriage provides access to a multiplicity of rights and benefits throughout our laws that are contingent upon that status. As such, marriage should be subject to restrictions such as prohibiting respective parties to a valid marriage contract from standing in relation to each other, i.e., brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew.~~]

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

SECTION 10. Notwithstanding any other provision of law, nothing in this Act shall invalidate any civil union or reciprocal beneficiary relationship in existence before the effective date of this Act. Any such civil unions or reciprocal beneficiary relationships shall continue until terminated in accordance with applicable law.

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

SECTION 12. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity shall affect all other provisions or applications of the Act that can be given effect, and to this end the provisions of this Act are inseverable.

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

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

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

Representative Oshiro moved that Floor Amendment No. 7 be adopted, seconded by Representative Say.

Representative Oshiro rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in support of Floor Amendment Number 7. Let me give you some of the big picture parts of this. What it does is delete the paragraph 2 findings on page 2, lines 4 through 10, from the current Senate bill.

"What it also does is insert Section 2 from House Bill Number 6, which is a religious freedom restoration act provision. It also, in Section 14, adds an inseverability clause, which is contained in the New York statute and

also the Maryland statute. It also deletes 572-C, rights of parents, from Senate Bill Number 1, which is also in our House Draft Number 1. It also deletes Section 9 of Senate Bill 1, which allows a party to a same-sex marriage access to Hawaii's courts and to the divorce, annulment or separation authorities.

"Let me get back to the first thing, first. The reason why I object to that particular provision in the bill, Mr. Speaker, is that I have grave concerns of what that language could mean, or could be construed as. As I think, articulated quite well by Justice Levinson, and then by retired Judge Ahu, who said that if there's any questions on the legislative intent of a particular measure, the courts would look to the language of the measure, including the Section 1, which is commonly known as the findings of facts or the purpose clause in our statute.

"That particular provision that's in the current House Draft 1 reads as follows, Mr. Speaker. It says that, 'It is the intent of the legislature to ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State.'

"Subsection 2. This is the part I'd like to delete from the current draft through this amendment. It says this, Mr. Speaker. 'Ensure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying all provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law.'

"Mr. Speaker, that's an extraordinary grant of authority to interpreters weighing in on this act. That they could interpret this to mean an amendment or construction of law where we have not gone in and touched any of the existing Hawaii Revised Statutes. So that's one of the reasons why I've added that element into this floor amendment. I don't really know what it means, but the plain reading of it says that there'll be no legal distinction, and whether this act does or does not amend any particular provision of law. The policy and the intention would supersede any of the existing laws whether we as a Body amend them or do not amend them.

"I believe that may be construed to trump any of the amendments here regarding public accommodations or any of the religious exemptions. I think that's too much authority, given to a court, through their interpretative powers.

"Another provision, Mr. Speaker, is regarding the Religious Freedom Restoration Act, and I'll ask for permission to submit written comments into the Journal, Mr. Speaker. But basically this is it. Right now we have no real standard on how to go and decide these important cases between religious freedoms, feelings of conscience, and equal protection of due process.

"Ever since the United States Supreme Court in the Employment Division v. Smith case, the Oregon peyote case by the Rehnquist Court came into being, we have lost that authority and ability to have a weigh-in of test of these two important issues.

"What the Religious Freedom Restoration Act, which is based upon congressional enactment back in 1993 does, Mr. Speaker, it gives the courts and the deciding bodies..."

Representative Say rose to yield his time, and the Chair "so ordered."

Representative Oshiro continued, stating:

"Thank you, Mr. Speaker. The ability to have a legal standard in place on how to resolve these inevitable conflicts between religious freedoms, freedom of conscience, and civil rights, or other policies of government which are important. It basically would codify the previous laws in place, the Sherbert Test, that was basically repealed when Employment Division v. Smith became the law of the land.

"It also has the support of the ACLU, both on the national level and the local level. And let me read the fact sheet from their website. The ACLU, along with almost every religious and civil rights group in America that has taken a position on the subject, rejects the Supreme Court's notorious decision of *Employment Division v. Smith*. In *Smith*, Mr. Speaker, Justice Scalia, who is still in the court, wrote that the accommodation of religion should be left 'to the political process' where government officials and political majorities may abridge the rights of free exercise of religion.

"The Constitution does not endorse any religious creed, and it does not recognize any power of government to decide theological questions. Beliefs about the nature of God is a proper subject for individuals, families, religious communities, and theologians, but not for government bodies..."

"That's currently the position of the American Civil Liberties Union, and it's the correct decision, Mr. Speaker. I did some research. Back in 1993, in response to the decision of the Rehnquist Court, it was unanimously approved by the United States Senate and Congress. Even our own Senators Daniel K. Inouye and Daniel K. Akaka supported it. I think there are only three members of the U.S. Senate who opposed it. And they are all Republicans, Mr. Speaker. But it established a balancing test in which you could have an ability to reconcile these two important constitutional provisions, freedom of religion and freedom from religion, freedom of conscience, freedom of speech, along with civil rights, due process, and equal protection.

"This is the case, Mr. Speaker, in the peyote case. There was an Indian tribe that believed the sacrament of the peyote was part and parcel of their religion. That's what we're protecting here.

"It also protects, Mr. Speaker, minority religions like the Santerians, who believe that they need to worship their gods or goddesses, how many they have, with an animal sacrifice. It protects these people. It'll even go, Mr. Speaker, to protect the indigenous religions and practices of our first nation's people, or even our Native Hawaiians. That's the purpose of this.

"Finally, Mr. Speaker, there's an inseverability provision within this bill that's based upon New York and Maryland. And the intent of this inseverability provision, Mr. Speaker, is this. That you would prevent the fringe on both sides of this discussion from taking advantage of the law to their advantage, to either be a martyr for one cause or the other. But if one part would be deemed illegal, immoral, or unconstitutional, the whole thing goes away. This would be the final standoff between the two warring sides. And that's what this bill would do with an inseverability provision.

"Finally, Mr. Speaker, it's the divorce provision in Section 9 that I object to. I've spoken about it earlier, but for these reasons I ask that we consider this floor amendment. Thank you, very much."

Representative Oshiro's written remarks are as follows:

"Mr. Speaker, I rise in support of Floor Amendment No. 7.

"This floor amendment would amend the House Draft 1 by:

- (1) Deleting certain language from the purpose clause;
- (2) Inserting SECTION 2 from House Bill No. 6, the 'Little' Religious Freedom Restoration Act;
- (3) Inserting SECTION 14 from House Bill No. 6, the inseverability clause; and
- (4) Deleting SECTION 9 of House Draft 1, which would allow a party to a same-sex marriage access to Hawaii courts for divorce, annulment, or separation proceedings.

"The rationale for each change is as follows:

#### **I. Deleting Certain Language from the Purpose Clause**

"This floor amendment deletes language found on page 2, lines 4 through 10 of House Draft 1, which states:

*"Ensure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying all provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law; and..."* [Emphasis Added.]

"Because this language is in the purpose clause, the courts will use this language to construe the Legislature's intent should there be any conflicts that arise in the application of this Act. A black-letter reading of this language appears to assert that the Legislature intends that all provisions of law regarding marriage should be applied equally to same-sex couples and opposite-sex couples regardless of whether the language in statute provides the case. Moreover, this legislative intention – that no legal distinction be made between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State – is to be construed and manifested even without any direct action to amend or not amend any provision of law.

"Frankly, I have never seen any such provision before and the breadth and scope of its reach leaves me breathless. But, as even retired Supreme Court Justice Levinson reminded us, the choice of words and phrases and the language in the law has meaning and the legislative intent will be applied to existing law. Mr. Speaker, does this language truly mean what it says? Wouldn't this supersede any and all amendments we are approving in the remaining sections of the bill that treat same-sex couples and opposite-sex couples differently?

"There are countless instances where marriage status impacts how the law will be applied and as such, it is unclear whether an equal treatment would conflict with the manner the statute is supposed to operate. As previously discussed in the debates on this measure, there are numerous statutes that treat parties differently because of gender. This is especially the case in family law statutes. Currently, the law treats the birth mother differently from the biological father primarily because the mother carries the child before birth – a near self-evident fact. Likewise, it is a presumption that a child born to a married couple is the biological offspring of the husband and spouse.

"As previously discussed regarding the parenting provisions, a blanket statement to apply all of the laws equally regardless of gender, while perhaps noble in its goal, is patently negligent because such a broad application of public policy will undoubtedly conflict with the practical implementation of law. That nowhere in the public record had we received any comment from the Hawaii State Judiciary and Hawaii State Bar Association, Tort Law Division, cause us to pause and seek their input and comment.

"Finally, it cannot be repeated enough that this purpose clause provision does not rest squarely with the rest of this measure. It should not be construed to provide the overarching legislative intent that 'there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State'. I fear that such a broad, blanket policy statement could make all subsequent provisions and exemptions therein both meaningless and void.

#### **II. 'Little' Religious Freedom Restoration Act**

"This floor amendment would also create a new right by codifying the federal Religious Freedom Restoration Act in Hawaii State Law to:

- (1) Establish the compelling interest test as the standard applicable by the courts of the State of Hawaii in all cases where free exercise of religion is substantially burdened; and
- (2) Establish a claim or defense to persons whose religious exercise is substantially burdened by government.

"Prior to 1990, the First Amendment was interpreted by the U.S. Supreme Court to give protection to religious belief and conduct in all cases where such belief or conduct was not outweighed by some compelling government interest in protecting life, liberty, property, or some other similarly weighty community concern. See, *Sherbert v. Verner*, 374 U.S. 398 (1962) (Sabbath-keeper's convictions protected); *Wisconsin*

v. Yoder, 406 U.S. 205 (1972) (Amish protected in conviction re need to educate children at home after age of 14); McDaniel v. Paty, 435 U.S. 618 (1978) (State cannot inquire into religious belief as condition of employment); Thomas v. Review Bd., 450 U.S. 707 (1972) (1981) (Jehovah's witness protected in conviction against making war materials); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (employee protected in observing holy days even when conversion occurred after hiring). But in the 1990 case of Employment Division v. Smith, 494 U.S. 872 (1990), the U.S. Supreme Court decided that, in many cases, the First Amendment should only protect religious exercise from laws or regulations that were targeted at religion. Under the Court's reasoning, a law that forbade Orthodox Jews from wearing yarmulkes on government property would be unconstitutional, as it would be targeting religion. However, if the law were to forbid all people from wearing hats on state property, it would be constitutional – even though the law would require Orthodox Jews to violate either their consciences or the law in order to walk on government property. Because the law is 'neutral' toward religion and 'generally applicable' to all persons, the First Amendment would no longer apply, despite the very real burden the law placed on a religious minority.

"Because many difficulties faced by minority religions are caused by legislative ignorance or insensitivity and not by open malice, religious groups were dealt a severe blow by the Smith decision. Most legislatures are clever enough to couch even anti-religious legislation in neutral and generally applicable terms, thereby evading the First Amendment. Thus, as the Harvard Law Review put it, the Smith Decision as a practical matter 'eviscerated' and 'gutted' much of the protection previously enjoyed under the Free Exercise Clause of the First Amendment.

"For a brief period from 1993 to 1997, there was a federal law that protected religious freedom generally. Known as the federal Religious Freedom Restoration Act (RFRA), it no longer applies to state actions.

"The federal RFRA resulted largely from the efforts of the Coalition for the Free Exercise of Religion, which was formed in response to the Smith decision. With the support of unlikely allies such as the Catholic Church, the ACLU, the Christian Legal Society, the National Council of Churches, major Jewish organizations, the National Association of Evangelicals, the Southern Baptists' Ethics Religious Liberty Commission, the Mormons, and People for the American Way, the federal RFRA was passed by a virtual unanimous Congress in 1993. It restored the compelling interest standard to claims of religious freedom.

"Legislatively, the federal RFRA was originally introduced by Rep. Charles Shumer (New York) in the House and Senator Edward Kennedy (Massachusetts) and it was approved unanimously by the House of Representatives (voice vote). In the Senate, only three members voted no – Byrd (D – WV), Helms (R – NC) and Mathews (D – TN).

"Hawaii's entire congressional delegation supported this legislation – Congress Members Neil S. Abercrombie and Patsy Mink, and Senators Daniel Akaka and Daniel Inouye.

"In 1997, the United States Supreme Court held in City of Boerne v. Flores, 521 U.S. 507 (1997), that Congress exceeded its legislative authority in applying the federal RFRA to state law. Because of this, unless the state enacts the RFRA into its own laws, the compelling interest test would not necessarily apply. It must be reemphasized that after this decision, the ACLU worked with a broad coalition of religious groups and civil rights groups to enact the Religious Land Use and Institutionalized Persons Act which, among other important protections, gives religious groups added protections against local land use policies and restrictions.

"And why is this important within the context of same-sex marriage? The RFRA provision would require Hawaii's courts to balance a person's right to freely exercise religious beliefs with the just as important right of another to be treated equally under the law. Without this vital component, the rights to equal protection of a same-sex couple would supersede the rights of the religious believer or conscientious objector – an outcome that is abhorrent to our American way of life.

"Justice necessitates balance. As such, in my view, the enactment of RFRA into the same-sex marriage bill is not only relevant, but essential for there to be any balance in this legislation, or justice for that matter.

"Earlier, concerns were raised that such a provision would allow anyone to discriminate so long as it was done so because of a 'sincerely held religious belief'. However, the courts have long dealt with these issues.

"By establishing an affirmative defense, the burden of showing beyond a reasonable doubt that the 'sincerely held religious belief' was unconstitutionally infringed upon by the statute is placed upon the person asserting the defense. See, State of Hawaii v. Jonathan H. Adler, Slip Op. 25224, 118 P.3d. 652 (2005). Only after that was found would the state then have to justify the statute by compelling government interest, and show that the statute was narrowly tailored to minimize the effect on the person's religious exercise. Thus, it only arises where there is a 'violation' of 'sincere' beliefs that are 'religious' and not to situations that merely make religious people uncomfortable, nor to insincere beliefs asserted as a pretext for discrimination, nor to non-religious moral beliefs.

"Without the inclusion of specific protections for conscientious objections such as the religious freedom restoration act, the enactment of House Draft 1 will force religious organizations, businesses and individuals to compromise their deeply held beliefs to comply with the law. Again, these are constituents who have no objection to providing services to same-sex couples, but object to facilitating the marriage of a same-sex couple.

"Moreover, this concern is not a mere hypothetical or without any merit when one examines the language found on page 6, of the 'Response To Inquiries Memorandum, Dated October 17, 2013, Bill Hoshijo, Executive Director, Hawaii Civil Rights Commission, re: Marriage Equality, Religious Organizations and Facilities, and Public Accommodations Law', which states in relevant part:

*"The State of Hawaii has a compelling state interest in eliminating discrimination in public accommodations. Out public accommodation law is a law of general applicability that serves a compelling state interest and does not target any religion." [Emphasis Added.]*

"Thus, if this is the standard by which the Hawaii Civil Rights Commission will conduct its analysis and application of Chapter 489, HRS, in the situation where there is a conflict between an individuals' liberty right under Section 489-3, HRS (Discriminatory practice prohibition), and another individual's First Amendment religious freedom right, without the balanced approach of the Sherbert Test, as would be established in the RFRA, the outcome will be a substantial and certain abridgment of one's First Amendment religious freedom right.

"As the preeminent and distinguished Professor of Constitutional Law, Erwin Chemerinsky, suggests:

*"[Third] [S]tate government can enact their own religious freedom restoration act in order to have state courts apply strict scrutiny to state government actions or laws that burden religion. States, of course, pursuant to police power, may adopt any law not prohibited by the Constitution. Nothing in the Court's decision in Flores precludes a state from deciding that it will tolerate state actions and laws that burden religion only if they meet strict scrutiny.*

*"There is no doubt that people have less protection for their religious practices after Flores than they did before. Hopefully, though, this will be only temporary as legislatures find other ways to protect individuals from neutral laws of general applicability that burden religion. Hopefully, too, the Supreme Court will uphold these laws and recognize that more is not less; legislatures may protect rights greater than those found in the Constitution by the Supreme Court." [Emphasis Added.] (See, Erwin Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights, 39 Wm. & Mary L. Rev 601 (1998) pg. 636.)*

### "III. Inseverability"

"To ensure that the equal protection and religious freedom provisions are applied in tandem, the bill is specifically designed to become invalid in its entirety if any portion of the bill is stricken by the courts.

"This approach is the same taken in Maryland and New York State where an inseverability provision was included in the bill that legalized same-sex marriage to obtain support from both liberal and conservative members of the Legislature. It has the effect of curbing the fringe members of the various stakeholders from seeking to strike down any portion of the law it finds disagreement with and promotes a mutual level of interdependence to the effectiveness of the whole policy as each has a similar political veto power over the other.

"This provision has been in effect in Maryland and New York, since 2012 and 2011, respectively and no published legal action has been issued in either state. We should consider this provision if we are serious and sincere about promoting a policy on same-sex marriage that allows all to 'live and let live' in our island home and community in the middle of the sea.

### "IV. Domiciliary Requirements Necessary for Recognition of Divorce Decrees Issued in the State of Hawaii"

"SECTION 10 of House Draft 1, page 17, line 9, through page 19, line 13, would allow any party to a marriage solemnized in the State of Hawaii to access Hawaii courts for the purpose of obtaining an annulment, divorce or separation if neither party is able to pursue an action for annulment, divorce, or separation where the parties are domiciled because both parties are domiciled in a jurisdiction or jurisdictions that do not recognize the marriage. This provision would exempt these parties from the three-month domiciliary requirement to use the courts in the State of Hawaii for purposes of divorce, annulment, or separation. Be certain that this provision would affect both out-of-state and out-of-country marriages and may have serious consequences upon child custody, support, visitation, and parental rights, without the current due process protections.

"Professor Lynn D. Wardle, a recent panelist at the House of Representatives Informational Briefing, October 23, 2013, former President of the International Society of Family Law, current President of the International Academy of the Study of the Jurisprudence of the Family, and author and co-author of six books about family law, and over 100 law review articles, mostly about family law, is a full-time law professor, having taught family law for 35 years. He strongly condemns the amendments to Section 580-1, Hawaii Revised Statutes (HRS), which allows the Hawaii courts to have jurisdiction to grant a divorce to any couple even living outside of Hawaii, regardless of where else they are domiciled, where else they live, where else they have their home, own property, or have children or custody of children, if they got married in Hawaii and now live in a state or country that does not recognize their marriage. Professor Wardle has shared with me that there is NO state that allows this radical extension of divorce jurisdiction and it is almost certainly unconstitutional under long-established precedents and standards set by the U.S. Supreme Court.

"In Williams v. North Carolina, 317 U.S. 287 (1942), the United States Supreme Court held that the federal government determines marriage and divorce status between state lines, and that the State of North Carolina was not required to recognize a Nevada divorce decree because the State of Nevada did not require either spouse to be domiciled in the state. Mere residence will not do but domicile is necessary. The reason for such a high standard is the constitutional requirement of due process of law.

"In other words, courts of the state in which a party to a marriage is domiciled, just like the state in which land is situated, have the only constitutional authority to issue a court order regarding the res or matter that is the subject of litigation – the marriage in one case, the land in another case.

"Furthermore, we should be questioning the necessity for this special privilege to a same-sex couple that is not granted to a heterosexual couple.

Why are we creating this special privilege? What effects will it have upon the operations and policies of our family courts?

"By allowing any same-sex couple married in Hawaii not domiciled here to access our courts for purposes of obtaining a divorce, annulment, or separation, it is arguable that the bill, as presently drafted, would jeopardize the validity of any divorce, annulment, or separation decree issued in the State of Hawaii as they are recognized by other states. SECTION 10 of House Draft 1, page 17, line 9, through page 19, line 13, is certain to run afoul of constitutional requirements of due process of law and place a cloud of uncertainty over Hawaii's Family Court decrees and orders.

"In conclusion, the amendments proposed in this floor amendment are necessary to correct fatal flaws in the House Draft 1. Should these flaws not be corrected, the potential for harm that this bill will have on our people is enormous, and in most cases irreversible and permanent.

"How can we forget the children who may or may not be Hawaii residents or even U.S. citizens or who are domiciled on the U.S. Mainland.

"Does this extraordinary change comport with all federal and state laws regarding the transfer of children across state and country borders?

"What occurs if the parties to the marriage do not consent to the family court's jurisdiction?

"What happens to the adjudication of child custody, spousal support, child support, property division, or other important matters such as educational opportunities, visitation rights, medical treatment, and other matters commonly disposed of under the present marriage laws and family court procedures?

"Do we understand how this change in our marriage laws and related family court rules and policies could, for all practical purposes, terminate and end a child's relationship with his or her own biological parent?

"Are we so sure that we may not be playing a part in an incremental pursuit to cut-off a child's link to his or her unique cultural legacy or ancestral heritage?

"The public record is lacking on any discussion of this provision and how it may affect children. The Attorney General's written testimony, dated October 31, 2013, page 4, does not even mention 'child' or 'children' or 'minor' or 'minors', which in my humble opinion only suggest a mere cursory review of the provision or a gross misunderstanding of how this provision could do great and irreparable harm to the child and children of a same-sex marriage couple.

"Mr. Speaker this kind of substantive change deserved much more discussion and review as it deals with children. That this Body did not examine and consider these foreseeable challenges underscores the great and grave danger in rushing this measure through.

"For this reason, I strongly urge your favorable consideration of this floor amendment."

Representative Jordan rose to speak in support of the proposed floor amendment, stating:

"Thank you very much, Mr. Speaker. I am in support of this measure. I'd like to thank the great Representative from Wahiawa for introducing this floor amendment. I appreciate these items that he has placed in this measure. I can appreciate the Religious Freedom Restoration Act. I think it's very kind of him to put that in there to protect religious freedom. See, Mr. Speaker, that's one of the reasons why I had to vote the way I did yesterday. Because I have to balance rights of minorities with religious freedom rights of the majority. After all, I thought that's what I was placed here to do when I took that oath to follow the process and uphold the constitution.

"And I don't want to erode upon anybody's particular rights. And that's why I had to dig deep inside me and say, what comes first. So I appreciate

this measure, especially this Religious Freedom Restoration Act. As the kind Representative from Wahiawa was expounding upon, when this was voted on, our current sitting Governor voted and supported freedom of religion. So I think he would be very open, since he is so supportive of providing services for same-gender couples.

"I don't even know why this wasn't brought up. I brought this up many times during the hearings. I do appreciate the inseverability clause, obviously that has been placed in two other measures across the country. I think it creates a very fair, balanced playing field. I think it will resolve a lot of these issues that we heard over those five days of testimonies. Who's going to attack who first? Who's going to lose their property? Who's going to be subject in the long court battles? It's the small person. It's the individual who feels their rights have been subjected.

"I beg to differ, when people say our public accommodations law is the best in the land and nobody's challenged it, Mr. Speaker. Our poor and our meek find out that they have to pay for it, they'll just walk away and say, yeah my rights were violated, but it's okay, I just won't go back there again. These, as a Legislative Body dictating to the judicial system, are bright lines when we're making this measure, Mr. Speaker. Thank you very much."

Representative Fale rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in support of the intent of the measure, Mr. Speaker. Given that the good Representative from Waikiki astutely pointed out that there are some serious flaws that we're going to have to deal with after this bill passes, Mr. Speaker, I believe it's in the wisdom of a very wise and prudent legislature to make sure that we minimize the damage that we do to our community if we move legislation forward in a rash manner and when it hasn't been properly vetted.

"Our community hasn't been able to weigh in on the amendments that were made to SB 1 given the short time that has transpired in between the time that the original bill was released, the time that the bill was amended, to where it is right now, Mr. Speaker.

"So I believe that it is very important for this Body to consider the amendments that have been placed before us, including this Floor Amendment Number 7, which is trying to deal with a number of the shortcomings of SB 1, Mr. Speaker, even with the few amendments that were made.

"Already we are seeing issues that are arising from the problems that have not been addressed with the amendments that were made to SB 1 recently. So this is definitely a very valiant and a very thought-out approach, Mr. Speaker, to address some of those issues.

"Given the fact that we are very aware of the rights that could very easily be trampled upon, Mr. Speaker, if we do not thoroughly address the concerns that are being raised. It is very clear that, having not been given the opportunity to take this measure back to my community, and the request was made in the hearing, Mr. Speaker, and they said to defer and ask you for a recess long enough for a few days, to take this measure back to our communities. That request was not granted, so this is the only opportunity we have to try and address some of these issues.

"It is still within the power of this Body to grant that recess long enough to allow us to educate our communities and to get the feedback necessary, whether this is good.

"I don't know, Mr. Speaker, if this amendment will address all of them. Maybe it will address some. But I think we need to understand, very clearly and without question, that there are some very serious flaws that need to be addressed in SB 1, even with the House draft, and these amendments, Mr. Speaker, I think, we need to be supportive of, given that we are not allowed the time to take the measure back and have our communities vet it, Mr. Speaker. Thank you very much."

Representative Brower rose to speak in opposition to the proposed floor amendment, stating:

"Thank you, Mr. Speaker. In opposition. In reference to the comment from the previous speaker, I do have concerns over this measure and its unintended consequences. I raised that to the Attorney General, and he said that I was wrong, and I accept his answer. Thank you."

Representative Fale rose to respond, stating:

"Mr. Speaker, just a reference. I'm glad he got an answer from the Attorney General, Mr. Speaker, because the Attorney General wasn't able to answer a whole host of questions that were posed to him during the hearings. So I'm glad at least the good Representative from Waikiki got an answer that was clear and concise and actually addressed what was given him.

"So I appreciate that very much, Mr. Speaker, and I wish the Attorney General was to do as much when we did have the hearing. Thank you very much."

Representative Saiki rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition to this floor amendment. I just wanted to make three points. First, for those members who oppose marriage equality, they should note that this floor amendment authorizes same-sex marriage.

"Second, for those members who are concerned about the process, and the legislative process in particular, they should note that this floor amendment adds brand new provisions that have not been discussed publicly. Such as, incorporation of the Religious Freedom Restoration Act.

"Third, for those members who are concerned about the scope of the religious exemptions, they should note that this floor amendment restricts the religious exemption for church facilities when compared to House Draft 1. And the reason why it's more restrictive is because this proposed language would not include protection for religious facilities that provide wedding operations, even if those operations are commercial in nature.

"For those reasons, I oppose this floor amendment and I call for the question. But please allow members to submit written comments if they have any. Thank you."

At this time, Representative Saiki called for the previous question.

At this time, the Chair stated:

"The question has been called. However, we will allow the mover to proceed, please, before the question is called."

Representative Oshiro rose to respond, stating:

"Thank you very much, Mr. Speaker. I hope this is not the pattern of the practice today. I think the Majority Leader and I share a common bond of having been Majority Leaders for the caucus, so he knows the importance of what I do today and the manner in which I do it. So thank you, Mr. Speaker. How much time do I have?"

The Chair addressed Representative Oshiro, stating:

"You have two minutes."

Representative Oshiro continued, stating:

"Okay, thank you very much, Mr. Speaker. Let me tell you why it's so important, Mr. Speaker. It's very important because, number one, we don't have to limit ourselves to 10 days, or 15 days, or 20 days, we can go up to 30 days. There is no rush. Unless you want to be the first legislature in the entire world to approve same-sex marriage in record time and disregard centuries of, thousands of years of culture and tradition, and forget about the religious rights and freedoms protected in our constitution.

"I don't think we want to do that, Mr. Speaker, so that's why I'm standing here today. Understand this, Mr. Speaker, members, that once we go out

there and we approve this, there's no going back. There's no going back to fix this bill, there's no going back to have a constitutional amendment to take away vested property rights, which would violate a person's due process rights under the state or federal constitution.

"So once the first marriage license is issued, Mr. Speaker, there's no going back folks. This is a one shot deal. And that's what the scholars talk about in this book, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, this is a treatise of the law today. This should be read by anyone, civil libertarians, civil rights activists, legislators, executives, commissioners, etc.

"This is a treatise that should be studied, and these folks are saying to us, many of them who support same-sex marriage. You can't rush something like this, Mr. Speaker. Thank you very much."

Representative Say rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, may you record a yes vote for me on this floor amendment, since this is a voice vote. Thank you."

The motion that Floor Amendment No. 7, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representatives Brower and Saiki voting no, and with Representatives Cachola, Choy, Nishimoto and Tokioka being excused.

At 1:30 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 1:37 o'clock p.m.

At this time, Representative Oshiro offered Floor Amendment No. 8, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1, H.D. 1, is amended by deleting its contents and inserting the following provisions:

"SECTION 1. The legislature acknowledges the recent decision of the United States Supreme Court in *United States v. Windsor*, 133 S.Ct. 2675 (2013), which held that section 3 of the Defense of Marriage Act, Public Law 104-199, unlawfully discriminated against married same-sex couples by prohibiting the federal government from recognizing those marriages and by denying federal benefits and protections to those couples. This legislature had previously extended to same-sex couples the right to enter into civil unions that provide the same rights, benefits, protections, and responsibilities under state law as afforded to opposite-sex couples who marry. However, these civil unions are not recognized by federal law and will not receive treatment equal to a marriage under federal law.

The legislature further finds that in *Garden State Equity v. Dow*, Docket No. L-1729-11 (New Jersey, September 27, 2013), the superior court of New Jersey granted summary judgment extending civil marriage to same-sex couples. Citing *Windsor*, the New Jersey appellate court held that by creating two distinct labels – marriage for opposite-sex couples and civil unions for same-sex couples – New Jersey civil union partners are excluded from certain federal benefits that legally married same-sex couples are able to enjoy. The court held that this unequal treatment requires New Jersey to extend civil marriage to same-sex couples to satisfy the equal protection guarantees of the New Jersey Constitution.

The legislature further finds that, while same-sex civil marriage would be a great advancement for human liberty, this change could have serious implications if steps are not taken to protect the liberties and equal rights of those religious organizations and believers who cannot conscientiously recognize or facilitate same-sex civil marriages. There will be no net gain for human liberty and equal rights if same-sex couples are permitted to oppress religious dissenters in the same way that those dissenters, when they had the power to do so, oppressed same-sex couples.

Sexual minorities and religious minorities make essentially parallel claims on the larger society, and the strongest features of the case for same-sex civil marriage make an equally strong case for protecting the religious liberty of dissenters. Both same-sex couples and committed

religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multifaceted intimate relationship with the person they love. For religious believers, the conduct at issue is to live and act consistently with the demands made by the Being that they believe made us all and holds the whole world together.

There is no reason to let either side oppress the other. Same-sex couples should not be denied the right to civil marriage, and the State should not force dissenting religious organizations to recognize or facilitate same-sex marriages.

The legislature also finds that in some religious faiths, marriage is a contract composed of two parts – an agreement between the individuals being married, and an agreement between the couple and the church. While the first agreement ensures that the relationship between the individuals is based on mutual love and respect and be "to death" or for "eternity," the second agreement formalizes the couple's recognition in the church and memorializes the rights, duties, and obligations of the church and the couple.

For example, according to the Catechism of the Catholic Church (1631), ". . . marriage introduces one into an ecclesiastical order, and creates rights and duties in the church between the spouses and toward their children. . ." For the Church of Jesus Christ of Latter-Day Saints, ". . . [marriage] is a pledge, or solemn covenant, a spiritual sign or bond between the contracting parties themselves and between them and God. . ."

While the State has asserted its sovereign authority to regulate the civil aspects of marriage, the legislature also recognizes that the broad application of this authority may impair the exercise of religious freedom and the ability for the couple to "contract" with a religious organization in the context of marriage.

The Hawaii supreme court's seminal ruling in *Baehr v. Miike*, 74 Haw. 530, 852 P.2 44 (Haw. 1993), spoke to the State's authority to issue marriage licenses by holding that the department of health could not deny a same-sex couple a marriage license solely on the basis of gender. But efforts to change the Hawaii marriage law to effectuate this principle run the risk of exceeding the scope of what is required under equal protection and entering into realms that are essential for citizens to fully exercise their religious freedom.

As such, the legislature asserts the need to separate the licensing aspects of marriage, which clearly may be governed under civil law, from the contractual aspects of marriage between the individuals being married and the religious organization solemnizing the marriage in accordance with common practice, canon, and common law for hundreds of years.

It is the intent of the legislature that:

- (1) Same-sex couples be able to take full advantage of federal benefits and protections granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State;
- (2) Marriages solemnized in accordance with this Act be equal in all respects to the marriages of opposite-sex couples under the laws of this State;
- (3) There be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State;
- (4) All provisions of law regarding marriage be applied equally to same-sex couples and opposite-sex couples, regardless of whether this Act amends any such provision of law; and
- (5) The statutory system of inequity within domestic relations be reformed to ensure that the bundle of rights afforded to married couples, including the unique meanings and traditions associated with it, are not denied by the State (in its capacity as a licensing authority) to any couple solely on the basis of gender.

Accordingly, the purpose of this Act is to harmonize the right to equal protection under the law for same-sex couples, as guaranteed by the Fourteenth and Fifth amendments of the United States Constitution and article I, section 3 of the Constitution of the State of Hawaii, with the equally important right to the free exercise of religion, as guaranteed by the First Amendment of the United States Constitution and article I, section 4 of the Constitution of the State of Hawaii.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**"CHAPTER  
RELIGIOUS FREEDOM RESTORATION ACT**

§ -1 **Findings.** (a) The legislature finds that:

- (1) The authors of the Bill of Rights secured the free exercise of religion as an unalienable right under the First Amendment of the United States Constitution;
  - (2) The free exercise of religion is also guaranteed under article I, section 4 of the Constitution of the State of Hawaii;
  - (3) Laws neutral toward religion may substantially burden religious exercise as surely as laws intended to interfere with religious exercise;
  - (4) Government should not substantially burden religious exercise without compelling justification;
  - (5) The United States Supreme Court in a recent decision virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
  - (6) The compelling interest test in the free exercise of religion established by the United States Supreme Court is a workable test for striking sensible balances between religious liberty and competing government interests.
- (b) The legislature declares its intent that:
- (1) It shall be the policy of the State that the compelling interest test in the free exercise of religion, as established by the United States Supreme Court under *Sherbert v. Verner*, 374 U.S. 398 (1963), shall be the standard applicable by the courts of this State in all cases where religious exercise is substantially burdened; and
  - (2) This chapter shall provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ -2 **Free exercise of religion protected.** (a) The State and its political subdivisions shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Neither the State nor its political subdivisions shall burden a person's exercise of religion unless it demonstrates that imposition of the burden on the person both:

- (1) Furthers a compelling government interest; and
  - (2) Is the least restrictive means of furthering that compelling interest.
- (c) Notwithstanding any law to the contrary, a person whose religious exercise has been substantially burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the State or its political subdivisions.
- (d) Nothing in this chapter shall be construed to authorize the State or its political subdivisions to substantially burden any religious belief.
- (e) Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of article I, section 4 of the Constitution of the State of Hawaii, prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under article I, section 4 of the Constitution of the State of Hawaii, shall not constitute a violation of this chapter."

SECTION 3. Chapter 321, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**"PART . LICENSING AND CERTIFICATION  
OF DOMESTIC RELATIONS CONTRACTS**

§321-A **Rights and obligations.** (a) Upon the issuance of a marriage license, the parties named in the license shall be entitled to those rights and obligations provided by law to married persons. The rights and obligations of marriage shall be granted to the licensees upon the solemnization of the marriage ceremony; provided that the marriage shall be solemnized within the thirty-day period in which the marriage license is valid in accordance with this part.

(b) Upon the issuance of a certificate of reciprocal beneficiary relationship, the parties named in the certificate shall be granted those rights and obligations provided by law to reciprocal beneficiaries. Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage under this part.

§321-B **Reliance on federal law.** Any law of this State that refers to, adopts, or relies upon federal law, including but not limited to the Internal Revenue Code, as amended, shall apply to all marriage licenses recognized under the laws of this State as if federal law recognized the marriage licenses in the same manner as the laws of this State, so that all marriage licensees receive equal treatment.

§321-C **Requisites of marriage license.** (a) The department of health shall issue a marriage license if the department determines that all of the following requisites are met:

- (1) The applicants do not stand in relation to each other of ancestor and descendant of any degree whatsoever, siblings of the half as well as the whole blood, uncle and niece, uncle and nephew, aunt and nephew, aunt and niece, whether the relationship is the result of the issue of parents married or not married to each other;
- (2) Both applicants at the time of applying for the license are at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, a marriage license may be issued to applicants under the age of sixteen years, but in no event under the age of fifteen years, in accordance with this section;
- (3) Neither applicant at the time of applying for the marriage license has any lawful living spouse;
- (4) Both applicants consent to marriage with neither applicant consenting under force, duress, or fraud;
- (5) Neither applicant is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;
- (6) The applicants are applying for the marriage license with an agent duly appointed and authorized to grant marriage licenses; and
- (7) The marriage ceremony is performed in the State by a person or society with a valid license to solemnize marriages, and the applicants and the person performing the marriage ceremony are all physically present at the same place and time for the marriage ceremony.

(b) A marriage license shall not be denied to any couple solely because both applicants are of the same gender.

(c) Whenever any person who is under the age of eighteen applies for a marriage license, the written consent of the applicant's parents or guardian or other person in whose care and custody the applicant may be, shall accompany the application for a marriage license. No license shall be issued to any minor who is under the jurisdiction of the family court without the written consent of a judge of the court.

(d) Whenever any person under the age of eighteen and whose parents are deceased, or who is a ward of a family court, applies for a marriage license, the applicant shall set forth in the statement accompanying the application, the name of the applicant's guardian or of any other person in whose care and custody the applicant may be.

(e) If any applicant for a marriage license appears to any agent to be under the age of eighteen years, the agent shall, before granting a marriage license, require the production of a certificate of birth or other satisfactory proof showing the age of the applicant.

§321-D **Requisites of reciprocal beneficiary certificate.** The department of health shall issue a reciprocal beneficiary certificate if the department determines that all of the following requisites are met:

- (1) Each of the applicants is at least eighteen years old;
- (2) Neither of the applicants is married, a party to another reciprocal beneficiary relationship, or a partner in a civil union;
- (3) The applicants are legally prohibited from obtaining a marriage license under this part;
- (4) Consent of either party to the reciprocal beneficiary relationship has not been obtained by force, duress, or fraud; and
- (5) The applicants have signed a declaration of reciprocal beneficiary relationship in accordance with this part.

§321-E **Registration as reciprocal beneficiaries; filing fees; records.** (a) Two persons, who meet the criteria set forth in section 321-D, may enter into a reciprocal beneficiary relationship and register their relationship as reciprocal beneficiaries by filing a signed notarized declaration of reciprocal beneficiary relationship with the director of health. For the filing of the declaration, the director shall collect a fee of

\$8, which shall be remitted to the director of finance for deposit into the general fund.

(b) Upon the payment of the fee prescribed under subsection (a), the director of health shall register the declaration and provide a certificate of reciprocal beneficiary relationship to each party named on the declaration. The director shall maintain a record of each declaration of reciprocal beneficiary relationship filed with or issued by the director.

**§321-F Termination of reciprocal beneficiary relationship; filing fees and records; termination upon marriage.** (a) Either party to a reciprocal beneficiary relationship may terminate the relationship by filing a signed notarized declaration of termination of reciprocal beneficiary relationship by either of the reciprocal beneficiaries with the director of health. For the filing of the declaration, the director shall collect a fee of \$8, which shall be remitted to the director of finance for deposit into the general fund.

(b) Upon the payment of the fee prescribed under subsection (a), the director of health shall file the declaration and issue a certificate of termination of reciprocal beneficiary relationship to each party of the former relationship. The director shall maintain a record of each declaration and certificate of termination of reciprocal beneficiary relationship filed with or issued by the director.

(c) A reciprocal beneficiary relationship shall automatically terminate when:

- (1) Either party to the reciprocal beneficiary relationship obtains the rights and obligations of marriage in accordance with this part; or
- (2) Either party to the reciprocal beneficiary relationship obtains the rights and obligations of marriage outside the State in accordance with laws outside the State.

(d) If either party to a reciprocal beneficiary relationship enters into a legal marriage, the parties shall no longer have a reciprocal beneficiary relationship and shall no longer be entitled to the rights and benefits of reciprocal beneficiaries.

**§321-G Non-domestic marriage licenses, right of domicile.** (a) Marriage licenses between two individuals, regardless of gender and legal where issued, shall be held legal in the courts of this State.

(b) The right of an individual to be or to become a resident domiciled in this State shall not be denied or abridged because of the marital status of the individual. The residence of one spouse shall not establish the residence of the other spouse, which shall be determined by the same factors that apply in determining the residence of any other individual capable of having an independent residence.

**§321-H Marriage license; agent to grant; fee.** (a) The director of health shall appoint, and at its pleasure remove, one or more suitable persons as agents authorized to grant marriage licenses under this part in each judicial circuit. The agents may issue licenses from any state facility when deemed necessary by the director. Any agent appointed under this subsection and receiving an application for a marriage license shall collect from the applicant a fee of \$60, of which the agent shall retain \$9 for the agent's benefit and compensation and shall remit \$51 to the director of health, except as otherwise provided under subsection (b). Upon the receipt of remittances under this subsection, the director of health shall deposit:

- (1) \$32 for each license issued to the credit of the general fund of the State;
- (2) \$4.50 for each license issued to the credit of the spouse and child abuse special account established under section 346-7.5;
- (3) \$4.50 for each license issued to the credit of the spouse and child abuse special account established under section 601-3.6; and
- (4) \$10 for each license issued to the credit of the birth defects special fund established under section 321-426.

In addition, an agent appointed under this subsection shall collect from the applicant a surcharge of \$5, of which the agent shall retain the full amount for the agent's additional benefit and compensation.

(b) The director of health may appoint, as regular employees under the civil service and classification laws, the number of suitable persons as agents authorized to grant marriage licenses for whom provision has been made in the general appropriations act. In the case of agents appointed under this subsection, the full amount of the fee collected from applicants pursuant to subsection (a) shall be remitted to the director of health. Upon the receipt of remittances under this subsection, the director shall deposit:

- (1) \$41 for each license issued to the credit of the general fund of the State;
  - (2) \$4.50 for each license issued to the credit of the spouse and child abuse special account established under section 346-7.5;
  - (3) \$4.50 for each license issued to the credit of the spouse and child abuse special account established under section 601-3.6; and
  - (4) \$10 for each license issued to the credit of the birth defects special fund established under section 321-426.
- (c) Every agent appointed under this section may administer any oaths that may be required under this part.
- (d) The department of health or its authorized agents shall furnish to each female applicant for a marriage license a brochure explaining rubella, the risks of infection with rubella during pregnancy, and how to seek testing and immunization. The department or its authorized agents shall also furnish to each applicant for a marriage license information, to be provided by the department, relating to acquired immune deficiency syndrome (AIDS), including the availability of any anonymous testing for human immunodeficiency virus (HIV) infection at alternate test sites, and information relating to population stabilization, family planning, birth control, and fetal alcohol and drug syndromes.

**§321-I Applications; license; limitations.** To secure a marriage license, the applicants for the license shall appear personally before an agent authorized to grant marriage licenses under section 321-H and shall file with the agent an application in writing. The application shall be accompanied by a statement signed and sworn to by each applicant, setting forth:

- (1) The applicant's full name, date of birth, social security number, and residence;
- (2) The relationship between the applicants, if any;
- (3) The full names of the applicants' parents; and
- (4) That any prior marriage or civil union other than an existing civil union between the persons applying for a marriage license has been dissolved by death or dissolution.

If all prior marriages or civil unions, other than an existing civil union between the persons applying for a marriage license, have been dissolved by death or dissolution, the statement shall also set forth the date of death of the last prior spouse or the date and jurisdiction in which the last decree of dissolution was entered. Any other information consistent with the standard marriage certificate as recommended by the Public Health Service, National Center for Health Statistics, may be requested for statistical or other purposes, subject to approval of and modification by the department of health; provided that the information shall be provided at the option of the applicant and no applicant shall be denied a license for failure to provide the information. The agent shall indorse on the application, over the agent's signature, the date of the filing thereof and shall issue a license which shall bear on its face the date of issuance. The license shall authorize the licensees to solemnize the marriage within thirty days commencing from and including the date of issuance. Upon solemnization at a marriage ceremony in accordance with this part, all rights and obligations of marriage authorized under law shall be granted to the licensees. However, if after the thirty-day period the marriage is not solemnized at a marriage ceremony, the license shall become void and no marriage ceremony shall be performed thereafter without the issuance of a new marriage license.

It shall be the duty of every person, legally authorized to grant licenses to marry, to immediately report the issuance of every marriage license to the agent of the department of health in the district in which the license is used, setting forth all facts required to be stated in a manner and on a form as the department may prescribe.

**§321-J Marriage ceremony; license to solemnize.** (a) It shall be unlawful for any person to perform a marriage ceremony within the State without first obtaining from the department of health a license to solemnize marriages.

(b) Any license to solemnize marriages issued pursuant to this part may be revoked or suspended by the department of health, if the holder of the license has failed to comply with the applicable provisions of this part or of the rules of the department of health.

**§321-K By whom solemnized.** (a) A license to solemnize marriages may be issued to, and the marriage rite may be performed and solemnized by, any minister, priest, or officer of any religious denomination or society

who has been ordained or is authorized to solemnize marriages according to the usages of the denomination or society, or any religious society not having clergy but providing solemnization in accordance with the rules and customs of the society, or any justice or judge or magistrate, active or retired, of a state or federal court in the State, upon presentation to the person or society of a license to marry, as prescribed by this part. The person or society may receive the price stipulated by the parties or the gratification tendered.

(b) The authority of any appropriately licensed person to solemnize a marriage, including any minister, priest, or officer of any religious denomination or society licensed to solemnize marriage in accordance with the usages of the denomination or society, shall be absolute. No refusal to solemnize a marriage by any person licensed to solemnize a marriage, including any licensed minister, priest, or officer of any religious denomination or society shall result in a civil claim or cause of action challenging the refusal under law, nor shall any action by any state or county agency to penalize or withhold benefits from any person licensed to solemnize marriage, including a licensed minister, priest, or officer of any religious denomination or society, or the denomination or society itself, under the laws of this State or its political subdivisions including laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status, because of the refusal of a person licensed to solemnize marriage, including any minister, priest, or officer of any religious denomination or society to solemnize a marriage.

**§321-L Record of solemnization; marriages, reported by whom; certified copies.** (a) Every person authorized to solemnize marriage shall make and preserve a record of every marriage by the person solemnized, comprising the names of the licensees married, their place of residence, and the date of their marriage.

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

(b) Each person legally authorized to perform a marriage ceremony shall report within three business days every marriage ceremony performed by the person to the agent of the department of health in the district in which the marriage takes place, setting forth all facts required to be stated in a standard certificate of marriage, the form and contents of which shall be prescribed by the department of health.

(c) The department of health shall deliver one certified copy of the certificate of marriage or any part thereof as provided in section 338-13 to the persons married. The certificate shall be prima facie evidence of the fact of marriage in any proceeding in any court.

The department of health shall upon request furnish to any applicant additional certified copies of the certificate of marriage, or any part thereof.

Copies of the contents of any certificate on file in the department, certified by the department, shall be considered for all purposes the same as the original.

The department may prescribe reasonable fees, if any, to be paid for certified copies of certificates.

**§321-M Delivery of records to department of health; penalty.** Whenever any agent authorized to grant marriage licenses ceases to be an agent, or is directed to do so by the department of health, or leaves the State, the agent shall deliver to the department all the agent's records of marriage licenses. Upon the death of an agent, the records shall be delivered to the department by the agent's personal representative or other legal representative.

Whenever any person holding a license to perform the marriage ceremony is directed to do so by the department of health, or whenever the license is canceled or otherwise terminated or upon the departure from the State of the person, the person shall deliver to the department all the person's records of marriages, or upon the death of the person the records shall be delivered to the department by the person's personal representative, or other legal representative.

Any person violating this section shall be fined not more than \$500.

**§321-N Administrative rules.** The director of health may adopt rules in accordance with chapter 91 necessary or appropriate to facilitate the provisions of this part.

**§321-O Construction.** This part shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the Constitution of the State of Hawaii and the United States Constitution."

SECTION 4. Chapter 489, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**"PART . RELIGIOUS FREEDOM IN PUBLIC ACCOMMODATIONS**

**§489- Religious freedom in marriage guaranteed.** Absolute freedom of conscience in all matters of religious sentiment, belief, and worship pertaining to marriage shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; provided that the liberty of conscience secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State.

**§489- Religious organizations protected.** No religious educational, healthcare, or denominational organization; no organization operated for charitable or educational purposes and that is supervised, operated, controlled by, connected with, or publicly identified with a religious organization or group, regardless of whether its activities are deemed wholly or partly religious; and no individual employed or supervised by any of the foregoing organizations, while acting in the scope of that employment or supervision, shall be required to take any of the following actions if doing so would cause the organization or individual to violate their sincerely held religious beliefs:

- (1) Provide services, accommodations, advantages, facilities, goods, benefits, or privileges for a purpose related to the solemnization or celebration of any marriage;
- (2) Solemnize or celebrate any marriage; or
- (3) Treat as valid any marriage;

provided that a religious organization engaged in the provision of health care, or its individual employees, shall treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate health care decision making.

**§489- Individuals and small businesses protected.** (a) No individual, sole proprietor, or small business shall be required to take any of the following actions if doing so would cause the individual, sole proprietor, or small business to violate their sincerely held religious belief:

- (1) Provide any facility, good, or service that assists or promotes the solemnization or celebration of any marriage, or provide counseling or other services that facilitate the formation or perpetuation of any marriage;
  - (2) Provide benefits to any spouse of an employee; or
  - (3) Provide housing, lodging, or similar accommodation to any couple.
- (b) This section shall not apply if either:

- (1) A party to the marriage is unable to obtain any similar good or service, employment benefits, or housing elsewhere without substantial hardship; or
- (2) In the case of an individual who is a government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; provided that no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(c) For purposes of this section:

"Small business" means a partnership or legal entity other than a natural person that either:

- (1) Provides services that are primarily performed by an owner of the business;
- (2) Has five or fewer employees; or
- (3) Owns five or fewer units of housing in the case of a legal entity that offers housing for rent.

"Religious organization" means a privately held corporation or other legal entity that both:

- (1) Holds itself out publicly as adhering to specific religious beliefs; and
- (2) Is operated consistently with those beliefs.

**§489- Immunity from civil cause of action and other penalties.** Notwithstanding any other law to the contrary, no refusal to provide services, accommodations, facilities, goods, or benefits protected by this part shall result in any of the following:

- (1) A civil claim or cause of action challenging the refusal under law; or
- (2) Any action by any state or county agency to penalize or withhold benefits from any protected entity or individual under any laws of this State or its political subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.

**§489- Construction.** This part shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the Constitution of the State of Hawaii and the United States Constitution."

SECTION 5. Chapter 572, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**"PART . RELIGIOUS FREEDOM IN MARRIAGE**

**§572- Religious freedom in marriage guaranteed.** Absolute freedom of conscience in all matters of religious sentiment, belief, and worship pertaining to this chapter shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; provided that the liberty of conscience secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State.

**§572- Religious organizations protected.** No religious educational, healthcare, or denominational organization; no organization operated for charitable or educational purposes and that is supervised, operated, controlled by, connected with, or publicly identified with a religious organization or group, regardless of whether its activities are deemed wholly or partly religious; and no individual employed or supervised by any of the foregoing organizations, while acting in the scope of that employment or supervision, shall be required to take any of the following actions if doing so would cause the organization or individual to violate their sincerely held religious beliefs:

- (1) Provide services, accommodations, advantages, facilities, goods, benefits, or privileges for a purpose related to the solemnization or celebration of any marriage;
- (2) Solemnize or celebrate any marriage; or
- (3) Treat as valid any marriage;

provided that a religious organization engaged in the provision of health care, or its individual employees, shall treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate health care decision making.

**§572- Individuals and small businesses protected.** (a) No individual, sole proprietor, or small business shall be required to take any of the following actions if doing so would cause the individual, sole proprietor, or small business to violate their sincerely held religious belief:

- (1) Provide any facility, good, or service that assists or promotes the solemnization or celebration of any marriage, or provide counseling or other services that facilitate the formation or perpetuation of any marriage;
  - (2) Provide benefits to any spouse of an employee; or
  - (3) Provide housing, lodging, or similar accommodation to any couple.
- (b) This section shall not apply if either:

- (1) A party to the marriage is unable to obtain any similar good or service, employment benefits, or housing elsewhere without substantial hardship; or
- (2) In the case of an individual who is a government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; provided that no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(c) For purposes of this section:

"Small business" means a partnership or legal entity other than a natural person that either:

- (1) Provides services that are primarily performed by an owner of the business;
- (2) Has five or fewer employees; or
- (3) Owns five or fewer units of housing in the case of a legal entity that offers housing for rent.

"Religious organization" means a privately held corporation or other legal entity that both:

- (1) Holds itself out publicly as adhering to specific religious beliefs; and
- (2) Is operated consistently with those beliefs.

**§572- Immunity from civil cause of action and other penalties.** Notwithstanding any other law to the contrary, no refusal to provide services, accommodations, facilities, goods, or benefits protected by this part shall result in any of the following:

- (1) A civil claim or cause of action challenging the refusal under law; or
- (2) Any action by any state or county agency to penalize or withhold benefits from any protected entity or individual under any laws of this State or its political subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.

**§572- Construction.** This part shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the Constitution of the State of Hawaii and the United States Constitution."

SECTION 6. Section 321-426, Hawaii Revised Statutes, is amended to read as follows:

"[~~§~~§321-426] **Birth defects special fund.** There is established within the state treasury the birth defects special fund to be administered and expended by the department of health, into which shall be deposited fees remitted pursuant to ~~section~~ sections 321-H and 572-5. Moneys in the special fund shall be used for the payment of the operating expenses of the birth defects program."

SECTION 7. Section 346-7.5, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) The account shall consist of fees remitted pursuant to sections ~~321-H~~, 338-14.5, and 572-5, income tax remittances allocated under section 235-102.5, interest and investment earnings, grants, donations, and contributions from private or public sources. All realizations of the account shall be subject to the conditions specified in subsection (b)."

SECTION 8. Section 572-21, Hawaii Revised Statutes, is amended to read as follows:

"[~~§~~§572-21] **Presumption of separate property.** There is a rebuttable presumption that all property, both real and personal, acquired in the name of [~~the husband or of the wife,~~] either party to the marriage, without regard to the time of acquisition thereof, is the separate property of the spouse in the name of whom the same has been acquired."

SECTION 9. Section 601-3.6, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) The account shall consist of fees remitted pursuant to sections ~~321-H~~, 338-14.5, and 572-5, income tax remittances allocated under section 235-102.5, fines collected pursuant to sections [~~§~~586-4(e)]~~],~~ 580-10, and 586-11, interest and investment earnings, grants, donations, and contributions from private or public sources. All realizations of the account shall be subject to the conditions specified in subsection (b)."

SECTION 10. Chapter 572, part I, Hawaii Revised Statutes, is repealed.

SECTION 11. Chapter 572B, Hawaii Revised Statutes, is repealed.

SECTION 12. Chapter 572C, Hawaii Revised Statutes, is repealed.

SECTION 13. (a) Upon the repeal of chapter 572B, Hawaii Revised Statutes, pursuant to section 11 of this Act, all rights, obligations, benefits, protections, and responsibilities granted by the State, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to those who contract, obtain a license, and are solemnized in accordance with chapter 572B, Hawaii Revised Statutes, are extinguished.

(b) Two individuals who are civil union partners and seeking to jointly obtain a marriage license shall be permitted to apply for a marriage license without first terminating their civil union; provided that the two

individuals are otherwise eligible to marry under chapter 321, Hawaii Revised Statutes, as amended by this Act.

(c) A civil union relationship under subsection (b) shall continue uninterrupted until the parties to the civil union have solemnized their marriage consistent with chapter 321, Hawaii Revised Statutes, as amended by this Act, and the solemnization of the marriage shall automatically terminate the civil union.

(d) Civil union partners who entered into the civil union in this State may elect to have their civil union legally converted to a marriage by operation of law without appearing personally before an agent and without solemnization as required by this Act by:

- (1) Applying for a marriage license pursuant to chapter 321, Hawaii Revised Statutes, as amended by this Act, by filing their application, in person or by mail with the department of health;
- (2) Providing a signed, notarized declaration that the civil union was entered into in this State and that the civil union partners are seeking to convert their civil union into a marriage;
- (3) Paying the marriage license fee as required by chapter 321, Hawaii Revised Statutes, as amended by this Act; and
- (4) Providing all information required by the marriage license application.

(e) Upon receipt of a marriage license application and notarized declaration requesting conversion, the department of health shall confirm that the applicants are civil union partners who entered into their civil union in Hawaii and shall issue a certificate of marriage, with the effective date of the marriage being the date the department accepts for filing the request for conversion.

(f) All rights, benefits, protections, and responsibilities of marriage shall apply to civil unions that are administratively converted to marriages pursuant to this section.

(g) Certificates of marriage issued pursuant to this section shall be deemed the same as certificates of marriage issued pursuant to chapter 321, Hawaii Revised Statutes, as amended by this Act, and shall be processed in the same manner.

(h) Marriages converted from civil unions pursuant to this section shall be deemed solemnized for all purposes.

SECTION 14. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity shall affect all other provisions or applications of the Act that can be given effect, and to this end the provisions of this Act are inseverable.

SECTION 15. In codifying the new sections added by section 3 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 16. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 17. This Act shall take upon its approval; provided that:

- (1) Section 11 of this Act shall take effect on January 1, 2016; and
- (2) Sections 4 and 5 of this Act shall be repealed on July 1, 2016."

Representative Oshiro moved that Floor Amendment No. 8 be adopted, seconded by Representative Say.

Representative Oshiro rose, stating:

"Mr. Speaker, I'll defer to the author of this measure. This is basically equivalent to House Bill 6, so I'll defer to my esteemed colleague from Waianae."

Representative Jordan rose to speak in support of the proposed floor amendment, stating:

"Thank you very much, Mr. Speaker. Yes, Mr. Speaker, during this short special session I did introduce House Bill Number 6, and if you had listened to any of those 57 hours of testimony, you heard many testifiers referring to House Bill 6 and why wouldn't we have a discussion on that.

"It is known that I did ask leadership to have this measure heard, and that was declined in written form as well as verbal form, and I appreciate

that, Mr. Speaker. But Mr. Speaker, I'd like to thank this being reintroduced as a floor amendment.

"I do know some individuals may have some serious issues with this measure. This measure was actually introduced to throw everything on the table, Mr. Speaker. All the different options we could afford to have a full-blown discussion in a great committee hearing.

"Obviously we didn't have that opportunity. And I don't know if we'll be able to discuss all of them currently on this Floor, Mr. Speaker. This would address the issuance of licenses in regards to the Supreme Court ruling on the Baehr case, and let the Department of Health issue those.

"This would also be discussing our Religious Freedom Restoration Act. This will also be talking about the inseverability clause. This provides much religious protection in here as well. Some may say it erodes those religious protections. This was only referring to marriages and the ceremonial purposes. We were not trying to erode anywhere else, Mr. Speaker. Just like SB 1, they wanted to narrow the focus to marriage solemnization and marriage ceremony. Nothing other, no more, no less.

"This would also, sorry I'm losing my train of thought because we have so many floor amendments today, this would also talk about protection for individuals with personal conscience of objection.

"Now, if you were told to go to war, people are allowed to say, 'I consciously object, and refuse to go to war.' There's no difference when you have somebody that is so deeply rooted in their religious belief, and that may be centuries of their family's history, that may be believing it 24 hours a day, 7 days a week, that is their held conviction. And we must always protect those rights, Mr. Speaker.

"I'm not talking about somebody that just thinks about going to church once a year. These are people that have deep beliefs. And I'm not trying to belittle individuals that go to church once a year, because that's me. And it might be any denomination that I walk in. Because I believe in spirit, I believe in every day that I'm blessed that I wake up.

"I am here, as the person that sits on the opposite side, Mr. Speaker, trying to protect religious freedoms. That's why this measure was introduced to have that full-blown dialogue. We are treading into unseen territory.

"Prior to this special session, there were only 13 states that have treaded in this law, of maybe five to seven years. And we were the first state to kick it all off back in the 90's. I thought we'd be the first state to set the highest set of example for the United States.

"That's why this measure was introduced. Definitely for the dialogue. And I appreciate the individuals being so passionate outside to let us begin to speak, I'll try and lower my voice a little bit. But that's all this was, Mr. Speaker, to have this dialogue. Thank you very much."

Representative Fale rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise to support the intent of the floor amendment and to discuss, some of the things the good Representative from Waianae just referred to are things that I actually experienced while deployed in combat in the Middle East, Mr. Speaker. We had soldiers that declared their objection to war, while in the middle of the fight, while we were in combat in the Middle East, Mr. Speaker.

"Personally, I had a real hard time dealing with those things because as a soldier, the last thing you do is abandon your fellow comrades on the battle field. And for them to make that assertion that they had suddenly developed an objection to war after we had spent hundreds of thousands of dollars on training them, on making sure that they were ready to defend this nation, deploying them into combat, and then for them to be simply released.

"But I learned a very important lesson there, Mr. Speaker, that even the camaraderie we experience as combat veterans is to protect something that

is even greater and more important, and that is the freedom of conscience, and every individual should be afforded that right. Everybody. Even if it's your combat buddy on your left or combat buddy on your right, everybody has to be afforded the freedom of conscience and be able to live in a country where that is at the very core in foundation, Mr. Speaker.

"This floor amendment at least helps us get along that way. Moves us in that direction. Because, once again, we know that there are a series of flaws with SB 1, given the House draft that we do have, and we are failing to address the issues that are raised by that measure. Thank you, Mr. Speaker."

Representative Belatti rose to speak in opposition to the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I stand in strong opposition to this floor amendment. Mr. Speaker, I can respect that we want dialogue. I can respect that we want to put ideas on the table. But sometimes words matter, ideas matter. And sometimes these words and these ideas can be hurtful and eroding at the very core of our values.

"Now I know what I just said could be applied to SB 1, House Draft 1, but let me tell you, I'm putting my stake in the ground on this floor amendment, because what this floor amendment does, Mr. Speaker, is enshrine discrimination for sincerely held religious beliefs, which I can respect.

"But, Mr. Speaker, there are people out in this world who sincerely hold the belief that a Caucasian man and an Asian woman should not marry. There's a sincerely held belief that divorce is wrong. I hold that belief. There is a sincerely held belief that contraception is bad.

"Now, Mr. Speaker, based upon these sincerely held religious beliefs, this bill would allow these same folks to kick a person out of their home. It would allow a landlord to say, 'you're married, you're an interracial couple, I will not rent my house to you, I will not rent my apartment to you.'

"We have fought this battle long and hard, Mr. Speaker. Hawaii has a strong public accommodations law, and I do not believe that this idea is something worth even talking about. Thank you, Mr. Speaker."

Representative Oshiro rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in strong support of Floor Amendment 8. I think I've spoken a lot on the basis of needing to have a standard. So let me just articulate the standard into the record and for the edification of those who might be able to listen or hear.

"What we'll be doing by the Religious Freedom Protection Act is establishing the Sherbert Test, which most progressive civil libertarians believe in. It consists of four criteria that are used to determine if an individual's right to religious free exercise has been violated by the government. That includes government policy such as anti-discrimination laws, environmental laws, housing laws, public accommodations laws, workplace laws, you name it. All that stuff that I as a good Democrat support.

"The test is as follows. For the individual, Mr. Speaker, the court must determine, number one, whether the person has a claim involving a sincere religious belief. Sincere religious belief is defined by case law. So it's not bogus, this is real, authentic religious belief. It's not something I made up this morning, or I made up after having a few beers.

"Number two, whether the government action is substantial burden on a person's ability to act on that belief. It's a substantial burden, not a trivial burden, not a slight burden, but a substantial burden. Again, Mr. Speaker, that is established clearly in case law.

"Mr. Speaker, if these two elements are established, by the proponent, by the plaintiff, by the complainant, then the government must prove the following, the burden shifts to the government, and this is what it is. That the government is acting in furtherance of a compelling state interest.

Compelling state interest. And, which is very important because under the Rehnquist Court this was eliminated, and it is pursued that interest in the manner least restrictive, or least burdensome to religion.

"So there is a standard, there is a mechanism to logically, rationally go through these types of important conflicts, which the authors of this text, Douglas Laycock, Anthony Picarello and Robin Fretwell Wilson, along with Mr. Berg, Professors Destro and Gaffney, have repeatedly told us over the last several months, that will arise once we approve same-sex marriage.

"And again, Mr. Speaker, this bill does allow for same-sex marriage, there's no doubt about it. House Bill 6 gives you all the bells and whistles of same-sex marriage. But it gives you also the tools to protect the religious institutions wall-to-wall within their church or facility or property, the clergy or the clergy's agent, that's true, but it also protects the right of an individual. When they leave their church or their temple or their sanctuary, to carry that deeply held conviction with them into the private sector or the public sector, at work or at play. Which is what I believe our constitutional founders would like to see.

"Just a little bit more, Mr. Speaker. Why the law is important, and why the law is necessary. Without clear guidance from Hawaii's Legislature, judges are likely to reject religious liberty and free speech defenses in executive and administrative enforcement actions, and private lawsuits claiming violation of non-discrimination laws. Generally speaking, judges have been unsympathetic to religious liberty claims that challenge the majority view concerning the nature of moral or religious obligation.

"Although most of the commentary since the 1990s focus on the United States Supreme Court's decision in *Employment Division v. Smith*, which held that, quote, 'neutral laws of general applicability,' end quote, do not violate First Amendment, no matter how substantially they burden an individual's or organization's ability to exercise their religious faith tradition. History teaches that judges are not inclined to respect the bewildering variety of American religious experiences unless the law is clear and they must do so.

"Although there are many examples, here are some. In Catholic Charities of Springfield, the state trial court judge granted a motion of summary judgment, rejecting the religious liberty argument. Because the judge expressly declined to address Catholic Charities argument that the state violated its rights under Illinois Human Rights Act, which is similar to our..."

Representative Har rose to yield her time, and the Chair "so ordered."

Representative Oshiro continued, stating:

"Thank you, Mr. Speaker. What occurred here is that once the trial court decided on summary judgment, that the religious institution had no claim of having its religious rights infringed upon, it never went any further. Had the state denied renewal of the contract in this case, on the basis of race or sexual orientation, I doubt the trial court judge would have felt constrained to hold that no violation of the law had been committed. Equal protection of the law is supposed to work both ways.

"The other case, Mr. Speaker, is the New Mexico case. The photography case right now is being litigated and may finally make its way up to the United States Supreme Court. It's more than just a photography case, Mr. Speaker. A small mom and pop, a couple runs a photography studio. They'll take pictures of anybody, but their deeply held religious beliefs forbade them from taking pictures of a marriage ceremony for a same-sex couple. Let's respect that. They'll do all other photographs. What's troubling about this case, Mr. Speaker, and should give everyone pause to shudder, that then government will tell you what you can speak, and when you must speak in order to support anti-discrimination laws.

"The construct behind this idea, Mr. Speaker, is that you need a system to balance out equally important, compelling rights under our constitution. And that's why we have to have this discussion, Mr. Speaker, and I wish we had more time. But I don't fault you, I don't fault my colleagues, Mr. Speaker. I fault the Governor, who in 20 years is the first governor to

unilaterally call us into a special session. Unilaterally, using his constitutional powers, but not allow the House and Senate leadership to develop a consensus on what we should and should not do in a special session.

"Mr. Speaker, you have indulged me a lot. Thank you very much. Permission to insert written comments."

Representative Oshiro's written remarks are as follows:

"Mr. Speaker, I rise in support of Floor Amendment No. 8.

"This floor amendment would delete the substance of Senate Bill No. 1, House Draft 1, and insert the provisions of House Bill No. 6. The major components of the floor amendment are as follows:

**I. Scope of Legalized Marriage Narrowed to State's Licensing Authority**

"The Hawaii Supreme Court's ruling in Baehr v. Miike, 74 Haw. 530, 852 P.2 44 (Haw. 1993) pertained to the state's authority to issue marriage licenses – that the Department of Health could not deny a same-sex couple a marriage license solely on the basis of gender. But efforts to fix the problem offered by the Governor and Senator Hee may exceed the scope of what is required under equal protection. This creates conflicts with religious freedoms guaranteed by the First Amendment.

"This floor amendment would separate the licensing aspects of marriage, which clearly may be governed under civil law, from the contractual aspects of marriage between the individuals being married and the religious organization solemnizing the marriage. That way the state would make very clear that it is not dictating how any particular religious organization should practice its faith.

"Thus, this floor amendment would merely prohibit the Department of Health from denying the issuance of a marriage license solely because the applicants are of the same gender.

"It should be noted that all of the procedures applicable to the Department of Health that are currently set in the Hawaii Marriage Law, are transferred to the Department of Health statutes under this floor amendment. References to 'contracts' were changed to 'licenses' to clarify that this floor amendment applies to the state's licensing authority and not on the manner in which marriage contracts are entered into by the applicable parties.

**II. Elimination of Civil Unions as Discriminatory 'State Action'**

"In Garden State Equity v. Dow, Docket No. L01729-11 (New Jersey, September 27, 2013), the New Jersey Appellate Court held that by creating two distinct labels – marriage for opposite couples and civil unions for same-sex couples, New Jersey civil union partners are excluded from certain federal benefits that legally married same-sex couples are able to enjoy.

"The New Jersey Court also ruled that the mere existence of the Civil Union Law constituted 'state action' that furthered discrimination in violation of equal protection.

"This floor amendment asserts that like New Jersey, Hawaii's Civil Union Law constitutes 'state action' in violation of equal protection and thus, this bill repeals the Civil Union Law. On January 1, 2016, all rights, benefits and obligations provided under the Civil Union Law would be extinguished. The delayed effective date would allow persons in civil unions to administratively obtain marriage licenses so that any accrued benefits will continue after the Civil Union Law becomes inoperative.

**III. 'Little' Religious Freedom Restoration Act**

"This floor amendment would also create a new right by codifying the federal Religious Freedom Restoration Act in Hawaii State Law to:

- (1) Establish the compelling interest test as the standard applicable by the courts of the State of Hawaii in all cases where free exercise of religion is substantially burdened; and
- (2) Establish a claim or defense to persons whose religious exercise is substantially burdened by government.

"Prior to 1990, the First Amendment was interpreted by the U.S. Supreme Court to give protection to religious belief and conduct in all cases where such belief or conduct was not outweighed by some compelling government interest in protecting life, liberty, property, or some other similarly weighty community concern. See, Sherbert v. Verner, 374 U.S. 398 (1962) (Sabbath-keeper's convictions protected); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish protected in conviction re need to educate children at home after age of 14); McDaniel v. Paty, 435 U.S. 618 (1978) (State cannot inquire into religious belief as condition of employment); Thomas v. Review Bd., 450 U.S. 707 (1972) (1981) (Jehovah's witness protected in conviction against making war materials); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (employee protected in observing holy days even when conversion occurred after hiring). But in the 1990 case of Employment Division v. Smith, 494 U.S. 872 (1990), the U.S. Supreme Court decided that, in many cases, the First Amendment should only protect religious exercise from laws or regulations that were targeted at religion. Under the Court's reasoning, a law that forbade Orthodox Jews from wearing yarmulkes on government property would be unconstitutional, as it would be targeting religion. However, if the law were to forbid all people from wearing hats on state property, it would be constitutional – even though the law would require Orthodox Jews to violate either their consciences or the law in order to walk on government property. Because the law is 'neutral' toward religion and 'generally applicable' to all persons, the First Amendment would no longer apply, despite the very real burden the law placed on a religious minority.

"Because many difficulties faced by minority religions are caused by legislative ignorance or insensitivity and not by open malice, religious groups were dealt a severe blow by the Smith decision. Most legislatures are clever enough to couch even anti-religious legislation in neutral and generally applicable terms, thereby evading the First Amendment. Thus, as the Harvard Law Review put it, the Smith Decision as a practical matter 'eviscerated' and 'gutted' much of the protection previously enjoyed under the Free Exercise Clause of the First Amendment.

"For a brief period from 1993 to 1997, there was a federal law that protected religious freedom generally. Known as the federal Religious Freedom Restoration Act (RFRA), it no longer applies to state actions.

"The federal RFRA resulted largely from the efforts of the Coalition for the Free Exercise of Religion, which was formed in response to the Smith decision. With the support of unlikely allies such as the Catholic Church, the ACLU, the Christian Legal Society, the National Council of Churches, major Jewish organizations, the National Association of Evangelicals, the Southern Baptists' Ethics Religious Liberty Commission, the Mormons, and People for the American Way, the federal RFRA was passed by a virtual unanimous Congress in 1993. It restored the compelling interest standard to claims of religious freedom.

"Legislatively, the federal RFRA was originally introduced by Rep. Charles Shumer (New York) in the House and Senator Edward Kennedy (Massachusetts) and it was approved unanimously by the House of Representatives (voice vote). In the Senate, only three members voted no – Byrd (D – WV), Helms (R – NC) and Mathews (D – TN).

"Hawaii's entire congressional delegation supported this legislation – Congress Members Neil S. Abercrombie and Patsy Mink, and Senators Daniel Akaka and Daniel Inouye.

"In 1997, the United States Supreme Court held in City of Boerne v. Flores, 521 U.S. 507 (1997), that Congress exceeded its legislative authority in applying the federal RFRA to state law. Because of this, unless the state enacts the RFRA into its own laws, the compelling interest test would not necessarily apply. It must be reemphasized that after this decision, the ACLU worked with a broad coalition of religious groups and

civil rights groups to enact the Religious Land Use and Institutionalized Persons Act which among other important protections, gives religious groups added protections against local land use policies and restrictions.

"And why is this important within the context of same-sex marriage? The RFRA provision would require Hawaii's courts to balance a person's right to freely exercise religious beliefs with the just as important right of another to be treated equally under the law. Without this vital component, the rights to equal protection of a same-sex couple would supersede the rights of the religious believer or conscientious objector – an outcome that is abhorrent to our American way of life.

"Justice necessitates balance. As such, in my view, the enactment of RFRA into the same-sex marriage bill is not only relevant, but essential for there to be any balance in this legislation, or justice for that matter.

"Earlier, concerns were raised that such a provision would allow anyone to discriminate so long as it was done so because of a 'sincerely held religious belief'. However, the courts have long dealt with these issues.

"By establishing an affirmative defense, the burden of showing beyond a reasonable doubt that the 'sincerely held religious belief' was unconstitutionally infringed upon by the statute is placed upon the person asserting the defense. See, *State of Hawaii v. Jonathan H. Adler*, Slip Op. 25224, 118 P.3d. 652 (2005). Only after that was found would the state then have to justify the statute by compelling government interest, and show that the statute was narrowly tailored to minimize the effect on the person's religious exercise. Thus, it only arises where there is a 'violation' of 'sincere' beliefs that are 'religious' and not to situations that merely make religious people uncomfortable, nor to insincere beliefs asserted as a pretext for discrimination, nor to non-religious moral beliefs.

"Without the inclusion of specific protections for conscientious objections such as the religious freedom restoration act, the enactment of House Draft 1 will force religious organizations, businesses and individuals to compromise their deeply held beliefs to comply with the law. Again, these are constituents who have no objection to providing services to same-sex couples, but object to facilitating the marriage of a same-sex couple.

"Moreover, this concern is not a mere hypothetical or without any merit when one examines the language found on page 6, of the 'Response To Inquiries Memorandum, Dated October 17, 2013, Bill Hoshijo, Executive Director, Hawaii Civil Rights Commission, re: Marriage Equality, Religious Organizations and Facilities, and Public Accommodations Law', which states in relevant part:

*"The State of Hawaii has a compelling state interest in eliminating discrimination in public accommodations. Out public accommodation law is a law of general applicability that serves a compelling state interest and does not target any religion."* [Emphasis Added.]

"Thus, if this is the standard by which the Hawaii Civil Rights Commission will conduct its analysis and application of Chapter 489, HRS, in the situation where there is a conflict between an individuals' liberty right under Section 489-3, HRS (Discriminatory practice prohibition), and another individual's First Amendment religious freedom right, without the balanced approach of the *Sherbert* Test, as would be established in the RFRA, the outcome will be a substantial and certain abridgment of one's First Amendment religious freedom right.

"As the preeminent and distinguished Professor of Constitutional Law, Erwin Chemerinsky, suggests:

*"[Third] [S]tate government can enact their own religious freedom restoration act in order to have state courts apply strict scrutiny to state government actions or laws that burden religion. States, of course, pursuant to police power, may adopt any law not prohibited by the Constitution. Nothing in the Court's decision in Flores precludes a state from deciding that it will tolerate state actions and laws that burden religion only if they meet strict scrutiny."*

*"There is no doubt that people have less protection for their religious practices after Flores than they did before. Hopefully, though, this will be only temporary as legislatures find other ways to protect individuals from neutral laws of general applicability that burden religion. Hopefully, too, the Supreme Court will uphold these laws and recognize that more is not less; legislatures may protect rights greater than those found in the Constitution by the Supreme Court."* [Emphasis Added.] (See, Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 Wm. & Mary L. Rev 601 (1998) pg. 636.)

#### **IV. Religious Protections for Clergy**

"This bill would reaffirm First Amendment protections to the free exercise of religion by making the authority of persons licensed to solemnize a marriage absolute. However, nothing in this bill would stop a couple that was refused solemnization from one licensed solemnizer to have their marriage solemnized by another person licensed to solemnize a marriage, such as a judge or official from another religious denomination. Still, my remarks herein is not and should not be taken to mean or be construed that I find the provision a necessary and essential component of a well-crafted same-sex marriage bill. As the Law Professors have stated in their Statement to all members of the Hawaii Legislature and is appropriate for restatement again here, '[Thus], with or without this statutory language, [no] one seriously believes that clergy will be forced to, or even asked, to perform marriages that are anathema to them. Focusing on the issue of 'forced officiating' is a straw-man argument distracting the uninformed from real situations where religious conscience is actually at risk.

"As a side note, I take some umbrage to statements made by some of my colleagues following up the testimony offered by the minister of Honpa Hongwanji – that the Marriage Law, as it presently stands, impairs clergy in exercising First Amendment religious liberties by preventing them from marrying a same-sex couple.

"This statement is totally and blatantly incorrect. There is nothing in the law that prevents any church from conducting a service to marry a same-sex couple in accordance with First Amendment rights. The question posed to us is whether after that marriage ceremony, the State of Hawaii and the federal government would recognize that marriage and provide that couple with all of the rights, benefits, and obligations that are allowed to married couples. From where I stand, that is a totally separate question that has nothing to do with the First Amendment.

"The only way the First Amendment is affected in the context of same-sex marriage is if a religious organization or official refuses to conduct a religious ceremony. And that is where this floor amendment seeks to protect the clergy.

"To ensure that the authority of a licensed solemnizer is absolute, this bill would need to bar civil claims or causes of actions against the solemnizer and the religious denomination or society because of the refusal to solemnize a marriage. The civil immunity would need to also cover any action by any state or county agency to penalize or withhold benefits from any protected entity or individual under any laws of this state or its political subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, education institutions, licensing, government contracts or grants, or tax-exempt status.

"But one should not take this to mean or interpret the aforementioned to sanction wholesale violation of our civil rights and anti-discrimination laws. To the contrary, these specific religious exemptions are established to reconcile nondiscrimination status and policies enacted years ago by Congress and previous Hawaii Legislatures with an equal need to recognize the interests and civil rights of religious objectors. Otherwise, there may be no protection for religious organizations and individuals and make them vulnerable to lawsuits whether framed as sexual orientation, discrimination, sex discrimination, or, where applicable, marital-status discrimination. And, this accommodation of religious rights is consistent with present civil rights policy where we recognize and allow in certain instances a religious institution to give preference to members of the same

religion in real property transactions, and allow even religious beliefs to be taken into account in hiring and employment practices of the religious organization. (See, Sections 515-8, and 378 (5), Hawaii Revised Statutes.) Additionally, it cannot be understated that none of the aforementioned will apply should a 'substantial hardship' arise and the same-sex partner or couple is unable to obtain any similar goods or services, employment benefit, or housing, elsewhere.

"It should be noted that the religious exemption in the House Draft 1, is very limited and only deals with the marriage or solemnization service itself. None of the other services provided by most clergy or religious officials would be covered. For example, the religious exemption would not immunize the clergy, minister, priest, or rabbi, from civil liability for not performing the following services for the same-sex couple:

Weekly Services  
Worship Services  
Baptism Services  
Communion Services  
Funeral Services  
Addiction Counseling Services  
Baby Dedication Services  
Ground Breaking Services  
Building Dedication Services  
Spiritual Counseling Services  
Premarital Counseling  
Marriage Counseling

"And, where these services are provided to non-members, it will probably be found to be a public accommodation under the Hawaii Civil Rights Commission, Section 489-2, HRS. (See, definition of 'Place of public accommodation' - means 'accommodation, . . . goods, services, facilities, privileges, advantages, or accommodations, are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. . . .' [Emphasis Added.] See also, 'Response To Inquiries Memorandum, Dated October 17, 2013, Bill Hoshijo, Executive Director, Hawaii Civil Rights Commission, re: Marriage Equality, Religious Organizations and Facilities, and Public Accommodations Law', page 4, paragraph 4, which reads:

*"Thus, in any particular case, the inquiry will be two-fold: Is this a place of public accommodation? And, is there prohibited discrimination based on race, sex (including gender identity or expression), sexual orientation, color, religion, ancestry, or disability? This is the inquiry under the existing public accommodations law. The proposed marriage equality law does not change the analysis." [Emphasis Added.]*

"As such, it appears more likely than not that even on a case-by-case basis, the services not explicitly provided an exemption will fall under the inquiry and analysis of the Hawaii Civil Rights Commission, unless such religious organization operates as a private membership club and does not provide goods, services, facilities, to the general public. (e.g. the Pacific Club, Elks, Outrigger Canoe Club). Of course, most religious organizations are not members only and we know of none that limit access of the general public to their religious services. See, 'Response To Inquiries Memorandum, Dated October 17, 2013, Bill Hoshijo, Executive Director, Hawaii Civil Rights Commission, re: Marriage Equality, Religious Organizations and Facilities, and Public Accommodations Law', page 3, last paragraph, through page 4, first paragraph.

"House Draft 1 leaves many religious organizations exposed and vulnerable to charges of discrimination and will most likely chill the present day practice of welcoming in the general public and providing useful and important services with and without government subsidization to the community at large.

"Some of the services or facilities that are made available to the general public that may be curtailed or eliminated include:

Non-Government Organization (NGO) Meetings  
Sports Clubs Meetings  
Corporate Training

Fundraising and Non-profit Benefit Events  
Civil Defense Training  
DOE Regional and Department Meetings  
Alcoholics Anonymous  
Domestic Abuse Support Group  
Teen Drug and Alcohol Support Group

"Are we willing to accept this likely scenario of chilling the religious freedoms in our communities? Do we understand the concern they have raised? Are we sure that we will not inadvertently cause our community service partners to pull back on their community services or resources to the general public in order to protect their religious beliefs and practices? Is this a risk worth taking?

"It is because of these concerns that this floor amendment is offered for your consideration.

#### **"V. Religious Protections for Individuals and Businesses**

"A much more suitable alternative would be found in House Bill No. 6. In preparing House Bill No. 6, noted and renowned legal scholars from across our Nation were contacted to assist in the drafting of religious protections for businesses and individuals. These included:

- Douglas Laycock, the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies, University of Virginia. Considered the 'Dean' of Religious Freedom Issues, Professor Laycock successfully argued before the United States Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, Slip No. 10-553 (2012), in which a unanimous Court held that the Establishment and Free Exercise Clauses of the First Amendment bars suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. He most recently argued before the U.S. Supreme Court this week in Town of Greece v. Galloway, which seeks to clarify the legal limits on public prayers in government meetings across the country.
- Thomas C. Berg, James Oberstar Professor of Law and Public Policy, University of St. Thomas, Minnesota. He has written more than 30 briefs on issues of religious liberty and free speech in cases in the U.S. Supreme Court and lower courts and has often testified to Congress in support of legislation protecting religious freedom. For his work, he received the Religious Liberty Defender of the Year Award from the Christian Legal Society in 1996, the Alpha Sigma Nu Book Award from the Association of Jesuit Colleges and Universities in 2004, and the John Courtney Murray Award from DePaul University College of Law for scholarly and other contributions to church-state studies.
- Bruce S. Ledewitz, Professor of Law, Duquesne University. He is a recognized expert in the fields of criminal law and constitutional law. His most recent book, Church, State, and the Crisis in American Secularism was published in 2011. He has served as Secretary to the National Coalition Against the Death Penalty from 1985-1990. His Platform for Reforms of the Pennsylvania Supreme Court was recently the subject of a statewide series of debates sponsored by the Pennsylvania League of Women Voters. He has written widely in both specialized legal journals and national media such as the New York Times, Wall Street Journal and the Chicago Tribune.
- Christopher C. Lund, Associate Professor of Law, Wayne State University Law School. He has represented a wide variety of groups and causes. He has, for example, worked for the American Civil Liberties Union defending the rights of Christian parents to home school their children, and for a diverse coalition of religious groups supporting the freedom of Muslim detainees at Guantanamo Bay. He regularly advises church-state groups regarding litigated cases and pending legislation. He is a past chair of the Law and Religion Section of the Association of American Law Schools, and the current chair of the Section on New Law Professors.
- Michael Perry, Robert W. Woodruff Professor of Law, Emory University. Since 2003, Professor Perry has held the Robert W. Woodruff University Chair at Emory University. A Woodruff Chair is the highest honor Emory University bestows on a member of its

faculty. He is also a Senior Fellow at Emory University's Center for the Study of Law and Religion. He is the author of twelve books and over seventy-five articles and essays. His books include: Religion in Politics: Constitutional and Moral Perspectives (Oxford, 1991); We the People: The Fourteenth Amendment and the Supreme Court (Oxford, 1999); Under God? Religious Faith and Liberal Democracy (Cambridge, 2003); Toward a Theory of Human Rights: Religion, Law, Courts (Cambridge, 2007); and Human Rights in the Constitutional Law of the United States (Cambridge, 2013).

- Robin Fretwell Wilson, Class of 1958 Law Alumni Professor of Law, Washington and Lee University School of Law.
- Richard W. Garnett, Professor of Law, University of Notre Dame Law School.
- Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso University School of Law.
- William Wood Bassett, Professor of Law Emeritus, University of San Francisco.
- Robert A. Destro, Profess of Law and Director of the Marriage Project, The Catholic University of America.
- Michael W. McConnell, Richard & Frances Mallery Professor of Law, Director, Constitutional Law Center, Stanford Law School.
- Carl H. Esbeck, Isbell Wade & Paul C. Lyda Professor of Law, University of Missouri School of Law.
- Marie A. Failinger, Professor of Law, Hamline University School of Law.

"Their recommendations were incorporated into the floor amendment presently before you specifically to provide religious protections for individuals and small businesses.

"In their testimony on Senate Bill No. 1 to the Senate Committee on Judiciary and Labor, Professors Laycock, Berg, Ledewitz, Lund, and Perry wrote:

*"We support same-sex marriage. We think that Senate Bill 1 can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The gain for human liberty will be severely compromised if same-sex couples now force religious dissenters, when they had the power to do so, used to force same-sex couples to hide their sexuality. Conservative religious believers should not be allowed to veto same-sex marriage for those who want it, but neither should they be forced to directly facilitate it in violation of their understanding of God's will."* (emphasis provided).

"Accordingly, this floor amendment would provide additional religious protections to balance these competing interests.

"These include protections for:

- (1) Religious educational, healthcare or denominational organizations, organizations operated for charitable or educational purposes that are identified with a religious organization or group, and individuals employed or supervised by any of these organizations;
- (2) Small businesses having five or fewer employees or owning five or fewer units of housing in providing goods, services, benefits or housing;
- (3) Judicial officers and government agency clerks with sincerely held religious beliefs to not solemnize a marriage; and
- (4) Individuals, in certain circumstances.

"However, it must be understood that these exemptions shall **NOT** apply if either:

- (1) A party to the marriage is unable to obtain any similar good or service, employment benefits, or similar good or service,

employment benefits, or housing elsewhere without substantial hardship; or

- (2) In the case of an individual who is a government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay.

"This is both a practical and realistic means to address the most common instances where conflict may arise and narrow the exposure for disputes and litigation among our community members.

"These provisions would sunset in three (3) years to allow the Legislature to reevaluate the need for these protections based on the experience gained. But, it is realistically expected that as same-sex marriage becomes more and more frequent, the entrepreneurial engines of small business will establish and promote niches of both services and goods to address the needs of the same-sex marriage industry. As such, as we transition into this natural economic dynamic of business enterprise seeking to fill a unmet need, the initial limited and constricted protections afforded to conscientious religious objectors will not be necessary and allowed to fall away as mere vestiges of a transitional period in local politics and policy as we enter into a post-same-sex marriage world in Hawaii.

#### **"VI. Religious Protections for Employers and Employees**

"As mentioned previously, House Draft 1 does not provide any religious protection for the 'Individual', but only the clergy, minister, priest, rabbi, and officer of any religious organization. As such, it does not protect any of the thousands of constituents with sincerely held religious beliefs when they leave the privacy of their homes and enter the public space of commerce or business as employer or employee. But, I don't know of anyone who has a genuine and authentic religious belief that can flip it on or off as any GLBT can turn his or her sexual orientation off or on, in public and private spaces. No one can expect a person to do this and it should not be the policy of Hawaii.

"But, under the House Draft 1, that is the effect it will have upon many of our constituents. And, it may force them to choose between their sincerely held belief or face demotion or termination for being a conscientious objector. This has occurred in other states and it is a foreseeable consequence of legalizing same-sex marriage without protections of individual religious freedom rights. We do not need to have a win or lose policy choice between two essential constitutional values – religious freedoms and equal protection or personal liberty rights.

"For a practical solution to many of our Government workers (HSTA, HGEA, UPW, HFFA, SHOPO, UHPA, etc.) I draw your attention to SECTION 4 of the floor amendment, pages 26-29, with particular attention to page 27, line 21: 'No Individual . . .', and page 28, lines 11-19, and page 28, lines 11-19: '(b) This section shall not apply if either: . . . In the case of an individual, another government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay . . . '.

"In other words, only in the instance where another co-worker is available and willing to provide the service will a person's sincerely held belief allow for this exemption to provide service to all. This may also help ameliorate the foreseeable tension of the conscientious objector who as a teacher would not be able to teach certain topics regarding same-sex relationships, finding that it substantially burdens her sincerely held religious beliefs, and a cohort or colleague is readily available to provide such teaching service without interruption or inconvenience. This 'hardship exemption' is premised upon the belief that the accommodation is a two-way street and only available when there is no other less restrictive alternative to provision of the service. It is consistent with the legal underpinnings of balancing interest as found in Sherbert.

"House Draft 1 does not provide for this practical accommodation of our public workers who will face hard choices whether they serve the public as a counselor, teacher, psychologist, or social worker, among those

occupations involving personalized skills and talents. Simply deeming public servants with sincerely held religious beliefs as unqualified or ineligible to serve will take us back to a dark time in our Nation's history where Catholics and Jews were deemed unfit for public service based upon their religious beliefs. Certainly, no one would condone such a policy today but that will be the foreseeable de facto policy of the State of Hawaii should we not approve such limited and practical protections for our public workers.

#### **"VII. The Demise of Religious Freedom in Hawaii**

"Finally, it is well established that once same-sex marriage is approved, those opposed to any exemptions for religious conscientious objectors will give the narrowest possible interpretation to all exemptions until it is meaningless and void of any regard for the religious freedom under the First Amendment. The Governor and his Administration has already shown their true colors as demonstrated in their public statements regarding the Governor's initial draft bills: Marriage Equity Bill, AG 8.22.13, based upon Senate Bill 1329, and attached to Governor's Memorandum, dated August 28, 2013, and Governor's Memorandum, dated September 11, 2013, with revised draft of Marriage Equity Bill, AG 9.9.13. As legal scholars have warned us, similar unsympathetic application of non-discrimination policies against religious freedoms and conscience from our courts and administrative agencies is also foreseeable without clear guidelines.

"Again, without the clear guidance to apply the Religious Freedom and Restoration Act, and the Sherbert standard, both the Civil Rights Commission and Hawaii's courts may apply the less protective standard of the Smith Decision in religious freedom cases.

"Mr. Speaker, the New Mexico photography case, Elane Photography v. Willock, 2013-NMSC-040, 309 P.3d 53 (2013), should give every advocate of freedom of expression and free exercise of religion and association pause. When government begins to tell us 'how we must speak', or 'what we must photograph', the practitioners of the express or creative arts, including journalism, poetry, music, design and art cease to be masters of their own subject matter, and freedom of expression ceases to exist.

"How can we tolerate our government telling us what to speak? How can we tolerate our government telling us what we can think? Is there anyone else in this august Body that appreciates that slippery slope we may be entering? I hope so. I really do. Mr. Speaker, we can do better for ourselves and for our constituents and their religious and First Amendment freedoms.

#### **"VIII. Inseverability**

"To ensure that the equal protection and religious freedom provisions are applied in tandem, the bill is specifically designed to become invalid in its entirety if any portion of the bill is stricken by the courts.

"This approach is the same taken in New York State where an inseverability provision was included in the bill that legalized same-sex marriage to obtain support from both liberal and conservative members of the Legislature.

#### **"IX. Hawaii State Legislature as Peacemaker**

"In closing, leading experts in this developing area of public policy and law have repeatedly stressed the importance of ensuring that individual religious liberties and freedom of conscience found in our National and State Constitutions should not be sacrificed in order to establish same-sex marriage in the 'Aloha' State. Indeed, they had repeatedly admonished us, saying:

*"Conflicts between same-sex marriage and religious conscience are reasonably foreseeable and thus avoidable. But, dubious battles of this sort can be avoided only when a prudent Legislature acts decisively to protect complimentary human values – liberty and equality – by adopting language that enables both interest to be protected realistically. Without such legislative safeguards, man*

*religious individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations will be constrained in crucial aspects of their religious exercise."*

"Indeed, the Statement of Professors Bassett, Berg, Destro, Esbeck, Falinger, Gaffney, Garnett, McConnel, and Robin Wilson, on Religious Freedom Implications of Proposed Hawaii Marriage Equality Act of 2013, compels us to submit the extraordinary request for your deep and thoughtful consideration.

"In the wise and esteemed words of our friends:

*"Without adequate safeguards for religious liberty of the sort proposed above, the recognition of same-sex marriage will lead to socially divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty. That is a destructive path leading to needless loss by both sides. A balanced "middle way" leads to a win-win solution for both sides. The Hawaii State Legislature should avoid both extremes and be the wise peacemaker."*

"For the foregoing reasons, I humbly ask that we take pause to seriously reflect upon this floor amendment before approving it on House Draft 1."

Representative Say rose in support of the proposed floor amendment and asked that the remarks of Representative Oshiro be entered into the Journal as his own, and the Chair "so ordered." (By reference only.)

Representative Nakashima rose in support of the proposed floor amendment and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Nakashima's written remarks are as follows:

"Mr. Speaker, I rise in support of Floor Amendment 8. Mr. Speaker, this amendment would provide for expansion of an individual's religious freedoms creating what is in fact a 'conscientious objector' provision in the enforcement of the civil rights law.

"Last session, as Chair of the House Committee on Labor and Public Employment, as we deliberated on the domestic worker bill, I learned of a case in which the owner of a B&B was approached by a same-sex couple who sought to rent out a room in their home. The owners did not want to rent to a same-sex couple and found them another place to stay. The owners of the B&B were found to be in violation of the public accommodations law and forced to pay restitution.

"Mr. Speaker, given the heated debate and high tensions created by this process, I believe that it would be prudent to create a temporary buffer between the factions by instituting this 'conscientious objector' provision and eliminate the possibility of court challenges for a period of three years."

Representative Awana rose in support of the proposed floor amendment and asked that the remarks of Representative Oshiro be entered into the Journal as her own, and the Chair "so ordered." (By reference only.)

Representative Carroll rose in support of the proposed floor amendment and asked that the remarks of Representative Oshiro be entered into the Journal as her own, and the Chair "so ordered." (By reference only.)

Representative Saiki rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition to this floor amendment. I'd like to make two comments. First, as was already mentioned by a prior speaker, this floor amendment will legalize same-sex marriage in Hawaii.

"Second point, is that this is one of the most punitive measures that I've seen in a while in the House. And that is because of the provision that would allow for what amounts to a conscientious objection provision. This provision is couched as one that would allow small businesses to discriminate against virtually anyone in the world for any purpose.

"But it actually goes far beyond just small businesses, and that is because this provision would allow an individual to discriminate against another. So you could have, for example, a front desk clerk at the Hilton Hawaiian Village, who decides that he or she wants to exclude a couple from registering at the hotel. This does not just apply to small businesses, it applies to every single person in the State of Hawaii. Thank you very much, and I call for the question."

At this time, Representative Saiki called for the previous question.

At 1:56 o'clock p.m., Representative Saiki requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 1:57 o'clock p.m.

Representative Saiki rose, stating:

"Mr. Speaker, before calling for the question, could you please permit members to insert written comments? Thank you."

Representative Lee rose and asked that the Clerk record a no vote for him, and the Chair "so ordered."

The motion that Floor Amendment No. 8, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representatives Belatti, Lee and Saiki voting no, and with Representatives Cachola, Choy, Ito, McKelvey and Nishimoto being excused.

At 1:58 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 2:02 o'clock p.m.

At this time, Representative Oshiro offered Floor Amendment No. 9, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1, H.D. 1, is amended by deleting its contents and inserting the following provisions:

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

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

The legislature further finds that, while same sex marriage would be a great advancement for human liberty, this change, could have serious implications if steps are not taken to protect the liberties and equal rights of those religious organizations and believers who cannot conscientiously recognize or facilitate same-sex civil marriages. There will be no net gain for human liberty and equal rights if same-sex couples are permitted to oppress religious dissenters in the same way that those dissenters, when they had the power to do so, oppressed same-sex couples. There is no reason to let either side oppress the other. Same-sex couples should not be denied the right to marriage, and the State should not force dissenting religious believers or organizations to recognize or facilitate same-sex marriage.

Therefore, it is the intent of the legislature to:

- (1) Ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State; and

- (2) Protect religious freedom and liberty by:

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

- (B) Clarifying that unless a religious organization allows use of its facilities or grounds by the general public for weddings for a profit, such organization shall not be required to make its facilities or grounds available for solemnization of any marriage celebration; and

- (3) Harmonize the right to equal protection under the law for same-sex couples with the equally important right to the free exercise of religion.

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

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

#### "CHAPTER

#### RELIGIOUS FREEDOM RESTORATION ACT

§ -1 Findings. (a) The legislature finds that:

- (1) The authors of the Bill of Rights secured the free exercise of religion as an unalienable right under the First Amendment of the United States Constitution;
- (2) The free exercise of religion is also guaranteed under article I, section 4 of the Constitution of the State of Hawaii;
- (3) Laws neutral toward religion may substantially burden religious exercise as surely as laws intended to interfere with religious exercise;
- (4) Government should not substantially burden religious exercise without compelling justification;
- (5) The United States Supreme Court in a recent decision virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (6) The compelling interest test in the free exercise of religion established by the United States Supreme Court is a workable test for striking sensible balances between religious liberty and competing government interests.

(b) The legislature declares its intent that:

- (1) It shall be the policy of the State that the compelling interest test in the free exercise of religion, as established by the United States Supreme Court under *Shubert v. Verner*, 374 U.S. 398 (1963), shall be the standard applicable by the courts of this State in all cases where religious exercise is substantially burdened; and
- (2) This chapter shall provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ -2 Free exercise of religion protected. (a) The State and its political subdivisions shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Neither the State nor its political subdivisions shall burden a person's exercise of religion unless it demonstrates that imposition of the burden on the person both:

- (1) Furthers a compelling government interest; and
- (2) Is the least restrictive means of furthering that compelling interest.

(c) Notwithstanding any law to the contrary, a person whose religious exercise has been substantially burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the State or its political subdivisions.

(d) Nothing in this chapter shall be construed to authorize the State or its political subdivisions to substantially burden any religious belief.

(e) Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of article I, section 4 of the Constitution of the State of Hawaii, prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under article I, section 4 of the Constitution of the State of Hawaii, shall not constitute a violation of this chapter."

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

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

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

(c) The act of seeking a license for or entering into a marriage under this chapter shall not diminish any of the rights, benefits, protections, and responsibilities that existed previously due to the couple's earlier status as civil union partners or reciprocal beneficiaries.

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

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

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

**§572-B Interpretation of terminology to be gender neutral.** When necessary to implement the rights, benefits, protections, and responsibilities of spouses under the laws of this State, all gender-specific terminology, such as "husband", "wife", "widow", "widower", or similar terms, shall be construed in a gender-neutral manner. This interpretation shall apply to all sources of law, including statutes, administrative rules, court decisions, common law, or any other source of law.

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

**§572-D Refusal to solemnize a marriage.** Nothing in this chapter shall be construed to require any clergy, minister, priest, rabbi, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnizations pursuant to this chapter to solemnize any marriage. No such person who fails or refuses to solemnize any marriage under this section for any reason shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil liability for the failure or refusal.

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

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

SECTION 4. Chapter 489, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**"PART . RELIGIOUS FREEDOM IN PUBLIC ACCOMMODATIONS**

**§489- Religious freedom in marriage guaranteed.** Absolute freedom of conscience in all matters of religious sentiment, belief, and

worship pertaining to marriage shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; provided that the liberty of conscience secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State.

**§489- Religious organizations protected.** No religious educational, healthcare, or denominational organization; no organization operated for charitable or educational purposes and that is supervised, operated, controlled by, connected with, or publicly identified with a religious organization or group, regardless of whether its activities are deemed wholly or partly religious; and no individual employed or supervised by any of the foregoing organizations, while acting in the scope of that employment or supervision, shall be required to take any of the following actions if doing so would cause the organization or individual to violate their sincerely held religious beliefs:

- (1) Provide services, accommodations, advantages, facilities, goods, benefits, or privileges for a purpose related to the solemnization or celebration of any marriage;
- (2) Solemnize or celebrate any marriage; or
- (3) Treat as valid any marriage;

provided that a religious organization engaged in the provision of health care, or its individual employees, shall treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate health care decision making.

**§489- Individuals and small businesses protected.** (a) No individual, sole proprietor, or small business shall be required to take any of the following actions if doing so would cause the individual, sole proprietor, or small business to violate their sincerely held religious belief:

- (1) Provide any facility, good, or service that assists or promotes the solemnization or celebration of any marriage, or provide counseling or other services that facilitate the formation or perpetuation of any marriage;
  - (2) Provide benefits to any spouse of an employee; or
  - (3) Provide housing, lodging, or similar accommodation to any couple.
- (b) This section shall not apply if either:

- (1) A party to the marriage is unable to obtain any similar good or service, employment benefits, or housing elsewhere without substantial hardship; or
- (2) In the case of an individual who is a government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; provided that no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(c) For purposes of this section:

"Small business" means a partnership or legal entity other than a natural person that either:

- (1) Provides services that are primarily performed by an owner of the business;
- (2) Has five or fewer employees; or
- (3) Owns five or fewer units of housing in the case of a legal entity that offers housing for rent.

"Religious organization" means a privately held corporation or other legal entity that both:

- (1) Holds itself out publicly as adhering to specific religious beliefs; and
- (2) Is operated consistently with those beliefs.

**§489- Immunity from civil cause of action and other penalties.** Notwithstanding any other law to the contrary, no refusal to provide services, accommodations, facilities, goods, or benefits protected by this part shall result in any of the following:

- (1) A civil claim or cause of action challenging the refusal under law; or
- (2) Any action by any state or county agency to penalize or withhold benefits from any protected entity or individual under any laws of this State or its political subdivisions, including but not limited to laws regarding employment discrimination, housing, public

accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.

**§489- Construction.** This part shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the Constitution of the State of Hawaii and the United States Constitution."

SECTION 5. Chapter 572, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**"PART . RELIGIOUS FREEDOM IN MARRIAGE**

**§572- Religious freedom in marriage guaranteed.** Absolute freedom of conscience in all matters of religious sentiment, belief, and worship pertaining to this chapter shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; provided that the liberty of conscience secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State.

**§572- Religious organizations protected.** No religious educational, healthcare, or denominational organization; no organization operated for charitable or educational purposes and that is supervised, operated, controlled by, connected with, or publicly identified with a religious organization or group, regardless of whether its activities are deemed wholly or partly religious; and no individual employed or supervised by any of the foregoing organizations, while acting in the scope of that employment or supervision, shall be required to take any of the following actions if doing so would cause the organization or individual to violate their sincerely held religious beliefs:

- (1) Provide services, accommodations, advantages, facilities, goods, benefits, or privileges for a purpose related to the solemnization or celebration of any marriage;
- (2) Solemnize or celebrate any marriage; or
- (3) Treat as valid any marriage;

provided that a religious organization engaged in the provision of health care, or its individual employees, shall treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate health care decision making.

**§572- Individuals and small businesses protected.** (a) No individual, sole proprietor, or small business shall be required to take any of the following actions if doing so would cause the individual, sole proprietor, or small business to violate their sincerely held religious belief:

- (1) Provide any facility, good, or service that assists or promotes the solemnization or celebration of any marriage, or provide counseling or other services that facilitate the formation or perpetuation of any marriage;
  - (2) Provide benefits to any spouse of an employee; or
  - (3) Provide housing, lodging, or similar accommodation to any couple.
- (b) This section shall not apply if either:

- (1) A party to the marriage is unable to obtain any similar good or service, employment benefits, or housing elsewhere without substantial hardship; or
- (2) In the case of an individual who is a government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; provided that no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(c) For purposes of this section:

"Small business" means a partnership or legal entity other than a natural person that either:

- (1) Provides services that are primarily performed by an owner of the business;
- (2) Has five or fewer employees; or
- (3) Owns five or fewer units of housing in the case of a legal entity that offers housing for rent.

"Religious organization" means a privately held corporation or other legal entity that both:

- (1) Holds itself out publicly as adhering to specific religious beliefs; and
- (2) Is operated consistently with those beliefs.

**§572- Immunity from civil cause of action and other penalties.** Notwithstanding any other law to the contrary, no refusal to provide services, accommodations, facilities, goods, or benefits protected by this part shall result in any of the following:

- (1) A civil claim or cause of action challenging the refusal under law; or
- (2) Any action by any state or county agency to penalize or withhold benefits from any protected entity or individual under any laws of this State or its political subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.

**§572- Construction.** This part shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the Constitution of the State of Hawaii and the United States Constitution."

SECTION 6. Section 572-1, Hawaii Revised Statutes, is amended to read as follows:

**"§572-1 Requisites of valid marriage contract.** In order to make valid the marriage contract, which shall be [~~only between a man and a woman;~~] permitted between two individuals without regard to gender, it shall be necessary that:

- (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, [~~brother and sister~~] two siblings of the half as well as to the whole blood, uncle and niece, uncle and nephew, aunt and nephew, or aunt and niece, whether the relationship is the result of the issue of parents married or not married to each other or parents who are partners in a civil union or not partners in a civil union;
- (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2;
- (3) [~~The man does not at the time have any lawful wife or civil union partner living and that the woman does not at the time have any lawful husband or civil union partner living;~~] Neither party has at the time any lawful wife, husband, or civil union partner living, except as provided in section 572-A;
- (4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;
- (5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;
- (6) The [~~man and woman~~] parties to be married in the State shall have duly obtained a license for that purpose from the agent appointed to grant marriage licenses; and
- (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the [~~man and the woman~~] parties to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony."

SECTION 7. Section 572-3, Hawaii Revised Statutes, is amended to read as follows:

**"§572-3 Contracted without the State.** Marriages between [~~a man and a woman~~] two individuals regardless of gender and legal [~~in the country~~] where contracted shall be held legal in the courts of this State."

SECTION 8. Section 572-6, Hawaii Revised Statutes, is amended to read as follows:

**"§572-6 Application; license; limitations.** To secure a license to marry, the persons applying for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent an application in writing. The application shall be accompanied by a statement signed and sworn to by each of the persons, setting forth: the person's full name, date of birth, social security number, residence; their relationship, if any; the full names of parents; and that all prior marriages[;] or civil unions, if any, other than an existing civil union between the persons applying for the marriage license, have been dissolved by death or dissolution. If all prior marriages or civil unions, other than an existing civil union between the persons applying for the marriage license, have been dissolved by death or dissolution, the statement shall also set forth the date of death of the last prior spouse or the date and jurisdiction

in which the last decree of dissolution was entered. Any other information consistent with the standard marriage certificate as recommended by the Public Health Service, National Center for Health Statistics, may be requested for statistical or other purposes, subject to approval of and modification by the department of health; provided that the information shall be provided at the option of the applicant and no applicant shall be denied a license for failure to provide the information. The agent shall indorse on the application, over the agent's signature, the date of the filing thereof and shall issue a license which shall bear on its face the date of issuance. Every license shall be of full force and effect for thirty days commencing from and including the date of issuance. After the thirty-day period, the license shall become void and no marriage ceremony shall be performed thereon.

It shall be the duty of every person, legally authorized to grant licenses to marry, to immediately report the issuance of every marriage license to the agent of the department of health in the district in which the license is issued, setting forth all facts required to be stated in such manner and on such form as the department may prescribe."

SECTION 9. Section 572-13, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

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

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

(b) Marriages, reported by whom. It shall be the duty of every person, legally authorized to perform the marriage ceremony, to report within three business days every marriage ceremony, performed by the person, to the agent of the department of health in the district in which the marriage takes place setting forth all facts required to be stated in a standard certificate of marriage, the form and contents of which shall be prescribed by the department of health~~[-]; provided that if any person who has solemnized a marriage fails to report it to the agent of the department of health, the parties married may provide the department of health with a notarized affidavit attesting to the fact that they were married and stating the date and place of the solemnization of the marriage. Upon the receipt of that affidavit by the department of health, the marriage shall be deemed to be valid as of the date of the solemnization of the marriage stated in the affidavit; provided that the requirements of section 572-1 are met.~~"

SECTION 10. Section 572B-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) Nothing in this section shall be construed to require any person authorized to perform solemnizations ~~[pursuant to chapter 572-07]~~ of civil unions pursuant to this chapter to perform a solemnization of a civil union, and no such authorized person who fails or refuses for any reason to join persons in a civil union shall be subject to any fine, penalty, or other civil action for the failure or refusal."

SECTION 11. Section 572C-2, Hawaii Revised Statutes, is amended to read as follows:

"~~[H]§572C-2[H]~~ **Findings.** ~~[The legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman. The legislature further finds that because of its unique status, marriage provides access to a multiplicity of rights and benefits throughout our laws that are contingent upon that status. As such, marriage should be subject to restrictions such as prohibiting respective parties to a valid marriage contract from standing in relation to each other, i.e., brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew.~~

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

SECTION 12. Notwithstanding any other provision of law, nothing in this Act shall invalidate any civil union or reciprocal beneficiary relationship in existence before the effective date of this Act. Any such

civil unions or reciprocal beneficiary relationships shall continue until terminated in accordance with applicable law.

SECTION 13. The department of health may, in its discretion, make any changes that it deems necessary to internal procedures or forms, to aid in the implementation of this Act.

SECTION 14. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity shall affect all other provisions or applications of the Act that can be given effect, and to this end the provisions of this Act are inseverable.

SECTION 15. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 16. This Act shall take effect on November 18, 2013."

Representative Oshiro moved that Floor Amendment No. 9 be adopted, seconded by Representative Say.

Representative Oshiro rose to speak in support of the proposed floor amendment, stating:

"Thank you very much, Mr. Speaker. I'm rising in support of Floor Amendment Number 9. Just for the edification of the members and to assist them in the discussion here. Mr. Speaker, what this floor amendment before us does, is have a hybrid of Senate Bill Number 1 and House Bill Number 6 with the following components. Of course, I delete the language on paragraph 2, lines 4 to 10 in the Senate bill. Insert Section 2 from House Bill Religious Freedom Restoration Act, which is just a standard in the Sherbert line of cases.

"We inserted an inseverability provision along the lines of what New York and Maryland has done. We also delete the rights of parents that many find objectionable, especially in the Hawaiian community, regarding maybe the creation of or the destruction of any bloodline for Native Hawaiians, or native peoples.

"It also would repeal or delete the portion that allows same-sex couples to have special rights to access the family courts, so for divorce, alimony, or support orders. Again, it focuses upon Section 4 of House Bill 6, the religious freedom and public accommodations, and Section 5 from House Bill 6, religious freedom and marriage.

"Now all of this is premised upon these thoughts, Mr. Speaker, and let me read some of these thoughts for you. Marriage is both a legal relationship and a religious relationship. The profound religious significance of marriage means that many religious organizations, the individuals, believers, experience marriage equity equally, reaching deep into a fundamentally religious institution.

"The challenge for any bill is to equalize civil marriage while preserving religious control over religious marriage. The current draft bill has not accomplished this task.

"The proposed sections protect the refusal to solemnize a marriage and refusal to provide physical facilities for the solemnization of marriage and the marriage-related services. The issue of solemnization is important, but it is only the most obvious part of the issue for religious organizations.

"A bill that addresses only solemnization will do less to protect religious liberty, than any other state that has enacted same-sex marriage by legislation. Equally important, and far more likely to be litigated, is the issue of recognition of same-sex marriages by religious organizations. It's the recognition of same-sex marriage by religious organizations for the purpose of carrying out their religious missions, which would be possibly litigated, or foreseeably litigated.

"A religious organization in the course of carrying out its religious mission cannot in good conscience treat as married two persons whose relationship fundamentally violates the religious organization's understanding of marriage. Must a pastor provide pastoral counseling for a same-sex marriage couple? Must a church employ spouses in same-sex marriages to run its religious functions?"

"A religious liberty provision addressed only to solemnization, neglects these and many similar situations. The best solution is what's in House Bill 6. It anticipates the range of issues likely to arise, and addresses them with care, balance, and attention to the essential rights of both same-sex couples and religious conscientious objectors.

"The Governor's draft and the current Senate draft provide services to help celebrate weddings or professional services to help same-sex marriages. This omission, while protecting these, but really does not confer any new benefits on same-sex couples.

"See, same-sex couples are really, if ever actually want some personalized services from providers who fundamentally disapprove of their relationship. And they will nearly always be able to obtain these services from others who are happy to serve them. That's been the argument from our legal experts, and contained in same-sex marriage and religious liberties.

"House Bill 6 offers carefully crafted language that will address this problem in a way that has failed both sides. It'll protect only individuals and very small businesses, five or less, that are essentially personal extensions of the individuals, owners, and others, when some other business is reasonably available to provide the same service. That's in the bill, Mr. Speaker.

"And get this, Mr. Speaker, it is not in the interest of the gay and lesbian community to create religious martyrs when enforcing the right of same-sex marriage. To impose legal penalties of civil liabilities on a wedding planner, or a cake baker, or a florist, or a videographer, or a musician, or a scheduler, who refuses to do a same-sex marriage, or on an individual marriage counselor who refuses to provide marriage counseling to same-sex couples, will simply ensure the conservative, religious opinions on the issue, can repeatedly be aroused to fever pitch."

Representative Har rose to yield her time, and the Chair "so ordered."

Representative Oshiro continued, stating:

"Thank you. Mr. Speaker, every such case will be in the news repeatedly. And every such story will further inflame the opponents of same-sex marriage. Refusing exemptions to such religious dissenters will publicly empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive in our community.

"It is far better to respect the liberty of both sides, Mr. Speaker, and let same-sex marriage be implemented with a minimum of confrontation. Let the people of Hawaii see happy, loving, committed same-sex marriages in their midst. Let them see that some of those marriages fail, just as many opposite-sex marriages fail. Let them see that these same-sex marriages, good and bad, have no effect on opposite-sex marriages.

"And let the market respond to the obvious economic incentives. Same-sex couples will pay good money, just like opposite-sex couples. Let same-sex marriages become familiar to the people, and do things without oppressing religious dissenters in the process.

"Same-sex marriage will be backed by law, backed by the state, and backed by the large and growing number of public institutions. The number of dissenters will continue to decline. As minds continue to change and others acquiesce to the new circumstances in the live and let live tradition of the American people, and especially here in *Hawaii nei*.

"The number of individuals in business or professional settings which assert their right to conscientious objections will be small in the beginning and it will plunge still further over time, if deprived of the chance to rally around a series of martyrs. Exemptions for religious conscientious objectors will really burden same-sex couples, Mr. Speaker.

"Few same-sex couples in Hawaii will have to go far to find merchants, professional counseling agencies, or any other desired services provided, who would cheerfully meet their needs and wants. And same-sex couples, Mr. Speaker, will generally be far happier working with a provider who

contently desires to serve them, than with one who believes them to be engaged in mortal sin, who begrudgingly serves them only because of the coercive power of the law.

"The proposed exemptions in House Bill 6 are drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area, that does not have reasonably convenient access to the one and only provider of such services.

"Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. It respects the rights of conscience on all sides. It protects the sexual liberty of same-sex couples and religious liberty of religious dissenters.

"It is obviously better for traditional religious believers, on a few moments reflection, it is also better for same-sex couples. Because it is better on both sides, it is better for Hawaii. Thank you, Mr. Speaker."

Representative McDermott rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I stand in support of the amendment. Of course, I'm going to vote against the bill, but I think the comments of the previous speaker are to protect the minority, to protect the newest minority we have, and that is people who still go to church and still hold fundamental religious beliefs, which this country was founded on.

"He spoke about the marriage counselor. Imagine, if you will, a marriage counselor who has deeply held religious convictions, a same-sex couple comes in, he says, 'I don't know where to begin, I can't offer you what you need. And if I do I may fail. And I really don't feel comfortable doing this.' Well, if we don't have some sort of protection, he's going to get sued. And if they find out after the fact he did some counseling and they fail, oh he had religious beliefs, they're going to sue him for malpractice.

"So as he said, the courts, at every opportunity, at the lower level particularly, narrowly construe the religious freedom issue. And they have to spend all their money until they make it up to the Supreme Court which has had a rather expansive view on it. But the lower courts are very narrow and hostile to faith and hostile to religion. So I think this is a good amendment, I think he did a good job. I'll support the amendment, but not the underlying bill. Thank you."

Representative Jordan rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I'd like to thank the good Representative from Ewa over there because during our testimonies, Mr. Speaker, we had a testifier come before us who was a counselor, and he did marriage counseling. And he spoke in opposition to SB 1. He says if we pass SB 1, it will violate his religious beliefs, and he will probably have to stop working or he will be sued.

"I had a private conversation with him outside in essence of time for the committee, and he felt very convicted. He is a Catholic, a staunch Catholic, of 400 years in his family tradition. And he felt that passionate about it, and he spoke about conscientious objection for his belief.

"I stand in support of this measure, Mr. Speaker, and that's what we're trying to point out here. How do we protect those individuals deeply rooted in their personal conviction, whatever it may be?"

"Now, correct me if I'm wrong because I'm not a practicing Catholic, but I've been told that the Catholic Church will not marry you unless you go through counseling of some sort, and if the priest allows you to do it. And he performs the services. Is that not already in violation? Maybe not, because they're a member of the church.

"So we're already trampling into these public accommodation issues and personal beliefs and rights. When are we going to have the discussion to really vet this out? That's why we're talking so deeply about these different amendments today, Mr. Speaker. We're speaking for those 5,000 voices that we heard over the last five days. And many of those individuals I

thought were way over on the outskirts proved me wrong. I was so honored so see they have come to the center and say, 'please just protect our rights, we have no ill to the GLTB community, they're our family members, we want to see them happy. How can we still live our convictions and provide them rights?' I heard that, Mr. Speaker.

"And that's why I'm proud. I'm proud of how I voted the other day. I must stand for that. I'm so grateful that our faith-based community has come to this point after 20 years. But I think SB 1, HD 1, as currently drafted, doesn't protect them enough. And that's why we're trying every effort here.

"Each one of these measures supports same-gender marriage. That's what we want here. The Governor, all the way down to the House and the Senate, as well as the minority voice out there. We were just asking for the dialogue. Thank you very much, Mr. Speaker."

Representative Say rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, just a yes vote. Thank you."

Representative Oshiro rose in support of the proposed floor amendment and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Oshiro's written remarks are as follows:

"Mr. Speaker, I rise in support of Floor Amendment No. 9.

"This floor amendment would amend the House Draft 1 by:

- (1) Deleting certain language from the purpose clause;
- (2) Inserting SECTION 2 from House Bill No. 6, the 'little' Religious Freedom Restoration Act;
- (3) Inserting SECTION 14 from House Bill No. 6, the inseparability clause;
- (4) Deleting SECTION 9 of House Draft 1, which would allow a party to a same-sex marriage access to Hawaii courts for divorce, annulment, or separation proceedings; and
- (5) Inserting SECTIONS 4 and 5 from House Bill No. 6, which would provide additional protections for religious freedom for clergy, small businesses, and individuals.

"The rationale for each change is as follows:

#### **"I. Deleting Certain Language from the Purpose Clause**

"This floor amendment deletes language found on page 2, lines 4 through 10 of House Draft 1, which states:

*"Ensure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying all provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law; and. . ."* [Emphasis Added.]

"Because this language is in the purpose clause, the courts will use this language to construe the Legislature's intent should there be any conflicts that arise in the application of this Act. A black-letter reading of this language appears to assert that the Legislature intends that all provisions of law regarding marriage should be applied equally to same-sex couples and opposite-sex couples regardless of whether the language in statute provides the case. Moreover, this legislative intention – that no legal distinction be made between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State – is to be construed and manifested even without any direct action to amend or not amend any provision of law.

"Frankly, I have never seen any such provision before and the breadth and scope of its reach leaves me breathless. Mr. Speaker, does this language truly mean what it says? Wouldn't this supersede any and all amendments we are approving in the remaining sections of the bill that treat same-sex couples and opposite-sex couples differently?"

"There are countless instances where marriage status impacts how the law will be applied and as such, it is unclear whether an equal treatment would conflict with the manner the statute is supposed to operate. As previously discussed in the debates on this measure, there are numerous statutes that treat parties differently because of gender. This is especially the case in family law statutes. Currently, the law treats the birth mother differently from the biological father primarily because the mother carries the child before birth – a near self-evident fact.

"As previously discussed regarding the parenting provisions, a blanket statement to treat all of the laws equally regardless of gender, while noble in its goal, is patently negligent because such a broad application of public policy will undoubtedly conflict with the practical implementation of law.

"Finally, it cannot be repeated enough that this purpose clause provision does not rest squarely with the rest of this measure. It should not be construed to provide the overarching legislative intent that 'there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State'. I fear that such a broad, blanket policy statement could make all subsequent provisions and exemptions therein both meaningless and void.

#### **"II. 'Little' Religious Freedom Restoration Act**

"This floor amendment would also codify the federal Religious Freedom Restoration Act in Hawaii State Law to:

- (1) Establish the compelling interest test as the standard applicable by the courts of the State of Hawaii in all cases where free exercise of religion is substantially burdened; and
- (2) Establish a claim or defense to persons whose religious exercise is substantially burdened by government.

"Prior to 1990, the First Amendment was interpreted by the U.S. Supreme Court to give protection to religious belief and conduct in all cases where such belief or conduct was not outweighed by some compelling government interest in protecting life, liberty, property, or some other similarly weighty community concern. See, Sherbert v. Verner, 374 U.S. 398 (1962) (Sabbath-keeper's convictions protected); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish protected in conviction re need to educate children at home after age of 14); McDaniel v. Paty, 435 U.S. 618 (1978) (State cannot inquire into religious belief as condition of employment); Thomas v. Review Bd., 450 U.S. 707 (1972) (1981) (Jehovah's witness protected in conviction against making war materials); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (employee protected in observing holy days even when conversion occurred after hiring). But in the 1990 case of Employment Division v. Smith, 494 U.S. 872 (1990), the U.S. Supreme Court decided that, in many cases, the First Amendment should only protect religious exercise from laws or regulations that were targeted at religion. Under the Court's reasoning, a law that forbade Orthodox Jews from wearing yarmulkes on government property would be unconstitutional, as it would be targeting religion. However, if the law were to forbid all people from wearing hats on state property, it would be constitutional – even though the law would require Orthodox Jews to violate either their consciences or the law in order to walk on government property. Because the law is 'neutral' toward religion and 'generally applicable' to all persons, the First Amendment would no longer apply, despite the very real burden the law placed on a religious minority.

"Because many difficulties faced by minority religions are caused by legislative ignorance or insensitivity and not by open malice, religious groups were dealt a severe blow by the Smith decision. Most legislatures are clever enough to couch even anti-religious legislation in neutral and generally applicable terms, thereby evading the First Amendment. Thus, as the Harvard Law Review put it, the Smith Decision as a practical matter

'eviscerated' and 'gutted' much of the protection previously enjoyed under the Free Exercise Clause of the First Amendment.

"For a brief period from 1993 to 1997, there was a federal law that protected religious freedom generally. Known as the federal Religious Freedom Restoration Act (RFRA), it no longer applies to state actions.

"The federal RFRA resulted largely from the efforts of the Coalition for the Free Exercise of Religion, which was formed in response to the Smith decision. With the support of unlikely allies such as the Catholic Church, the ACLU, the Christian Legal Society, the National Council of Churches, major Jewish organizations, the National Association of Evangelicals, the Southern Baptists' Ethics Religious Liberty Commission, the Mormons, and People for the American Way, the federal RFRA was passed by a virtual unanimous Congress in 1993. It restored the compelling interest standard to claims of religious freedom.

"Legislatively, the federal RFRA was originally introduced by Rep. Charles Shumer (New York) in the House and Senator Edward Kennedy (Massachusetts) and it was approved unanimously by the House of Representatives (voice vote). In the Senate, only three members voted no – Byrd (D – WV), Helms (R – NC) and Mathews (D – TN).

"Hawaii's entire congressional delegation supported this legislation – Congress Members Neil S. Abercrombie and Patsy Mink, and Senators Daniel Akaka and Daniel Inouye.

"In 1997, the United States Supreme Court held in City of Boerne v. Flores, 521 U.S. 507 (1997), that Congress exceeded its legislative authority in applying the federal RFRA to state law. Because of this, unless the state enacts the RFRA into its own laws, the compelling interest test would not necessarily apply. It must be reemphasized that after this decision, the ACLU worked with a broad coalition of religious groups and civil rights groups to enact the Religious Land Use and Institutionalized Persons Act which among other important protections, gives religious groups added protections against local land use policies and restrictions.

"And why is this important within the context of same-sex marriage? The RFRA provision would require Hawaii's courts to balance a person's right to freely exercise religious beliefs with the just as important right of another to be treated equally under the law. Without this vital component, the rights to equal protection of a same-sex couple would supersede the rights of the religious believer or conscientious objector – an outcome that is abhorrent to our American way of life.

"Justice necessitates balance. As such, in my view, the enactment of RFRA into the same-sex marriage bill is not only relevant, but essential for there to be any balance in this legislation, or justice for that matter.

"Earlier, concerns were raised that such a provision would allow anyone to discriminate so long as it was done so because of a 'sincerely held religious belief'. However, the courts have long dealt with these issues.

"By establishing an affirmative defense, the burden of showing beyond a reasonable doubt that the 'sincerely held religious belief' was unconstitutionally infringed upon by the statute is placed upon the person asserting the defense. See, State of Hawaii v. Jonathan H. Adler, Slip Op. 25224, 118 P.3d. 652 (2005). Only after that was found would the state then have to justify the statute by compelling government interest, and show that the statute was narrowly tailored to minimize the effect on the person's religious exercise. Thus, it only arises where there is a 'violation' of 'sincere' beliefs that are 'religious' and not to situations that merely make religious people uncomfortable, nor to insincere beliefs asserted as a pretext for discrimination, nor to non-religious moral beliefs.

"Without the inclusion of specific protections for conscientious objections such as the religious freedom restoration act, the enactment of House Draft 1 will force religious organizations, businesses and individuals to compromise their deeply held beliefs to comply with the law. Again, these are constituents who have no objection to providing services to same-sex couples, but object to facilitating the marriage of a same-sex couple.

"Moreover, this concern is not without any merit when one examines the language found on page 6, of the 'Response To Inquiries Memorandum, Dated October 17, 2013, Bill Hoshijo, Executive Director, Hawaii Civil Rights Commission, re: Marriage Equality, Religious Organizations and Facilities, and Public Accommodations Law', which states in relevant part:

*"The State of Hawaii has a compelling state interest in eliminating discrimination in public accommodations. Out public accommodation law is a law of general applicability that serves a compelling state interest and does not target any religion."* [Emphasis Added.]

"Thus, if this is the standard by which the Hawaii Civil Rights Commission will conduct its analysis and application of Chapter 489, HRS, in the situation where there is a conflict between an individuals' liberty right under Section 489-3, HRS (Discriminatory practice prohibition), and another individual's First Amendment religious freedom right, without the balanced approach of the Sherbert Test, as would be established in the RFRA, the outcome will be a substantial and certain abridgment of one's First Amendment religious freedom right.

"As the preeminent and distinguished Professor of Constitutional Law, Erwin Chemerinsky, suggests:

*"[Third] [S]tate government can enact their own religious freedom restoration act in order to have state courts apply strict scrutiny to state government actions or laws that burden religion. States, of course, pursuant to police power, may adopt any law not prohibited by the Constitution. Nothing in the Court's decision in Flores precludes a state from deciding that it will tolerate state actions and laws that burden religion only if they meet strict scrutiny."*

*"There is no doubt that people have less protection for their religious practices after Flores than they did before. Hopefully, though, this will be only temporary as legislatures find other ways to protect individuals from neutral laws of general applicability that burden religion. Hopefully, too, the Supreme Court will uphold these laws and recognize that more is not less; legislatures may protect rights greater than those found in the Constitution by the Supreme Court."* [Emphasis Added.] (See, Erwin Chemerinsky, The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights, 39 Wm. & Mary L. Rev 601 (1998) pg. 636.)

### **III. Inseverability**

"To ensure that the equal protection and religious freedom provisions are applied in tandem, the bill is specifically designed to become invalid in its entirety if any portion of the bill is stricken by the courts.

"This approach is the same taken in Maryland and New York State where an inseverability provision was included in the bill that legalized same-sex marriage to obtain support from both liberal and conservative members of the Legislature. It has the effect of curbing the fringe members of the various stakeholders from seeking to strike down any portion of the law it finds disagreement with and promotes a mutual level of interdependence to the effectiveness of the whole policy as each has a similar political veto power over the other.

"This provision has been in effect in Maryland and New York, since 2012 and 2011, respectively and no published legal action has been issued in either state. We should consider this provision if we are serious and sincere about promoting a policy on same-sex marriage that allows all to 'live and let live' in our island home and community in the middle of the sea.

### **IV. Domiciliary Requirements Necessary for Recognition of Divorce Decrees Issued in the State of Hawaii**

"SECTION 10 of House Draft 1, page 17, line 9, through page 19, line 13, would allow any party to a marriage solemnized in the State of Hawaii to access Hawaii courts for the purpose of obtaining an annulment, divorce or separation if neither party is able to pursue an action for annulment, divorce, or separation where the parties are domiciled because both parties are domiciled in a jurisdiction or jurisdictions that do not recognize the

marriage. This provision would exempt these parties from the three-month domiciliary requirement to use the courts in the State of Hawaii for purposes of divorce, annulment, or separation. Be certain that this provision would affect both out-of-state and out-of-country marriages and may have serious consequences upon child custody, support, visitation, and parental rights, without the current due process protections.

"Professor Lynn D. Wardle, a recent panelist at the House of Representatives Informational Briefing, October 23, 2013, former President of the International Society of Family Law, current President of the International Academy of the Study of the Jurisprudence of the Family, and author and co-author of six books about family law, and over 100 law review articles, mostly about family law, is a full-time law professor, having taught family law for 35 years. He strongly condemns the amendments to Section 580-1, Hawaii Revised Statutes (HRS), which allows the Hawaii courts to have jurisdiction to grant a divorce to any couple even living outside of Hawaii, regardless of where else they are domiciled, where else they live, where else they have their home, own property, or have children or custody of children, if they got married in Hawaii and now live in a state or country that does not recognize their marriage. Professor Wardle has shared with me that there is NO state that allows this radical extension of divorce jurisdiction and it is almost certainly unconstitutional under long-established precedents and standards set by the U.S. Supreme Court.

"In Williams v. North Carolina, 317 U.S. 287 (1942), the United States Supreme Court held that the federal government determines marriage and divorce status between state lines, and that the State of North Carolina was not required to recognize a Nevada divorce decree because the State of Nevada did not require either spouse to be domiciled in the state. Mere residence will not do but domicile is necessary. The reason for such a high standard is the constitutional requirement of due process of law.

"In other words, courts of the state in which a party to a marriage is domiciled, just like the state in which land is situated, have the only constitutional authority to issue a court order regarding the res or matter that is the subject of litigation – the marriage in one case, the land in another case.

"Furthermore, we should be questioning the necessity for this special privilege to a same-sex couple that is not granted to a heterosexual couple. Why are we creating this special privilege? What affects will it have upon the operations and policies of our family courts?

"By allowing any same-sex couple married in Hawaii not domiciled here to access our courts for purposes of obtaining a divorce, annulment, or separation, it is arguable that the bill, as presently drafted, would jeopardize the validity of any divorce, annulment, or separation decree issued in the State of Hawaii as they are recognized by other states. SECTION 10 of House Draft 1, page 17, line 9, through page 19, line 13, is certain to run afoul of constitutional requirements of due process of law and place a cloud of uncertainty over Hawaii's Family Court decrees and orders.

"In conclusion, the amendments proposed in this floor amendment are necessary to correct fatal flaws in the House Draft 1. Should these flaws not be corrected, the potential for harm that this bill will have on our people is enormous, and in most cases irreversible and permanent.

"How can we forget the children who may or may not be Hawaii residents or even U.S. citizens or who are domiciled on the U.S. Mainland.

"Does this extraordinary change comport with all federal and state laws regarding the transfer of children across state and country borders?

"What occurs if the parties to the marriage do not consent to the family court's jurisdiction?

"What happens to the adjudication of child custody, spousal support, child support, property division, or other important matters such as educational opportunities, visitation rights, medical treatment, and other matters commonly disposed of under the present marriage laws and family court procedures?

"Do we understand how this change in our marriage laws and related family court rules and policies could, for all practical purposes, terminate and end a child's relationship with his or her own biological parent?

"Are we so sure that we may not be playing a part in an incremental pursuit to cut-off a child's link to his or her unique cultural legacy or ancestral heritage?

"The public record is lacking on any discussion of this provision and how it may affect children. The Attorney General's written testimony, dated October 31, 2013, page 4, does not even mention 'child' or 'children' or 'minor' or 'minors', which in my humble opinion only suggest a mere cursory review of the provision or a gross misunderstanding of how this provision could do great and irreparable harm to the child and children of a same-sex marriage couple.

"Mr. Speaker, this kind of substantive change deserved much more discussion and review as it deals with children. That this body did not examine and consider these foreseeable challenges underscores the great and grave danger in rushing this measure through.

#### **"V. Additional Protections for Religious Freedom**

"The House Draft 1 would provide the Hawaii Civil Rights Commission with broad authority to determine whether an activity of a religious organization is protected under the First Amendment or subject to the Hawaii Public Accommodations Law, Chapter 489, HRS. Not only will this create a chilling effect that will interfere with religious exercise, but the bill, as presently drafted, would not provide any protections whatsoever for individual religious and conscientious beliefs.

"The religious exemptions in House Draft 1 is broader than the version received from the Senate by inserting language modeled after the State of Connecticut's Public Accommodations Law. However, this language does not take into account the constitutional, statutory, and common law protections embedded in Connecticut State Law that was not included with the borrowed language.

"First, Connecticut's Constitution specifically protects religious and conscientious beliefs. Article Seven states:

*"It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the State. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship."*

"Second, the State of Connecticut has enacted the Religious Freedom Restoration Act of 1993, Section 52-571b, General Statutes of Connecticut, which establishes the compelling interest test as the standard applicable by the courts in all cases where free exercise of religion is substantially burdened, and establishes a claim or defense to persons whose religious exercise is substantially burdened by government.

"For these reasons, in my opinion, the language from the Connecticut Public Accommodations Law is not appropriate and would not adequately protect the religious liberties of clergy, small businesses nor individuals.

"A much more suitable alternative would be found in House Bill No. 6. In preparing House Bill No. 6, noted and renowned legal scholars from across our Nation were contacted to assist in the drafting of religious protections for businesses and individuals. These included:

- Douglas Laycock, the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies, University of Virginia. Considered the 'Dean' of Religious Freedom Issues, Professor Laycock successfully argued before the United States Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal

Employment Opportunity Commission, Slip No. 10-553 (2012), in which a unanimous Court held that the Establishment and Free Exercise Clauses of the First Amendment bars suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. He most recently argued before the U.S. Supreme Court this week in Town of Greece v. Galloway, which seeks to clarify the legal limits on public prayers in government meetings across the country.

- Thomas C. Berg, James Oberstar Professor of Law and Public Policy, University of St. Thomas, Minnesota. He has written more than 30 briefs on issues of religious liberty and free speech in cases in the U.S. Supreme Court and lower courts and has often testified to Congress in support of legislation protecting religious freedom. For his work, he received the Religious Liberty Defender of the Year Award from the Christian Legal Society in 1996, the Alpha Sigma Nu Book Award from the Association of Jesuit Colleges and Universities in 2004, and the John Courtney Murray Award from DePaul University College of Law for scholarly and other contributions to church-state studies.
- Bruce S. Ledewitz, Professor of Law, Duquesne University. He is a recognized expert in the fields of criminal law and constitutional law. His most recent book, Church, State, and the Crisis in American Secularism was published in 2011. He has served as Secretary to the National Coalition Against the Death Penalty from 1985-1990. His Platform for Reforms of the Pennsylvania Supreme Court was recently the subject of a statewide series of debates sponsored by the Pennsylvania League of Women Voters. He has written widely in both specialized legal journals and national media such as the New York Times, Wall Street Journal and the Chicago Tribune.
- Christopher C. Lund, Associate Professor of Law, Wayne State University Law School. He has represented a wide variety of groups and causes. He has, for example, worked for the American Civil Liberties Union defending the rights of Christian parents to home school their children, and for a diverse coalition of religious groups supporting the freedom of Muslim detainees at Guantanamo Bay. He regularly advises church-state groups regarding litigated cases and pending legislation. He is a past chair of the Law and Religion Section of the Association of American Law Schools, and the current chair of the Section on New Law Professors.
- Michael Perry, Robert W. Woodruff Professor of Law, Emory University. Since 2003, Professor Perry has held the Robert W. Woodruff University Chair at Emory University. A Woodruff Chair is the highest honor Emory University bestows on a member of its faculty. He is also a Senior Fellow at Emory University's Center for the Study of Law and Religion. He is the author of twelve books and over seventy-five articles and essays. His books include: Religion in Politics: Constitutional and Moral Perspectives (Oxford, 1991); We the People: The Fourteenth Amendment and the Supreme Court (Oxford, 1999); Under God? Religious Faith and Liberal Democracy (Cambridge, 2003); Toward a Theory of Human Rights: Religion, Law, Courts (Cambridge, 2007); and Human Rights in the Constitutional Law of the United States (Cambridge, 2013).
- Robin Fretwell Wilson, Class of 1958 Law Alumni Professor of Law, Washington and Lee University School of Law.
- Richard W. Garnett, Professor of Law, University of Notre Dame Law School.
- Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso University School of Law.
- William Wood Bassett, Professor of Law Emeritus, University of San Francisco.
- Robert A. Destro, Profess of Law and Director of the Marriage Project, The Catholic University of America.
- Michael W. McConnell, Richard & Frances Mallery Professor of Law, Director, Constitutional Law Center, Stanford Law School.
- Carl H. Esbeck, Isbell Wade & Paul C. Lyda Professor of Law, University of Missouri School of Law.
- Marie A. Failinger, Professor of Law, Hamline University School of Law.

"Their recommendations were incorporated into the floor amendment presently before you specifically to provide religious protections for individuals and small businesses.

"In their testimony on Senate Bill No. 1 to the Senate Committee on Judiciary and Labor, Professors Laycock, Berg, Ledewitz, Lund, and Perry wrote:

*"We support same-sex marriage. We think that Senate Bill 1 can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The gain for human liberty will be severely compromised if same-sex couples now force religious dissenters, when they had the power to do so, used to force same-sex couples to hide their sexuality. Conservative religious believers should not be allowed to veto same-sex marriage for those who want it, but neither should they be forced to directly facilitate it in violation of their understanding of God's will." (emphasis provided).*

"Accordingly, this floor amendment would provide additional religious protections to balance these competing interests.

"These include protections for:

- (1) Religious educational, healthcare or denominational organizations, organizations operated for charitable or educational purposes that are identified with a religious organization or group, and individuals employed or supervised by any of these organizations;
- (2) Small businesses having five or fewer employees or owning five or fewer units of housing in providing goods, services, benefits or housing;
- (3) Judicial officers and government agency clerks with sincerely held religious beliefs to not solemnize a marriage; and
- (4) Individuals, in certain circumstances.

"However, it must be understood that these exemptions shall NOT apply if either:

- (1) A party to the marriage is unable to obtain any similar good or service, employment benefits, or similar good or service, employment benefits, or housing elsewhere without substantial hardship; or
- (2) In the case of an individual who is a government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay.

"This is both a practical and realistic means to address the most common instances where conflict may arise and narrow the exposure for disputes and litigation among our community members.

"These provisions would sunset in three (3) years to allow the Legislature to reevaluate the need for these protections based on the experience gained. But, it is realistically expected that as same-sex marriage becomes more and more frequent, the entrepreneurial engines of small business will establish and promote niches of both services and goods to address the needs of the same-sex marriage industry. As such, as we transition into this natural economic dynamic of business enterprise seeking to fill a unmet need, the initial limited and constricted protections afforded to conscientious religious objectors will not be necessary and allowed to fall away as mere vestiges of a transitional period in local politics and policy as we enter into a post-same-sex marriage world in Hawaii.

#### **"VI. Religious Protections for Employers and Employees**

"As mentioned previously, House Draft 1 does not provide any religious protection for the 'Individual', but only the clergy, minister, priest, rabbi, and officer of any religious organization. As such, it does not protect any

of the thousands of constituents with sincerely held religious beliefs when they leave the privacy of their homes and enter the public space of commerce or business as employer or employee. But, I don't know of anyone who has a genuine and authentic religious belief that can flip it on or off as any GLBT can turn his or her sexual orientation off or on, in public and private spaces. No one can expect a person to do this and it should not be the policy of Hawaii.

"But, under the House Draft 1, that is the effect it will have upon many of our constituents. And, it may force them to choose between their sincerely held belief or face demotion or termination for being a conscientious objector. This has occurred in other states and it is a foreseeable consequence of legalizing same-sex marriage without protections of individual religious freedom rights. We do not need to have a win or lose policy choice between two essential constitutional values – religious freedoms and equal protection or personal liberty rights.

"For a practical solution to many of our Government workers (HSTA, HGEA, UPW, HFFA, SHOPO, UHPA, etc.) I draw your attention to SECTION 4 of the floor amendment, Pages 26-29, with particular attention to Page 27, Line 21: 'No Individual . . .', and Page 28, Line 11-19, and Page 28, Line 11-19: '(b) This section shall not apply if either: . . . In the case of an individual, another government employee or official, another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay. . . .'

"In other words, only in the instance where another co-worker is available and willing to provide the service will a person's sincerely held belief allow for this exemption to provide service to all. This may also help ameliorate the foreseeable tension of the conscientious objector who as a teacher would not be able to teach certain topics regarding same-sex relationships, finding that it substantially burdens her sincerely held religious beliefs and a cohort or colleague is readily available to provide such teaching service without interruption or inconvenience. This 'hardship exemption' is premised upon the belief that the accommodation is a two-way street and only available when there is no other less restrictive alternative to provision of the service. It is consistent with the legal underpinnings of balancing interest as found in Sherbert.

"House Draft 1 does not provide for this practical accommodation of our public workers who will face hard choices whether they serve the public as a counselor, teacher, psychologist, or social worker, among those occupations involving personalized skills and talents. Simply deeming public servants with sincerely held religious beliefs as unqualified or ineligible to serve will take us back to a dark time in our Nation's history where Catholics and Jews were deemed unfit for public service based upon their religious beliefs. Certainly, no one would condone such a policy today but that will be the foreseeable de facto policy of the State of Hawaii should we not approve such limited and practical protections for our public workers.

#### **"VII. The Demise of Religious Freedom in Hawaii**

"Finally, it is well established that once same-sex marriage is approved, those opposed to any exemptions for religious conscientious objectors will give the narrowest possible interpretation to all exemptions until it is meaningless and void of any regard for the religious freedom under the First Amendment. The Governor and his Administration has already shown their true colors as demonstrated in their public statements regarding the Governor's initial draft bills: Marriage Equity Bill, AG 8.22.13, based upon Senate Bill 1329, and attached to Governor's Memorandum, dated August 28, 2013, and Governor's Memorandum, dated September 11, 2013, with revised draft of Marriage Equity Bill, AG 9.9.13. As legal scholars have warned us, similar unsympathetic application of non-discrimination policies against religious freedoms and conscience from our courts and administrative agencies is also foreseeable without clear guidelines.

"Again, without the clear guidance to apply the Religious Freedom and Restoration Act, and the Sherbert standard, both the Civil Rights Commission and Hawaii's courts may apply the less protective standard of the Smith Decision in religious freedom cases.

"Mr. Speaker, the New Mexico photography case, Elane Photography v. Willock, 2013-NMSC-040, 309 P.3d 53 (2013), should give every advocate of freedom of expression and free exercise of religion and association pause. When government begins to tell us 'how we must speak', or 'what we must photograph', the practitioners of the express or creative arts, including journalism, poetry, music, design, and art cease to be masters of their own subject matter, and freedom of expression ceases to exist.

"How can we tolerate our government telling us what to speak? How can we tolerate our government telling us what we can think? Is there anyone else in this august Body that appreciates that slippery slope we may be entering? I hope so. I really do. Mr. Speaker, we can do better for ourselves and for our constituents and their religious and First Amendment freedoms.

"In conclusion, the amendments proposed in this floor amendment are necessary to correct fatal flaws in the House Draft 1. Should these flaws not be corrected, the potential for harm that this bill will have on our people is enormous.

"For this reason, I strongly urge your favorable consideration of this floor amendment."

Representative Tokioka rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. A yes vote."

Representative Saiki rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition to this floor amendment. I'd like to make two points. First, this floor amendment legalizes same-sex marriage in Hawaii.

"The second point is, I'm not really sure, to be somewhat blunt about it, I'm not really sure how much value there is in further discussing this proposal in public hearings. In particular I want to point to one provision that I find very troubling. It's on page 6.

"It basically allows any individual and any small business to discriminate, if there is a religious belief that justifies that discrimination. I want to give an example of how broad this is. The language would allow the discrimination to include the provision of any benefit to a spouse of an employee, whether or not that is a same-sex marriage couple. It would also allow for discrimination in housing, lodging, and similar accommodations to any couple, regardless of whether it is a same-sex couple. The discrimination is not limited to same-gender couples. It could be on the basis of race, age, gender.

"I view this as a very vindictive proposal. For that reason I oppose it, and I call for the question, but please allow members to insert written comments, thank you."

At this time, Representative Saiki called for the previous question.

The motion that Floor Amendment No. 9, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representative Saiki voting no, and with Representatives Cachola, Choy and Nishimoto being excused.

At this time, the Chair stated:

"Members, we are going to have a recess, and you're all invited for lunch in the Democratic Caucus Room."

At 2:20 o'clock p.m., the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 3:57 o'clock p.m., with Vice Speaker Mizuno presiding.

At this time, the Chair stated:

"Announcement to the gallery. Members of the audience, in order to maintain decorum in this Chamber, I'll ask the audience to refrain from any outbursts or demonstrations which may disrupt the deliberations and proceedings on the Floor. Thank you, members."

At this time, Representative Oshiro offered Floor Amendment No. 4, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1, H.D. 1, is amended by deleting its contents and inserting the following provisions:

"SECTION 1. The purpose of this Act is to propose an amendment to article I, section 23, of the Constitution of the State of Hawaii to provide that marriage shall be reserved to opposite-sex couples.

SECTION 2. Article 1, section 23, of the Constitution of the State of Hawaii is amended to read as follows:

**"MARRIAGE**

**Section 23.** ~~[The legislature shall have the power to reserve marriage]~~ Marriage shall be reserved 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 reserve marriage to opposite-sex couples?"

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

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

Representative Oshiro moved that Floor Amendment No. 4 be adopted, seconded by Representative Say.

Representative Oshiro rose to speak in support of the proposed floor amendment, stating:

"I'm in support of Floor Amendment Number 4. Just in a nutshell, it's the same contents as House Bill Number 5, I believe, that was introduced by the Representative from Ewa Beach, on about October 28, 2013. Mr. Speaker, let me explain to the public and to the members what we're trying to do here, giving you some background.

"This is a constitutional amendment. First we need to understand that according to Article I, Bill of Rights, Political Power, Section 1, 'all political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.'

"Number two, Rights of Individuals, according to Section 2 of the same article, 'all persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.'

"So what this would do here, if it was approved by this Body, it would then go through the Senate for consideration. And then if approved by the Senate, in their infinite wisdom, it would then go before the voters, if we were able to achieve and have the same approval in the Regular Session 2014, by both the House and Senate.

"It requires either a simple majority in a single session like this, or in two consecutive sessions, a majority of the votes. What this would do would have the effect of amending our State Constitution, primarily Article I, Section 23, which states as follows: 'The legislature shall have the power to reserve marriage to opposite-sex couples.' Thank you very much, Mr. Speaker."

Representative McDermott rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, my name was said in, not vain, but said not exactly that I introduced the bill, and I did. I'm in support, Mr. Speaker, with unbridled enthusiasm, like our protestors outside. You've heard them all morning, 'let the people vote, let the people vote.'

"Mr. Speaker, why, why are they upset? Because in 1998 this was sent out to every registered voter, from the Office of Elections. A ballot information sheet telling them what the amendment meant. And here's the language verbatim, '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.' Only. Mr. Speaker, I'm not a lawyer, but I know what the word 'only' means.

"Now unfortunately, that word wasn't on the ballot. We misled them, Mr. Speaker. Like a used car salesman, bait and switch. We said, get a brand new Ram Quad Cab for 19,999, then they go down, well that doesn't have air conditioning, and it doesn't have wheels, but you can have this one over here for \$40,000.

"Mr. Speaker, these people, I don't know if I'm the only one who's noticed, Mr. Speaker, but those folks out there, they're not Republicans, they're the majority party folks. And you've turned your back on them."

At this time, the Chair stated:

"May I remind our guests in the gallery, this is a very passionate issue to both sides, so out of respect to everyone here and the membership here, allow us to do our job. Representative McDermott, sorry, please continue."

Representative McDermott continued, stating:

"No, thank you, Mr. Speaker. A recent poll was done, we paid \$10,000 for it. 70 percent of the people think this question should be decided by them. When a major societal change is going to come, the people who own the government, the people who we work for, the people who pay our salaries, have been telling us very loudly and clearly what they want.

"Now as Judge Levinson said under questioning, it's not a constitutional right, it's not a fundamental right. So what are we doing? We're turning our backs on our people. Mr. Speaker, your people, who we're turning our backs on. That's who we're turning our backs on. The downtrodden, the disenfranchised, the truck driver, the clerk at Longs. These are your people, Mr. Speaker. These are the people who the Democratic Party came together to rise up and lift up, and we're turning our backs on them. Because we think they're stupid, they don't know, they go to church, it's foolish, it's a magic show, it's not real. Here's our new world, come join us in our world. They're saying, 'no, please.'

"So, Mr. Speaker, they showed up in droves. Over 5,000 people to testify. Minority research kept track of the folks who supported and opposed same-sex marriage. First day of testimony, 18 percent in support, 82 percent opposed.

"Now this is walk-in testimony. These are people who took off of work to come down here and said 'no'. They repeatedly said, let the people decide, give us a vote. Let us choose the world in which we want to live in.

"Friday, 20 percent support, 80 percent opposed. Saturday, 10 percent support, 90 percent opposed. Monday, 9 percent support, 91 percent opposed. Mr. Speaker, it's clear. My colleagues, I beg you, don't turn your back on your people. You're all they've got, why are you not listening to them? They want a constitutional amendment, you're going to turn your back on them. This is a constitutional amendment.

"Now, some may say it's flawed. The title is flawed, or this, they can nitpick it to death. Well you know what, Mr. Speaker? We have time, we can pull HB 5 to the Floor, a clean constitutional amendment, and vote it. Doesn't matter what the Senate does, we don't work for the Senate, we work for the folks outside, in the hallways, who slept over the weekends, that's who we work for.

"Now I don't think I'm the only one who understands that, Mr. Speaker. Please, I beg you, majority party, listen to the 70, 80 percent of the people who want a constitutional amendment. Please."

Representative Evans rose to speak in opposition to the proposed floor amendment, stating:

"I stand against the floor amendment. I'm offended by someone saying that I don't listen to the people. And I want you to know that I think everybody in this Chamber, every single Representative has been listening. But it's not just about people that show up at the Capitol. It's not just about the people sitting in the gallery, or people standing out in the rotunda.

"I took surveys, I get phone calls, I get emails, and guess what? I'm from the Big Island and so most of the people that I represent, they can't get here, because they can't afford to fly, they can't afford to take off work and fly and actually get hotel rooms, not knowing if they were going to testify on the second, third or fourth day. But to say that we don't listen is so false. And I want you to know that people have overwhelmingly, from my district, contacted me.

"Now we're talking about two things. One, I think he was out of order because he's implying what my intent is. But I'll tell you, we do listen to the people. And there's another group of people that people haven't even brought up, and that is, I represent 27,000 plus people in my district. They happen to be from one-day-old to I think over 100 plus, in my district.

"There's a lot of people out there that don't know how to express themselves to their legislator. So it's our job to figure out how to reach out, how to represent all the different people that we represent. And I'm telling you, I will not make my decision based on 5,000 people showing up and, oh, of the 5,000, X amount said 'yes', X amount said 'no', and then I've got to place my vote on that. Wrong, I will not do that, and I do not support this amendment. Thank you."

Representative Yamane rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, standing in support. Thank you, Mr. Speaker. I respect those in my community. I respect the voices and the families that I'm charged and took the oath of office to represent. That is why I support a constitutional amendment, to let those voices be heard. Mr. Speaker, this measure not only brings it and allows every person allowed to vote to make that decision for them, but this was for discussion.

"I'm confident, Mr. Speaker, that people in my community will read, will talk, get educated and they'll make the best decision that they feel represents them and their family. And this is the reason why I support a constitutional amendment, so that the people who cannot fly here, who cannot take off and be here today, could not testify in front of the committee, will have a voice. Thank you."

Representative Awana rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I rise in support. Earlier we heard many concerns surrounding this bill, Senate Bill 1, House Draft 1, in as so much that we received numerous floor amendments to change the bill, gut the bill, and clarify the bill. For whatever reason, the amendments were not adopted. Floor Amendment Number 4 will greatly improve the language by allowing the people to vote through a constitutional amendment.

"Mr. Speaker, as you may have heard, from 10 a.m. this morning, there has been a persistent group chanting 'let me vote, let the people vote.' Mr. Speaker, as I look to you, to your left and to your right, I see two flags. One is the United States flag and the other is the Hawaii State flag. We are in America, Mr. Speaker, in a country where one of the most unique rights is the right to vote.

"These people want to vote, Mr. Speaker, and I will support them and the rest of the tens of thousands who requested to exercise this right via their emails, letters, phone calls, testimony, and personal visits to our offices.

"Although there are many claims that the title may be flawed, Mr. Speaker, I beg to differ. A vote is a great equalizer. A vote does not discriminate. And the bill's name is entitled, 'Equal Rights.' For these reasons, Mr. Speaker, I rise in strong support. Thank you."

Representative Ward rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, in support. I think you've been in my office, and a number of my colleagues have been in my office, and they see a bust of Jefferson as soon as they come in, a live bust of Thomas Jefferson. Jefferson shouts at me every day, 'listen to the common sense of the common people for the common good.' This the common people shouting common sense for our common good as a people.

"I say this because we're behaving like the banana republics, that I used to be a democracy officer in. That the U.S. would send me out through the State Department and USAID to show newly elected officials that because someone's not educated, someone does not have a cosmopolitan sit-down white-jacket and white-tie job, that they don't have any wisdom.

"Mr. Speaker, the core, the soul of the earth is in the people. That's why our constitution says, all power in this state is vested in the people. The people want to have a process, they want to have a method by which they can be heard.

"They were duped in 1998. I don't care how much inside baseball all the lawyers are going to tell us, they were duped in 1998 to think that they were voting against same-sex marriage. They weren't, we botched that one, and that's what part of the anger is here.

"But my point is to listen to the people, what they can do. And if we're so confident, all those who voted in the Finance and Judiciary Committee, if you guys got the votes, you got the confidence, let the people reify it, let the people reexamine it, and let them have their say. If we're so confident that we're going to pass this, let's get them to stamp it and say, yes, we're all part of having same-sex marriage brought here, not just some of us.

"We're not a banana republic. We listen to the people, they have common sense, and it's for our common good, Mr. Speaker. For those reasons I ask everyone to vote yes."

Representative Jordan rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker, I am in support of this amendment. Thank you very much, Mr. Speaker."

Representative Fale rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, in support. We had over 15,000 pieces of testimony come in over two weeks. We went through five days of testimony, over 55 hours plus of listening to people. We never gave the neighbor islands the opportunity to weigh in, which was obviously a mistake."

The Chair addressed Representative Fale, stating:

"Wait, Representative, you can't infer motive on any of the chairs. It's your opinion."

Representative Fale continued, stating:

"My opinion, Mr. Speaker, that was my opinion. I don't understand what the problem is with letting people decide. This is something that they have to live with. I don't understand why we're going to make such a huge societal change in the State of Hawaii and then say, you have to live with it, without allowing them the opportunity to say something.

"It blows me away. I'm one of the youngest members here and I get it. The way that constitutional amendment was written 1998, apparently you have to be an attorney for 30 years to understand what it meant.

"When we ask the common person, what did this constitutional amendment do? Apparently we have a problem with clarifying legislative intent. That's a problem with leadership that comes from this building, Mr. Speaker.

"Here's an opportunity, here's an opportunity with this floor amendment, to lay something out that is clear and simple, for the people who will have to live with this major societal change, that this Body is on the verge of imposing on them. That doesn't sound like democracy to me, Mr. Speaker.

"Whether it's right, whether it's wrong, whatever your feelings are about it, the people of this state will have to live with it. How can we oppose something that they're supposed to live with, and not give them a chance to weigh in?

"They're opposed. You see it, Mr. Speaker, say that 55 percent of the State of Hawaii support same-sex marriage. If that is the will of the people of Hawaii, I am completely fine to live with that. But I am not about to make a decision to impose something this big, on this magnitude, that was dictated to this Body from the 5th floor of this building against the wishes of the State House and the State Senate, and here we are, here we are.

"And the people who are afraid of microphones, who live day-to-day, got the courage to come here and voice their opinions and let us know how they feel. I was told, every day in this building I'm told, go get the people to come speak on the legislation here because their voice matters, and what they have to say will influence what goes on here. I have no confidence to ever do that again.

"If we have what we have, we made history, we made history in this building. Never before have we received the degree of public input, public testimony. People are tired. They have put their hearts, they have put days, they have sacrificed money, some have gotten their cars towed, Mr. Speaker, because they did not wish to have their voice not heard.

"And for those people to say, it does not matter what you say, it does not matter how you feel, Mr. Speaker, this is no longer the People's House. How can we say, we should call this just the Governor's House. Because we're here to do the Governor's will. Not the people's will, the Governor's will.

"Mr. Speaker, my job is to represent the people of my community. I am a people's representative, Mr. Speaker. The key word being people. And apparently we have problems with understanding simple English language when it's presented, as it was in the 1998 constitution.

"Mr. Speaker, that's not what I wrote to say, sometimes emotion kind of grabs you. But I don't understand, Mr. Speaker, the people out there don't understand. Why can't we do something, when the people ask us to do it? And if it's something as simple as just let us vote. How can we say no?"

Representative Tokioka rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I stand in strong support. Just real briefly, I know it's been a long day already. I know the people outside can't hear us, but I really want them to know that we heard them. For the thousands of people who came to this Capitol, Mr. Speaker, we want them to know that their voices were heard. Thank you very much, Mr. Speaker."

Representative Fukumoto rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. In support of the amendment. In 1998 I wasn't old enough to vote yet so I didn't get to vote on the 1998 amendment. But I do remember how confusing it was to people, and I think from the volume of calls that we've received in our offices, at least I've realized that people didn't understand what happened in that amendment, and people were confused because they didn't even realize that we could do what we're doing here now in a special session, even discussing same-sex marriage. Because they thought this was a done deal, they thought it was over.

"I think it's an arrogant thing, for this Body to continue to say that they should have known better. They didn't know better, and clearly they didn't. We need to give them a chance, I think this is what they've asked and demanded for. Clearly they're demanding for this.

"And I think, even though we haven't had a roll call or anything else, in the interest of full transparency, these people deserve to know how we're going to vote. They deserve to know how we feel about this, because this is what they're asking for. So, Mr. Speaker, in the interest of full transparency, at the end of discussion I would like to call for a roll call vote. Thank you."

At this time, Representative Fukumoto requested a roll call vote.

At this time, the Chair stated:

"Before we continue, members, I'd like to remind all of you that pursuant to the House Rules of proper decorum, we are not going to allow personal attacks. Motives of a member will not be discussed in this Chamber. The speeches can be very passionate. If you are supportive or in opposition of the bill or the amendments, feel free to argue the merits of it, why it's good or bad. But let's have respect and proper decorum in this Chamber. Thank you."

Representative Cullen rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in support. We've been listening all this morning, let the people vote. We've listened for five days, testimony overwhelmingly opposed to this Senate bill. But for this floor amendment, we hear the people. We need to move forward and say we listened to them, and move this amendment through. So, we not just need to hear them, we need to listen. Mr. Speaker, we need to listen."

Representative Har rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I rise in strong support of the floor amendment. Mr. Speaker, I'm very angry right now. I think my anger is very representative of many of the people who are sitting outside right now, who are standing and chanting, as well as many of the people in the gallery today.

"I'm angry, Mr. Speaker, for several reasons. First and foremost, we don't need this floor amendment. Mr. Speaker, as you and all the members of this Body know, we have a bill, House Bill 5, that is sitting in committee right now, that can be heard, and will give the people the ability to vote. And yet we are not allowing that bill to be heard. So I'm angry about that, Mr. Speaker.

"Mr. Speaker, a recent poll was done by QMark. 54 percent of the people of the State of Hawaii who were polled think that same-sex marriage should be legalized. And, Mr. Speaker, you know what? I agree with that poll. So if I agree with that poll, why can't we allow the people to vote? If that's, in fact, the majority of this people, why can't we let the people vote?

"Mr. Speaker, over the past five days we have heard testimony from numerous individuals. I speak on behalf of Kupono Kuwamura, number 5016 was his registration number. 21 years old and he said, 'I've never done this before, I've never come to testify. Yet I represent a generation that was not heard. We all want to be heard, please allow us to vote on this issue.'

"We had Mr. Brandon Ahu, registration number 5063, a graduate of Kamehameha Schools and USC, and he said, 'is our government listening? I'm going to ask you to allow me to vote on this issue. Our state is divided. How can this be falling on deaf ears? If you vote 'yes' to this bill, you are further disillusioning us in government, in this process.'

"We also heard from Ms. Danielle Surface, number 3542. She said, 'over and over again you continue to hear the same message. But I think that's important that you keep hearing the same thing. People feel deceived, they

feel that you folks were dishonest, and now you're rushing this. If you continue to move on this course, you will continue to cause more strife and problems. Take your responsibility seriously, and please let the people vote.'

"We heard from Ms. Patricia Langi, registration number 3613. She said, 'in 1998 I was too young to vote. And now, I feel like I'm 8 years old again, I have no voice, no one is listening. Please, let me vote.'

"Finally, Mr. Speaker, Robyn Gomes, from Nanakuli, registration 4127, said, 'this process is a joke. The shenanigans that are going on right now is wrong, and you shouldn't be doing this to the people. This process is flawed. I am a Native Hawaiian, and to us, this is not the way, this is not the way to do this to me and my family. To me and my family, this is a slap in the face.'

"So, Mr. Speaker, I think my anger is very representative of many of the people who have participated in this journey with us. So, Mr. Speaker, on behalf of Kupono Kuwamura, 5016, Brandon Ahu, 5063, Danielle Surface, 3542, Patricia Langi, 3613, Robyn Gomes, 4127, and the thousands of people who came and testified and asked to let the people vote, for them, I stand in strong support of this floor amendment, and I also ask this Body to hear House Bill 5, allow the amendment, and let the people vote. Thank you, Mr. Speaker."

Representative Aquino rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. Strong support."

Representative Ito rose in support of the proposed floor amendment and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Ito's written remarks are as follows:

"Mr. Speaker, I rise in support of Special Session SB1, HD1, FA4.

"Mr. Speaker, do we not hear the cries of our constituents? Not just mine, but the constituents of all of us in this chamber. They cry out, 'Let the people decide.' Their cry is loud and clear and I agree with them. On such a delicate and controversial measure, we the members of this Chamber should not be making the decision for our constituents. This decision should be left to the residents of the State of Hawaii through a Constitutional Amendment. There are some in this Chamber who say that the courts will overturn such a decision. To this I say 'Let the courts make the final decision and we the residents of the State of Hawaii abide by the courts decision.' Additionally, who is to say whether Hawaii's residents will decide for or against same-sex marriage. Now we will never know.

"Mr. Speaker, it is my understanding that when the US Supreme Court overturned DOMA, 'Defense Of Marriage Act', they collectively agreed that 'The issue of same-sex marriage should be up to the people of each state to decide what they want for their state.'

"Mr. Speaker, for this reason I am in support of Special Session SB1, HD1, FA4, and ask my colleagues to support this measure."

Representative Onishi rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition to this amendment. Mr. Speaker, in talking to the people from the Big Island from my district, I'm from Hilo. I talked to a lot of people about this issue. And one of the things in my discussions with them, I told them that I support equality. This amendment, although it says that it would reserve marriage to opposite-sex couples, does not provide equality.

"The other thing is that, I also promised people that I would do my best to ensure that there would be religious protection for organizations, and people who work for organizations, that they would not have to perform same-sex marriages if it was against their religious belief. This amendment does not provide that. So I stand in opposition, Mr. Speaker."

Representative Har rose to respond, stating:

"Mr. Speaker, brief rebuttal. Just very quickly. For the members of this Body who don't trust the people to do the right thing, I would ask you to look at Washington D.C. Washington D.C., the people did, in fact, vote, and they did legalize same-sex marriage, Mr. Speaker. So what we're saying is, we do not trust people to do the right thing.

"Again, the QMark poll recently taken said 54 percent of the people of the State of Hawaii have agreed that same-sex marriage should be legalized. So what's the harm? Again, we should be allowing the people to vote. Thank you, Mr. Speaker."

Representative Ward rose to respond, stating:

"Just to footnote that fact. The \$10,000 poll was scientific, it was a stratified poll that said, regardless of age, ethnicity, it was all representative, it was a very random stratified sample. The point is, in that sampling, it didn't make any difference if you were a Democrat or a Republican, rich or poor, it was actually a representative sample even if you were for or against same-sex marriage, that you wanted the people to decide it. So even those who are for the equality issue, they are polled, and at this rate, scientifically saying, we don't care what side you're on the issue, we think it's not the purview of this Body, we think it's the purview of those people.

"Again I would repeat, these people are not stupid. They know what's going on. They know this is their state as much as anybody else. And this poll indicates that regardless of the position, the people are saying, let them have a say. It's as simple as that, Mr. Speaker. Very, very simple. Thank you."

At 4:29 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 4:38 o'clock p.m.

Representative Saiki rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition to the floor amendment. Just some brief comments. The bottom line is that this floor amendment is unconstitutional and it is defective, and I'd like to explain why.

"In 2004, the Senate amended a bill. The title of the bill was, 'A Bill for an Act Relating to Sexual Assault.' The Senate Judiciary Committee amended this House bill by adding a constitutional question. The bill eventually became law, and plaintiffs filed a lawsuit questioning the validity of that constitutional amendment. The Hawaii Supreme Court decided that case and held that the amendment violated the constitution for two reasons.

"The first requirement that was violated was the constitutional provision that requires that constitutional amendments be proposed in bills that contain bill titles relating to constitutional amendments. And this is what the Supreme Court explained. 'The failure to designate House Bill 2789, as a constitutional amendment in its title was a plain, clear, manifest, and unmistakable violation of the constitution beyond a reasonable doubt.'

"The second reason that the bill was unconstitutional was because it did not meet the three-reading requirement, and this is what the Supreme Court stated. 'We also conclude that the failure to give the proposed constitutional amendment three readings in each house on separate days was a plain, clear, manifest, and unmistakable violation of the constitution beyond a reasonable doubt.'

"Mr. Speaker, both of these requirements have not been met and will not be met if this bill is amended, it will be deemed invalid and unconstitutional. Accordingly, I oppose this floor amendment, call for the question, but please allow members to submit written comments prior to the vote. Thank you."

At this time, Representative Saiki called for the previous question.

Representative Tsuji rose to speak in support of the proposed floor amendment, stating:

"Thank you very much, Mr. Speaker. In support, brief comments. May I say a few comments, please? Thank you very much, Mr. Speaker. I'm in strong support. During the course of the event relating to marriage equality, I've received thousands of communications, including emails, voicemails, letters, no different from the rest of the legislators here.

"But one short comment that I'd like to say. I received about 250 of these post cards. It comes to my office stamped with the person sending it out with a printed name. And it's very simple, Mr. Speaker, and if I may say, 'I vote, I live in your district, I say no to same-sex marriage. Let the people decide, if you will.' And this saying, 'let the people decide,' represents about 80 percent of the correspondence I received. Thank you very much."

Representative Oshiro rose, stating:

"Mr. Speaker, prior to the recess, I believe I had the Floor when I called for the recess. So I believe that all previous speakers are out of order and the Floor should be yielded to myself. Can we have a short recess, please?"

At 4:42 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 4:47 o'clock p.m.

Representative Oshiro rose to respond, stating:

"Thank you very much, Mr. Speaker, and I apologize for the temporary inconvenience of disrupting. I just thought that I was duly recognized as having the Floor before the recess. But I just wanted to add to the debate and discussion, Mr. Speaker, that it is well within the authority of both the House and the Senate leadership in the respective Chambers to go and amend or set aside any and all rules pertaining to the special session.

"We can create a bill, in fact, we can go and file it, we can go and have a public hearing. There's nothing that stops us or makes it a prohibition to consider any and all measures before us. On a more practical matter, Mr. Speaker, is that House Bill 5 has been available for public consumption by both the members and the public at large for consideration. So that might be the proper vehicle to address this issue before us.

"I just wanted to make the record very clear for both the public listening in, in the gallery and elsewhere, and the members on the Floor. But let me also say this, Mr. Speaker. I find it very troubling, and somewhat disconcerting, that the fact that we're probably debating one of the most important public policy issues of the State of Hawaii, over the last, at least 20 years since I've been here, and not have these proceedings broadcast statewide, does a great disservice for those who cannot be at the Capitol grounds outside or in their respective offices.

"I find it quite disturbing, Mr. Speaker, that even the rural areas of Oahu are not having the chance to witness and participate in this great debate. And I find it very disconcerting, and of deep concern, that the neighbor islanders are not also having the chance to witness this great debate.

"So insofar as you might be able to do anything, Mr. Speaker, even at this late time, I would ask you and beseech of you, to allow the public to witness this grand debate in the spirit of democracy that we are having this morning and this afternoon. Thank you."

Representative Say rose in support of the proposed floor amendment and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Say's written remarks are as follows:

"Mr. Speaker, I do support the people having the chance to vote. Thank you, Mr. Speaker."

Representative Fale rose to respond, stating:

"Mr. Speaker, once again in support. My thought just slipped my mind, but it was just in brief rebuttal, Mr. Speaker. It's just essentially to the point that if we can't trust the people of Hawaii to make this decision, then we have failed as leaders. And that leads exactly to the point, Mr. Speaker, that this bill was only six days presented to the State of Hawaii before it got introduced into the Legislature. And in between that time and now, we have had no opportunity to properly take SB 1, I can tell you this, Mr. Speaker, I have not had the opportunity to take SB 1 back to my community. I have not had the opportunity to take the amendments back to the community, or to talk about any of the possibilities that do exist there.

"I believe, Mr. Speaker, that this Body, with the minds that we have here, any of the flaws or any of the issues that we have in regards to getting this, any of the technicalities that we need to fix or address, to make sure that we are in concurrence with the Constitution of the State of Hawaii to make sure that the people can vote on this issue. We are not limited to the number of days that we have been here, we have up to 30 days with the possible extension of 15 days.

"If that's what it takes to get this right, Mr. Speaker, this Body should do what is right. The people of Hawaii deserve whatever is done to make sure that it is right and properly vetted, Mr. Speaker. And to deny the people of Hawaii the opportunity to weigh in on this, even just denying us the opportunity to take this back. When we had that long debate over the weekend, I know that our neighbor island Representatives didn't have the opportunity to go back to their home districts and talk about this issue extensively, Mr. Speaker. Since we haven't been afforded that opportunity, we should not deny the people of Hawaii the opportunity to weigh in on this. Thank you, Mr. Speaker."

Representative Ward rose, stating:

"Mr. Speaker, point of information. Following the comments of the Representative from Wahiawa, the question that arises is, after five days of 'Ōlelo and the people of Hawaii seeing everything that's being done, why at this pinnacle of debate would we not be on 'Ōlelo?"

Representative Takai rose, stating:

"Mr. Speaker, the speaker is out of order."

Representative Ward continued, stating:

"It was a point that he made. I want to verify, are we on 'Ōlelo or are we not on 'Ōlelo?"

At 4:51 o'clock p.m., Representative Takai requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 4:53 o'clock p.m.

At this time, Representative Fukumoto requested a roll call vote.

The request for roll call was put to vote by the Chair and upon a show of hands, the request was granted.

The Chair then stated:

"Members, let me clarify this for you. A roll call vote will be taken. If you vote 'aye' you are in favor of the floor amendment. If you vote 'no' or 'nay' you are in opposition of the floor amendment. Is that clear?"

Representative Fale rose, stating:

"Mr. Speaker, just a point of information. So, a 'yes' vote means we are in support of allowing the constitutional amendment to let the people decide on marriage? I just want to be clear, Mr. Speaker."

The Chair then stated:

"Yes, you're supporting Floor Amendment Number 4. A 'yes' vote means you support Floor Amendment Number 4."

Representative Fale: "And opposition means you are not supporting?"

The Chair then stated:

"Opposition, 'no' means you oppose the floor amendment.

"Members, respectfully because of the people that are lawfully demonstrating, the Chair requests that you say in a loud voice, either an 'aye' or a 'nay' for the purpose of the count."

Roll call having been approved, the motion that Floor Amendment No. 4, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair, and on the following show of ayes and noes, failed to carry:

Ayes, 19: Aquino, Awana, Carroll, Cullen, Fale, Fukumoto, Har, Ito, Johanson, Jordan, Matsumoto, McDermott, Oshiro, Say, Tokioka, Tsuji, Ward, Woodson and Yamane.

Noes, 28: Belatti, Brower, Coffman, Evans, Hanohano, Hashem, Ichiyama, Ing, Kawakami, Kobayashi, Lee, Lowen, Luke, Mizuno, Morikawa, Nakashima, Nishimoto, Ohno, Onishi, Rhoads, Saiki, Souki, Takai, Takayama, Takumi, Thielen, Wooley and Yamashita.

Excused, 4: Cabanilla, Cachola, Choy and McKelvey.

At 5:00 o'clock p.m., Representative Saiki requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 5:05 o'clock p.m.

At this time, the Chair stated:

"Members in the audience, I respectfully ask that in order to maintain decorum in this Chamber, I respectfully ask that you refrain from any outbursts or demonstrations which may disrupt the deliberations and proceedings on the Floor. Disruption of the proceedings is in violation of not only House Rules, but of the Hawaii State law. Under HRS 21-17, the Sergeant-at-Arms does have the power and authority to remove anyone who is disrespectful, also pursuant to Hawaii Revised Statutes 710-1078 if there is any disrespect of a house of the legislature, which means both the House and the Senate. We've got four or five more amendments to go. Respectfully I ask all of you to allow us to continue our business here and follow proper decorum."

Representative McDermott rose, stating:

"Mr. Speaker, with all the racket and noise, can I make a motion to revoke that? I couldn't hear what was going on."

The Chair addressed Representative McDermott, stating:

"No, we voted on the other one. Now we are going to your amendment, I think we've got Floor Amendment No. 11? I think that's yours, constitutional amendment, right?"

Representative McDermott: "I suppose. Was the vote reported out? I didn't hear."

The Chair then stated:

"Representative, we voted on Floor Amendment Number 4. The vote was 28 to 19, in opposition, so that floor amendment died. Your floor amendment is number 11, that's the amendment we're going to take up right now."

Representative Awana rose to a point of order, stating:

"Mr. Speaker, point of order. I believe we need to go through amendment 10 before we hit amendment 11."

The Chair then stated:

"Representative, I will address your question. Other members may have the same question. Members, we're taking out of order Floor Amendment Number 11, this is Representative McDermott's floor amendment, because it is very similar to Floor Amendment Number 4. It makes sense. I did talk to the introducer of the floor amendment, and he does agree that his amendment would be next."

At this time, Representative McDermott offered Floor Amendment No. 11, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by replacing its contents with the following:

SECTION 1. The purpose of this Act is to propose an amendment to article I, section 23, of the Constitution of the State of Hawaii to provide that marriage shall be reserved to opposite-sex couples.

SECTION 2. Article 1, section 23, of the Constitution of the State of Hawaii is amended to read as follows:

**"MARRIAGE**

**Section 23.** ~~[The legislature shall have the power to reserve marriage]~~ Marriage shall be reserved 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 reserve marriage to opposite-sex couples?"

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

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

Representative McDermott moved that Floor Amendment No. 11 be adopted, seconded by Representative Ward.

Representative McDermott rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I understand this amendment might have some technical and legal difficulties, and if that's the case, I'd like to remind the Majority Leader that House Bill 5 still sits in the hopper, and we can waive the rules, or from the way I've seen it we've been making them up as we go along anyway, so it doesn't much matter."

The Chair addressed Representative McDermott, stating:

"Representative McDermott, that's just your opinion, but it is not a reflection of the Judiciary or Finance Chairs."

Representative McDermott continued, stating:

"Oh no, they've done a great job. But House Bill 5 sits there. And it sits there as a sound vehicle, in case we can't pass this amendment out."

The Chair then stated:

"Representative McDermott, I apologize respectfully. I'm seeing that you're bringing up House Bill 5 as a nexus to your Floor Amendment No. 11."

Representative McDermott: "Well, because it will be rebutted that it's unconstitutional and has a fatal flaw, so I'm saving the Majority Leader time as a courtesy to him, save him some energy, let him know that it's sitting there."

Vice Speaker Mizuno: "But you're making a nexus to this floor amendment, that's all I'm asking."

Representative McDermott continued, stating:

"Yes, sir. But I'm moving on now. Mr. Speaker, we sat through testimony from the folks who could get here. I did put a written request in to the Speaker for neighbor island hearings, so we could get out and get all the input. We, for whatever reason, didn't do that.

"But I sat there and listened. I didn't just hear, I listened. Like my wife tells me, when she's yelling at me. I say, I hear ya, I hear ya. She says no, you're not listening. Oh, okay honey, I got it. But I was listening to the old, elderly Filipino woman in, god bless her, in broken English, who took so much courage to get up there and speak. Tears running down her face, because this is the first time she's ever done anything like this, asking us for the vote.

"The elderly Samoan lady named Ruta, who was there every day, and one night needed a ride home, and I had to give her a ride home. Didn't get home until 2:30, and my wife said, what took so long? I said, I gave an elderly lady name Ruta a ride home. She didn't believe me. But nevertheless.

"The welder and his family, who was there for three days, sleeping during the day with his little children, took off of work. The truck driver, the homemaker, the teacher, the teacher after teacher after teacher, asked us to empower them, enfranchise them with the vote, Mr. Speaker. You see, they believe that they own this government. Yes, it's a representative republic, and the normal day-to-day mechanics of government, such as a beach set-back or the size of a building, we can take care of.

"But when it comes to a major societal change, just as Justice Moon said in this Chamber, 20 years ago, because I was here. He said, the Legislature can give the people the ultimate trump card. Because it's in the constitution for us to do it. Which is this amendment.

"Now, if there are flaws in the amendment, and there very well may be, I'm not a lawyer, there might be some flaws, we have House Bill 5 sitting out there, as an alternative. But Mr. Speaker, the people feel so upset because they feel they were deceived. They want their vote because we advertised to them, through the Office of Elections, I have it in my hand, I've got the real newspaper ads in my office, four weeks straight, and we mailed them a copy.

"Let me read what we told them, the people. The meaning of a yes vote. This is what the Office of Elections, which the Legislature funds, told the people, explaining the amendment to them. '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.'

"Only. What's the welder supposed to think when he reads that, in plain language? What's a first generation American supposed to think when they read that in plain language? Do they say, oh, wait honey, let's get the committee report from the web. Well you couldn't get it from the web in those days, at least not very easily. What are they supposed to think?"

Representative Matsumoto rose to yield her time, and the Chair "so ordered."

Representative McDermott continued, stating:

"Thank you, Representative. So they feel deceived. I mean, how many times did we hear that in the testimony. They feel deceived, feel we weren't straight with them. They just don't think we told them the truth. And that is the truth, we weren't straight with them, Mr. Speaker. Now we can make it right, we can go back to the people, we have a second chance here. We have a vehicle, we have an opportunity to say, okay, we'll do that, we'll enfranchise you.

"It is a major societal change, it will change everything, from our marriage laws, to the way things are conducted in schools. You don't have to take my word for it, look at the other states that have done it. They've all had an impact in their school system. Shouldn't the people who pay the bill have an opportunity to weigh in on such a major societal change, shouldn't they have a say? This is my seventh year, I've never seen anything like

this, ever. And what are they saying. Listen. Let the people vote, let the people vote.

"Mr. Speaker, I'll close by saying, having the right to do something doesn't mean it's the right thing to do. And although some in this Body think we have the right to force people to live under our new societal constraint that we deem appropriate for them, it's not the right thing to do. So I implore my colleagues, listen to our constituents. As Justice Moon said, the people have the ultimate trump card in a constitutional amendment. All power is derived from them. They own the government. Thank you, sir."

Representative Fale rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, in support. Mr. Speaker, I know nobody in this building has ever seen anything like this. I've talked to those who have been here longest, they have never seen anything like this. So if nothing, if this does not communicate to this Body what the people want, what the people desire, what we should do, then nothing will. I've talked to people who have been in this building for over 20 years, Mr. Speaker. In two decades, in two decades of serving in this Legislature, they have never seen anything like this. And yet we blow it off. We blow it off and say, that means nothing.

"This amendment, Mr. Speaker, allows us to let the people know that we do have eyes, and yes, we see. We do have ears, and yes, we hear. We do have hearts, and yes, we feel. Those of us who have been in and around politics for years now, know how this goes. This is a dog and pony show, and almost, we know which bills are going to pass this special session, Mr. Speaker. We know. We try and make it look otherwise, but we know. That's how the special session went. Mandated by the Governor onto a less than willing Legislature. Arms were twisted, deals were made, things happened behind closed doors, to get us to where we are on SB 1 here on Second Reading."

The Chair addressed Representative Fale, stating:

"Representative Fale, I'm going to have to say that you're going to have to refrain from saying backroom deals or inferring that something happened. Be respectful to your colleagues, that's all I'm asking. You can be passionate, but to infer that some backroom deal happened, it's being disrespectful to your members, and it's clear in the House Rules that we can't do that."

Representative Fale continued, stating:

"Thank you, Mr. Speaker. Thank you for the latitude. I'm used to that. I know how this works, but I'm embarrassed. I'm ashamed. That this is how our Legislature does business. Because the people we have heard, in over 50 hours of testimony, the people who are gathered here today in this gallery, Mr. Speaker, thousands of individuals and families came out to testify. People all the way from Waiialua and Haleiwa, from Kahuku to Laie, Hauula, Kaaawa, Waiahole, they all came to tell me how they felt. Your constituents came out. From Waianae, Kapolei, Mililani, Aiea, Kalihi, Hawaii Kai. From Maui, Molokai, Kauai and Hawaii.

"Your constituents, your neighbors, they all saw the sausage-making process that is Hawaii government. They came out for more than 50 hours over five days, giving sincere testimony, for or against this bill. Wanting to have a say, wanting their government to honestly listen and debate and discuss, based on their testimony. And for them to see what they saw, they feel embarrassed, they feel ashamed. This House is supposed to be the People's House. Not the Governor's House. Not the rich-and-powerful's House. Not outside influencers and special interest House. But the People's House.

"I'm embarrassed. Our constituents deserve better. Mr. Speaker, the State and people of Hawaii deserve better. Nobody can say that this is the best that we could do. We were expected to do this in five days. Even today, Mr. Speaker, we know this is not the best we can do. For either side, we know we could do better. I am embarrassed and ashamed because history was made by the voice of the people. Never before has this State

Legislature heard an outcry that led to five days of testimony. And after all the testimony and concerns, Mr. Speaker, I do not believe that the bill that is before us reflects the people.

"This is not the way the people of Hawaii do business. This is not the way the State Legislature should do business. The pressure and the money and the power being pushed on this Body to hurry through a landmark piece of legislation has more impact on some of us than thousands of phone calls and emails and hours of testimony from the very people we represent."

Representative Johanson rose to yield his time, and the Chair "so ordered."

Representative Fale continued, stating:

"Mr. Speaker, we have an amendment before us to help. My confidence in this Body is shaken. The people's confidence in this Body is shaken. Mr. Speaker, we need to do something to restore that confidence and give people hope, so that they can see the light at the end of the tunnel, so that they know we represent them.

"And we know that this is not the best that we can do, and we need to go back to work, Mr. Speaker. We are all paid here, to be here today. The people who are sitting out there are not paid to be there. They have sacrificed and given so much because they expect us. Why do they have to, I feel like we're little children, where the parents have to come in, look in on their kids, to see if they're doing the right thing. Why can't we. Why can't we just go back, into the workshop, and work something out that will make sure that everybody's interests are taken care of when it comes to the people of this great state. So that we can sort out benefits, so that we can sort out religious protections.

"It is with certainty, Mr. Speaker, that we know that this isn't the best we can do. It's hard for me to go back and explain to my own family. What's going on in that building? Is that really the best you guys can do? I remember looking into the eyes of my parents, and the shame that I felt whenever it was. Whether I was on the rugby field, whether I was in the boxing ring, whether I was in the classroom, I had to come home and look my mom and dad in the eye and say, mom and dad..."

Representative Saiki rose to a point of order, stating:

"Mr. Speaker, this speaker is out of order, he's at 6:45."

The Chair addressed Representative Fale, stating:

"It's okay, Representative Fale, continue, but continue to make sure there's a nexus to the floor amendment."

Representative Fale continued, stating:

"Yes, Mr. Speaker. This floor amendment allows us to do some more work, Mr. Speaker, to reach out to the people of Hawaii. We have problems getting things right, Mr. Speaker. The people know that, and they have said, you know what, you guys need a little help, help us, let the people decide on this issue, Mr. Speaker. That's simply what we've got to do. Thank you, Mr. Speaker."

Representative Fukumoto rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, in support, and since this is the same thing as we just talked about, if I could have those words adopted again, as I said last time. As well as the speaker from Laie's words adopted as my own, thank you," and the Chair "so ordered." (By reference only.)

Representative Awana rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I rise in support. Thank you. I will repeat a part of my prior speech on Floor Amendment Number 4, which contents are identical

to the existing Floor Amendment Number 11, because there may be some part of my previous speech that was not heard.

"So earlier we heard many concerns surrounding Senate Bill 1, House Draft 1. In as so much that we received numerous floor amendments to change the language of the bill, gut the bill, and clarify the bill. For whatever reason, the amendments were not adopted.

"Floor Amendment Number 11 will greatly improve the language by allowing the people to vote through a constitutional amendment.

"Mr. Speaker, as you may have heard from 10 a.m. this morning, and it is now 5:24 in the afternoon, there has been a persistent group chanting 'let me vote, let the people vote.'

"Mr. Speaker, as I look to your left and to your right, I see two flags. One, a United States flag, and another, a Hawaii State flag. We are in America, Mr. Speaker, in a country where one of the most unique rights is the right to vote. These people want to vote, Mr. Speaker, and I will support them and the rest of the tens of thousands who requested to exercise this right via emails, letters, phone calls, testimony, and personal visits to our offices.

"Although there may be claims that the title may be flawed, Mr. Speaker, I beg to differ. A vote is a great equalizer, a vote does not discriminate. The bill's name is entitled, 'Equal Rights'. For these reasons, Mr. Speaker, I rise in strong support, and I am pleading with the members to please accept Floor Amendment Number 11.

"In our Floor speeches, we speak about having transparency, open government, doing what is in the best interest for the people of Hawaii, and this building being 'the People's House'. Our constituents are standing outside asking to vote, our constituents are in the galley asking to vote. Are we going to deny them this opportunity? Let's not prove to them that talk is cheap. Let's show them that we represent the people, and we will put our talk into action.

"I am pleading with you, Mr. Speaker, and the other members of this Chamber, to open your minds and open your hearts. We are trying their patience, Mr. Speaker. By way of the last vote, we were not respecting their wishes, Mr. Speaker. Again, I ask that you support this amendment, support our people.

"Members, if you were sitting in the gallery, what would you want your legislator to do? Thank you, Mr. Speaker."

Representative Kobayashi rose to speak in opposition to the proposed floor amendment, stating:

"Mr. Speaker, I rise in opposition. If we pass this floor amendment, we will be duping the people, tricking the people, such as was done with the 1998 constitutional amendment. It has already been explained by the Majority Leader that the construction of this floor amendment will not pass constitutional muster. The wording of the title, and the procedure of having three readings are defective.

"Now I will admit that after hearing long and numerous arguments, I believe that the 1998 constitutional amendment was bad language, terrible language. But that was in the past, and because of a specific reason, the language in 1998 was written for that time and purpose. Not today's time and purpose.

"In 1998, as you will recall, there had already been a decision by the Hawaii State Supreme Court saying that it was unconstitutional to limit marriage only to opposite-sex couples. Hence the term 'opposite-sex' and hence the term of the rest of the constitutional amendment was written to get around that particular Hawaii State Supreme Court decision.

"The 1998 constitutional amendment had a purpose and was rooted in its time. I believe, in overall evaluation, it was very bad, very tricky language. But two wrongs do not make a right. You want to dupe people again with this language? Only to find out that if we pass this language, whoops, it's defective.

"So I submit that as much as people would like to pass this language, we have to look at the facts. Don't trick the people again. Thank you."

At 5:29 o'clock p.m., Representative Fukumoto requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 5:32 o'clock p.m.

Representative Fukumoto rose to respond, stating:

"Thank you, Mr. Speaker. I just wanted to, for the record, state that I do not believe that anybody here is trying to dupe the public. Just if that could go into the record, thank you."

At this time, the Chair stated:

"Thank you. To that point, to all members, I want to read House Rule 27.7, it states, 'It is not the person but the measure that is the subject of debate, and it is not allowable to arraign the motives of a member, but the nature or consequences of a measure may be condemned in strong terms.'

"So I wanted to thank the Minority Floor Leader. Members, stay focused on the measure or amendments, let's not focus on the motives, but on the measure or the amendment itself, why it's good or bad for the state. Thank you very much."

Representative Kobayashi rose, stating:

"Mr. Speaker, I will retract whatever I said that may have unfairly characterized someone's motive, thank you."

Representative Thielen rose to speak in opposition to the proposed floor amendment, stating:

"Thank you, Mr. Speaker. We also represent the minority. I'm in opposition to the amendment. I wanted to just say, we also represent the minority. People want to marry the partners of their choice. I support that equal right, and I call for the question, please."

At this time, Representative Thielen called for the previous question.

At this time, Representative Fale requested a roll call vote.

Representative Har rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker, I just want to note that I am in support of the floor amendment, and just one brief rebuttal. The Majority Leader as well as the Representative from Kaimuki are talking about procedural defects. I agree. So we can resolve that very easily, let's hear House Bill 5 and let's give the people the opportunity to vote. Thank you very much, Mr. Speaker."

Representative Oshiro rose in support of the proposed floor amendment and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Oshiro's written remarks are as follows:

"Mr. Speaker, I rise in support of Floor Amendment No. 11. This floor amendment would delete the substance of House Draft 1, and insert the provisions of House Bill No. 5, which would propose an amendment to Article I, Section 23, of the Constitution of the State of Hawaii to reserve marriage to opposite-sex couples. I understand that this is an amendment proposed by the Representative from Ewa, Ewa Beach, Ewa Gentry, and Iroquois Point.

"At the outset, I cite *Taomae v. Lingle*, Slip No. 26962 (September 1, 2005), in which the Hawaii Supreme Court held that Articles III and XVII of the Hawaii Constitution require that:

- (1) A proposal to amend the constitution must be reflected in the title of the bill; and
- (2) A proposed constitutional amendment must be read three times in each house to be validly adopted.

"Should Senate Bill No. 1 be amended by approving this floor amendment and if this bill is enacted, the *Taomae* Decision would effectively render this Act invalid upon challenge. As such, it would have the desired effect of terminating Senate Bill No. 1.

"As previously stated, I believe the current version of this bill would pose grave consequences and cause mischief to the application of countless other statutes. It's potential to do grave harm to our people is immense. In my view, it would be better for this bill to be invalidated than to allow it to continue through the process. Moreover, through this amendment we have provided ourselves an opportunity to consider a duly scheduled and noticed public hearing on a constitutional amendment through House Bill No. 5.

"For the record, I insert excerpts from my remarks on Floor Amendment No. 5, which summarizes the problems identified with House Draft 1:

*"During the more than fifty hours of hearings on Senate Bill No. 1, and the receipt of over twenty-eight thousand pages of documents, your Joint Committee on Judiciary and Finance spent little more than two hours deliberating on it before reporting the measure to this Floor for Second Reading. As you know, that decision was not well received by many testifiers and observers and only added to the perception that this whole affair was a grand 'dog and pony' show – that those five days and nights of receiving public comment and testimony was a farce or big shibat. Certainly, why one would not even take a day or two to review the vast record and consult with the members of the Joint Committee suggest the fix was already in.*

*"And, if to add insult to injury, despite hearing experts from various fields identify major substantive and technical problems with the bill, your Committee recommended passage of a draft that seemingly does not address any of these concerns.*

*"Given the monumental shift in public policy that this bill will have, and the apparent lack of any meaningful analysis and discussion at the Committee level, the good Representative from Waianae, Makaha, Makua, and Maili offered an amendment for the Committee's consideration. Despite its good intentions, the amendment was summarily dismissed by the Co-Chairs without any discussion.*

*"Floor Amendment No. 5, which is presently before us, is the draft that was offered by the Representative from Waianae. It models the approach taken by this House during the Regular Session of 2012 when it approved on Third Reading Senate Bill No. 2429, RELATING TO FORECLOSURES. For Senate Bill No. 2429, this House took the extraordinary step of approving a 'short-form' bill on Third Reading to facilitate continued discussions among various stakeholders on a comprehensive codification of statutory foreclosure procedures to ensure the thorough legal and technical review of the statutory amendments offered to the Legislature. This step was taken to provide both the House of Representatives and the Senate with maximum flexibility during the remainder of the 2012 Regular Session to facilitate a meaningful resolution to the issue.*

*"During the public hearing on Senate Bill No. 1, this House learned that numerous problems existed with the bill. These problems would lead to serious complications to other laws and pose grave danger to the welfare of our People. From my perspective, to do nothing to address them while it is still within our power to fix them is nothing less than gross negligence on our part. As enumerated in the floor amendment:*

*"**Number 1.** The basic premise of this bill is faulty. The majority of federal benefits that are available to same-sex couples may already be obtained by Hawaii citizens who get married in a state that authorizes same-sex marriage and return to Hawaii to reside. Admittedly, this is*

not a perfect solution nor one that any may find feasible or financially viable, but it is a less-intrusive approach given the equities of the circumstance and irreversible general interests at stake. It is not irrational nor without merit and it is certainly not suggestive of any ill-will or animus. For a remedy, even temporary in scope and affect, is better than none. Moreover, the present known and readily available remedy does not preclude a more satisfying resolution in the near future and does not curtail future benefits due to retroactive application of federal laws and services.

“Insofar as same-sex marriage is distinguishable from civil unions, so too must we approach legalizing same-sex marriage with the same careful and dispassionate analysis and reflection needed for such a weighty decision. For instance, the approval of House Bill No. 444, House Draft 1, Senate Draft 1, RELATING TO CIVIL UNIONS, began with the pre-filing of the bill on January 23, 2009. The bill did not pass Final Reading in the House until April 29, 2010, or about 400 days and two Regular Legislative Sessions later.

“Compare what we have before us in this Special Session and how much time has elapsed since we convened on October 28, 2013, and one can appreciate how quickly and expediently we are proceeding. Indeed, it is as if we are hell-bent on racing through this Special Session to fulfill the Governor’s request regardless of any harm to our people it may cause and without any sign of legislative independence and restraint.

“Doesn’t prudence scream out for a temporary delay in making any wholesale change to the definition of marriage that will have such far-reaching and irreversible effects on all people, both gay and straight?”

“**Number 2.** We don’t know what the total impacts of this policy change will be. Because many federal agencies are still trying to determine how the United State Supreme Court’s decision in United States v. Windsor, 133 S. Ct. 2675 (2013), would affect their operations, the total number of benefits and services, as well as the obligations that would apply to married same-sex couples have not yet been determined. Have we considered the fiscal ramifications of additional federal benefits to same-sex couples and whether the federal government could shift some of these costs to the states through federal mandates? Has anyone considered that not all same-sex couples will choose to be married, as marriage may not be the most financially advantageous classification for their particular needs? And, how many of the approximate 2,000 civil union partners will be seeking to change their status to married couple?”

“**Number 3.** There are other similarly situated couples that currently are denied federal benefits. In Parke v Park, 25 Haw. 397 (1920), the Hawaii Supreme Court held that a license was prerequisite to a valid marriage, and as such all rights, benefits, and obligations that were previously recognized in common law marriage were extinguished.

“Yet, since 1958, the federal Internal Revenue Service (IRS) has stated that a couple would be treated as married for purposes of federal income tax filing status and personal exemptions if the couple entered into a common-law marriage in a state that recognizes that relationship as a valid marriage. The IRS further concluded that its position with respect to a common-law marriage also applies to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship. The IRS therefore held that a taxpayer who enters into a common-law marriage in a state that recognizes such marriages shall, for purposes of federal income tax filing status and personal exemptions, be considered married notwithstanding that the taxpayer and the taxpayer’s spouse are currently domiciled in a state that requires a ceremony to establish the marital relationship.

“This is especially pertinent since this ruling, Revenue Ruling 58-66, was cited in Revenue Ruling 2013-17, which was promulgated shortly after the Windsor Decision, and held that same-sex couples married in states that legalize same-sex marriage shall be considered

married for purposes of federal income tax filing status and personal exemptions, regardless of whether they are currently domiciled in a state that requires a ceremony to establish the marital relationship.

“So couples who are situated in loving, committed relationships have been denied federal benefits for over seven decades. If as the Governor says, ‘benefits delayed are benefits denied’, shouldn’t this Legislature legalize common-law marriages? After all, same-sex couples have been denied these federal benefits for just a few months.

“**Number 4.** This bill may contravene domiciliary requirements for divorce and may pose questions on the validity of Hawaii State judicial decisions as they are recognized in other states. In Williams v. North Carolina, 317 U.S. 287 (1942), the United States Supreme Court held that the federal government determines marriage and divorce status between state lines, and that the State of North Carolina was not required to recognize a Nevada divorce decree because the State of Nevada did not require either spouse to be domiciled in the state. By allowing any same-sex couple married in Hawaii not domiciled here to access our courts for purposes of obtaining a divorce decree, it is arguable that the bill, as presently drafted, will jeopardize the validity of all divorce decrees issued in the State of Hawaii as they are recognized in other states. At a minimum, we should obtain clarification before we proceed.

“**Number 5.** Hawaii might lose its ERISA preemption exemption. Because the legal recognition of same-sex couples will require employers to provide certain benefits to employees and their spouses differently in accordance with a statutory change, it is unclear whether the enactment of this bill would constitute a material change to the application of the Prepaid Health Care Act, Chapter 393, Hawaii Revised Statutes, and result in Hawaii losing its exemption from preemption under the federal Employee Retirement Income Security Act (ERISA) in accordance with 29 U.S.C. §1144(b)(5)(B)(ii). Should that happen, Hawaii may no longer be able to require employers to provide health insurance for its full-time employees by law. At the very least, one should obtain a federal ruling or opinion letter before proceeding further. It is only reasonable.

“Mr. Speaker, ask yourself, If Hawaii was no longer able to require employers to follow this law, don’t you think many of Hawaii’s citizens and their families will be harmed?”

“**Number 6.** This bill will fundamentally alter First Amendment rights. As presently drafted, this bill would ostensibly provide the Hawaii Civil Rights Commission with broad authority to determine whether an activity of a religious organization is protected under the First Amendment or subject to the Hawaii Public Accommodations Law, Chapter 489, Hawaii Revised Statutes. Not only will this create a chilling effect that will interfere with religious exercise, the bill might not provide any protections whatsoever for individual religious and conscientious beliefs. Emmanuel Temple v. Abercrombie, Civ. No. 11-00790 JMS-KSC (U.S. District Court, District of Hawaii, 2011) is a case-in-point of how these laws may affect the day-to-day functions of a church and affect the religious practices and actions of its adherents.

“While the Joint Committee on Judiciary and Finance considered broader religious exemptions modeled after the State of Connecticut’s Public Accommodations Law, this language might not be suitable because of that state’s very different history.

“Connecticut is nicknamed the ‘Constitution State’ because it has one of the oldest constitutions in North America. It was founded by colonists escaping Massachusetts because of religious persecution. Because of this, the people of Connecticut have long revered religious freedom and provided protections for their beliefs throughout their constitution, statutes, and common law.

“In particular, Article Seven of the Constitution of the State of Connecticut states:

*'It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the State. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship.'*

*"Number 7. It should be noted that another problem identified – that the blanket application of non-gender terms in statutes relating to paternity, maternity, and parentage might cause the rights of a same-sex parent to supersede or even extinguish the parental rights of a biological parent – was eliminated in the House Draft 1. And, that change to Senate Bill No. 1, is appreciated and demonstrates the knowledge that such amendments can be made in spite of or even in opposition to the unequivocal proclamations of the Attorney General who opined on SB 1, on October 31, 2013, that:*

*'In the Department's view, no amendments are necessary for the bill to accomplish the bills stated intent and purpose.'* [Emphasis Added.]

*"Yet, clearly, there are many, many problems with this bill that need to be fixed before it should be approved on Third and Final Readings. And, I for one have little confidence in our Attorney General whose consistent legal analysis of every draft, from the Governor's same-sex marriage bill, AG.8.22.13 and AG.9.9.13 and AG 8/15/13 through Senate Bill No. 1, House Draft 1, have been akin to Bobby McFerrin's 'Don't Worry, Be Happy'.*

*"In our reckless zeal to ensure the equal protection of the laws to same-sex couples, this bill has the potential of doing irreparable harm to all of our people. We must not proceed foolishly any further. And, we should take pause to make sure that we do this in the right way and for the right reason."*

"Mr. Speaker, I point out the obvious because recently, this House seems to be oblivious to the discontent of our constituents and the legions of community activists who have sacrificed greatly in unprecedented numbers to be given a mere two minutes to state their personal convictions upon a most public of forums. We have not demonstrated the better angles of ourselves and our collective reputations and the reputation of this great institution have suffered because of it. We have borne the brunt of our own folly and carelessness and capitulated to the unilateral act of the Governor to summon us into this Special Session. Once we gaveled in, the Governor's problem became our problem... our *kuleana*.

"As a long-term member of this House, it has been simply appalling to witness the audacity and unmitigated contempt we have shown our constituents of differing viewpoints and persuasions. Moreover, in viewing the public hearings from the confines of my office television and having studied and reviewed the key legislative testimony submitted by the Administration, the Attorney General, and the Hawaii Civil Rights Commission, I have come to the disturbing conclusion that in this particular instance, and for this constitutional amendment alone, I must separate myself against my own personal convictions and tendencies and accede the full political power to the people and entrust in them all the blessings and curses of the popular vote. And, I do so full well knowing that therein may lie deep bias, bigotry, and prejudice. On the other hand, the people may possess the temperance, fair-mindedness, and authentic belief in justice and equality absent from these Capitol halls. For I am convinced, that given all I have witnessed since we entered this Special Session, that we in our own ways share the same afflictions of bias, bigotry, and prejudice of the people we represent. That is – we are no better or worse. And our votes, like those of the electorate, are no better or worse.

"Consequently, on this question of unprecedented policy change as enormous as redefining marriage under civil law to apply regardless of

gender, I submit that it should be decided by the people through the rejection or ratification of a constitutional amendment. For all the rhetoric that has been espoused by my colleagues on why they think this measure is needed, the fact of the matter is this – the Courts ruled that the Department of Health exceeded its licensing authority when it denied a marriage license to a same-sex couple. To satisfy equal protection concerns, all that may be needed is to prohibit the Department of Health from doing so.

"What the Governor and my colleagues are doing with House Draft 1 goes way beyond what may be necessary to legalize same-sex marriage in Hawaii. And, the imposition it will cause upon our religious freedoms and on men and women of conscience and conviction may be too simplistically seen as a win or lose proposition. The changes suggested in the House Draft 1 effect the most basic principles on which our entire constitutional and statutory construct rests.

"But, what I found most troubling and disturbing was the lack of any meaningful dissection and analysis of the components of the bill's intricacies. Certainly, there was some discussion on the implications of the Windsor decision, the Baehr decision, the Hollingsworth decision, parental rights, foreign divorces, and religious exemptions, but not much else. It was as if all the committee members already understood how the bill worked or did not work, what was in the bill and what was out, and how the bill would affect or not affect other laws or be reconciled with our First Amendment religious freedoms.

"Mr. Speaker, I suggest you go and review the hours of public hearing. You will quickly realize that any authentic discussion or debate on the bill's operational aspects was conspicuously missing, and any attempt to shed light on these components by certain committee members was immediately squelched or dissuaded. Again, this only goes to support the farce and description of the 2013 Special Session as a textbook example of a legislative 'dog and pony' show.

"Should this body decide that from a public policy standpoint, legalized same-sex marriage is needed to facilitate the social evolution that is occurring not only in Hawaii, but across our Nation and throughout the World, then so be it. But ultimately, for the reasons stated previously and for those reasons alone, I find that it is the people who should decide whether we should go this course – not seventy-six legislators whose independence as a co-equal branch of our government is sadly highly suspect.

"As such, let it be known as my position and statement:

'A constitutional amendment is the only way to make this PONO.'

"And when this floor amendment is defeated and House Draft 1 is voted upon, every one should pause and think really hard on whether the passage of House Draft 1 is truly in the people's best interests. Ask yourself, whether we have capitulated our legislative policy-setting authority on each component of the same-sex marriage bill due to a subconscious fear of the Governor's vengeance and budget ledger books? And, ask yourself whether, we as the people's representatives, have not cast our own votes that have arisen from our own deep bias, bigotry, and prejudice?

"I beg my colleagues to support this floor amendment."

The request for roll call was put to vote by the Chair and upon a show of hands, the request was granted.

At 5:36 o'clock p.m., Representative Saiki requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 5:40 o'clock p.m.

Roll call having been approved, the motion that Floor Amendment No. 11, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair, and on the following show of ayes and noes, failed to carry:

Ayes, 18: Aquino, Awana, Carroll, Cullen, Fale, Fukumoto, Har, Ito, Johanson, Jordan, Matsumoto, McDermott, Oshiro, Tokioka, Tsuji, Ward, Woodson and Yamashita.

Noes, 28: Belatti, Brower, Coffman, Evans, Hanohano, Hashem, Ichiyama, Ing, Kawakami, Kobayashi, Lee, Lowen, Luke, Mizuno, Morikawa, Nakashima, Nishimoto, Ohno, Onishi, Rhoads, Saiki, Say, Souki, Takai, Takayama, Takumi, Thielen and Wooley.

Excused, 5: Cabanilla, Cachola, Choy, McKelvey, and Yamane.

Representative Fale rose, stating:

"Mr. Speaker, point of information. Those who weren't here, they'll just be marked absent, and that will be recorded?"

At this time, the Chair stated:

"Yes, they will be marked as excused."

At this time, Representative Ward offered Floor Amendment No. 10, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the words "Part I" just above Section 1 of the bill.

SECTION 2. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by amending Section 1 to read as follows:

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

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

Therefore, it is the intent of the legislature to:

- (1) Ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State;
- (2) Ensure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying all provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law; and
- (3) Protect religious freedom and liberty by:
  - (A) Ensuring that any clergy, minister, priest, rabbi, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnizations shall not be required to solemnize any marriage or civil union that is against their religious beliefs or faith, in accordance with the Hawaii state constitution and the United States Constitution; and
  - (B) Clarifying that a religious organization or nonprofit organization operated, supervised, or controlled by a religious organization shall not be required to provide goods, services, or its facilities or grounds for the solemnization or celebration of a marriage or civil union that is in violation of its religious beliefs or faith.

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

SECTION 3. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the following new Part immediately after Section 12 of the bill.

### "Part II

SECTION 13. Within the past three years, several states, including Hawaii, have enacted laws that require school districts that teach sexuality health education to include age appropriate, medically accurate health education. The legislature finds that while sexuality health education in schools is intended to assist students in their growth and development, great care must be taken to uphold religious liberty for individuals of conscience, whether they be teachers, parents, or legal guardians of those students.

The increasing incidence of teaching so-called "alternative lifestyles" in schools, particularly homosexual lifestyles, necessarily implicates the First Amendment right to free exercise of religion under the Constitutions of the United States and the State of Hawaii. Many religious traditions do not condone homosexuality or homosexual relationships and therefore, teachers must be given the right to "opt out" of having their child receive any sexuality health education material that promotes or otherwise addresses homosexuality or homosexual relationships, if doing so would violate the teacher's sincerely held religious beliefs. Likewise, parents and legal guardians must also be given the right to "opt out" of having their child receive any sexuality health education that promotes or otherwise addresses homosexuality or homosexual relationships, if doing so would violate the parent's or legal guardian's sincerely held religious beliefs.

Therefore, the purpose of this Part is to clarify that:

- (1) A teacher shall not be required to teach sexuality health education material that promotes or otherwise addresses homosexuality or homosexual relationships, if doing so would violate the teacher's sincerely held religious beliefs. No teacher who fails or refuses to teach such material under this Act shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil or criminal liability for the failure or refusal. The school may, in its discretion, arrange for another teacher to teach the material in question;
- (2) A parent or legal guardian shall not be required to ensure the attendance of the parent's or legal guardian's child at sexuality health education classes if the material promotes or otherwise addresses homosexuality or homosexual relationships, if doing so would violate the parent's or legal guardian's sincerely held religious beliefs. No parent or legal guardian who fails or refuses to ensure the attendance of the parent's or legal guardian's child under this Act shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil or criminal liability for the failure or refusal; and
- (3) A student shall be excused from sexuality health education classes or any portion thereof pursuant to this Act, only upon the written request of the student's parent or legal guardian. A student shall not be subject to any disciplinary action, academic penalty, or other sanction if the student's parent or legal guardian requests that the student not receive instruction under this Act.

SECTION 14. Section 321-11.1, Hawaii Revised Statutes, is amended to read as follows:

"[H]§321-11.1[3] **Medically accurate sexuality health education.** (a) Sexuality health education programs funded by the State shall provide medically accurate and factual information that is age appropriate and includes education on abstinence, contraception, and methods of disease prevention to prevent unintended pregnancy and sexually transmitted disease, including human immunodeficiency virus.

(b) For the purposes of this section:

"Age appropriate" means suitable to a particular age or age group based on developing cognitive, emotional, and behavioral capacity typical for that age or age group.

"Factual information" means medical, psychiatric, psychological, empirical, or statistical information that is verified or supported by research conducted by recognized medical, psychiatric, psychological, and public health professionals or organizations.

"Medically accurate" means verified or supported by research conducted in compliance with accepted scientific methods and recognized as accurate and objective by professional organizations and agencies with expertise in

the relevant field, such as the federal Centers for Disease Control and Prevention, the American Public Health Association, the American Academy of Pediatrics, and the American College of Obstetricians and Gynecologists.

"Sexuality health education" means education in any medium regarding human development and sexuality, including education on pregnancy, family planning, and sexually transmitted diseases."

(c) A teacher shall not be required to teach sexuality health education material that promotes or otherwise addresses homosexuality or homosexual relationships, if doing so would violate the teacher's sincerely held religious beliefs. No teacher who fails or refuses to teach such material under this section shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil or criminal liability for the failure or refusal. The school may, in its discretion, arrange for another teacher to teach the material in question.

(d) A parent or legal guardian shall not be required to ensure the attendance of the parent's or legal guardian's child at sexuality health education classes if the material promotes or otherwise addresses homosexuality or homosexual relationships, if doing so would violate the parent's or legal guardian's sincerely held religious beliefs. No parent or legal guardian who fails or refuses to ensure the attendance of the parent's or legal guardian's child under this section shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil or criminal liability for the failure or refusal.

(e) A student shall be excused from sexuality health education classes or any portion thereof pursuant to this section, only upon the written request of the student's parent or legal guardian. A student shall not be subject to any disciplinary action, academic penalty, or other sanction if the student's parent or legal guardian requests that the student not receive instruction under this section.

SECTION 4. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the words "Part III" immediately following Section 14 of the new Part II of this bill as amended.

SECTION 5. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by renumbering Sections 13, 14, 15, and 16 as Sections 15, 16, 17, and 18, as follows:

SECTION 15. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

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

SECTION 17. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 18. This Act shall take effect on December 2, 2013."

At 5:45 o'clock p.m., Representative Fale requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 5:48 o'clock p.m.

Representative Ward moved that Floor Amendment No. 10 be adopted, seconded by Representative McDermott.

Representative Ward rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. In support. We all know that our state motto is 'the life of the land is perpetuated in righteousness.' After listening to the people for five days, I think we should add that it's perpetuated by Hawaii's families and the fairness to them.

"This amendment is about the teachers and *keiki* to opt out. If there's anything clear after five days of listening, the first clarion call was protect our churches, protect our pastors. But the second very, very, very, very clear, clarion call was protect our kids. Mother, after mother, after mother said, 'I don't want my kids to have to learn how the homosexuals make love to each other.' That was such a clarion call, Mr. Speaker.

"I know that in my previous remarks I said that when we have a constitution that denies people citizenship because of a race or denies them a vote because of a gender, we have a constitution and the magic of America that's self-correcting. But never, ever did we have to teach the sexual practices of those subcultures or those genders or those ethnicities.

"But the trend is, as first comes same-sex marriage, then comes a curricular revolution. And, Mr. Speaker, this is not imaginary. This is the empirical evidence from Massachusetts, this is the empirical evidence from Canada. The corollary that they have seen, and we will see in Hawaii, unless we pretend, is that after same-sex marriage, comes the sexual revolution in our schools, in our curriculum.

"In caucus yesterday, I brought up similar thoughts to what I've just said about it, an opt out for our *keiki* and opt out for our teachers. They said, 'well look, this bill has got nothing do to with education,' or, 'we'll take that up later.' Mr. Speaker, that was a thumbing of our nose at the people of Hawaii who mother, after mother, after mother, said 'protect our kids.'

"So to say that this is not about education is really, really naïve, and really, really is taking us into a direction is not true. Mr. Speaker, we don't have bears in Hawaii, but we had some mama bears and papa bears speaking very, very, very, very loudly.

"We saw the Japanese mother saying '*kodomo no tame ni*,' for the sake of our kids. Let them opt out of this training. We saw Japanese mothers, in fact, Mr. Speaker, you know my daughter is from Nanjing. I was so touched by immigrant, after immigrant, after immigrant who said, 'our culture says this is not right.' Then we even had a Chinese engineer, economist, who said, you know, if you look at all the highest-spending visitors, the Chinese are the highest at about \$400 a day. And the amount of visitors and children that come from South-East Asia, that may decrease because it's now worth \$755 million per year. Not the La Croix study that is \$254 million over three years.

"So what the Chinese immigrants have said is, watch out. Even if you lose 10 percent of the take of the students and the visitors who come here for weddings, that's \$75 million per year. If you lose 15 percent, 20 percent, 40 percent, same-sex marriage does not become a winning proposition, it becomes a losing proposition.

"So, Mr. Speaker, we heard from the Japanese, we heard from the Chinese, we heard from the Vietnam veterans, those who said, 'we fought to keep these freedoms which you are now taking away from us.' But, Mr. Speaker, the loudest and the deepest, and the most piercing call of all, we heard from the Native Hawaiians. We heard from the soul of the *aina*, we heard the Native Hawaiians crying out, in the voice of one Collette Machado who spoke with such passion and commitment, and Mr. Speaker, I'd hate to say that maybe she spoke so strong that when she fell over in the lobby Friday night, we were all struck. And for those who are here who pray, still pray for Collette Machado, she needs our help. She helped us to voice the words of the Native Hawaiian into the membership.

"Mr. Speaker, we also heard the cries of Hawaiian leader Jonah Kaauwai, that struck a bolt in my heart, Mr. Speaker, because he said, 'what is now upon us is as dangerous as the 1893 overthrow of the Hawaiian Kingdom.'"

Representative Fukumoto rose to yield her time, and the Chair "so ordered."

Representative Ward continued, stating:

"It cannot be five minutes yet, I'm just getting started. Thank you, Representative. Jonah Kaauwai compared what is now being done as a plot of the next overthrow of the Hawaiian Kingdom, comparable to 1893. This time it's cultural, the last time it was political and a total takeover of the Hawaiian people. That was heavy."

Representative Evans rose, stating:

"Mr. Speaker, Floor Amendment 10 is about teaching sexuality health education material in school, and I'm sorry, but I don't understand where the conversation is going. Thank you."

The Chair then stated:

"Point of clarification, thank you. I believe Representative Ward is making a nexus to his floor speech to the floor amendment. If he goes further I will make sure he stays on track."

Representative Ward: "The good Representative from Big Island will get it. Because I'm going to talk about Tenari Maafala."

The Chair addressed Representative Ward, stating:

"Let's stay focused on the amendment, Representative Ward."

Representative Ward continued, stating:

"The most bold and outspoken of all the testifiers of the last day, well probably the historical essence of the ethos and that zeitgeist of what's going on now was Tenari Maafala. I'm not going to repeat what he said, but he's being crucified for what he said and he's now the Chick-fil-A of Hawaii. He's being called one, how can you say such things? But within the heart of the man came this issue, and I'm coming to the one for the good Representative from the Big Island."

The Chair addressed Representative Ward, stating:

"Representative, stay focused on the amendment."

Representative Ward: "Yes, I'm staying focused, I'm just trying to get her attention so she knows when it comes, she gets the whole message."

Vice Speaker Mizuno: "Representative Ward, it's for everybody, it's for all the members. No personal attacks. Let's stay focused on the amendment."

Representative Ward continued, stating:

"I said all of this to say two things. I've said all of those preliminary remarks to say two things. The people of Hawaii are demanding, yes demanding, 'protect our children.' That's the message that these people are shouting about, these people in the audience are talking about, we demand you protect our children. This is a non-negotiable. This is not something that's a maybe. Now I don't want to get all riled up like Tenari did, but you heard him say, 'you're going to take my life before you're take this thing into its next stage.' That's what Tenari said."

"This Body, and I'm glad that the Representative from Diamond Head said that we were duped in 1998. Well, Mr. Speaker, these people are not going to be duped again. You know the old saying, 'Fool me once, shame on you. Fool me twice, shame on me.' These people are not going to be duped, they are not stupid. They are listening, they are watching, they are alive, they are awake to what's going on. And Mr. Speaker, when you've got a mama bear and a papa bear awakened, and they're ashamed and angry to protect their children, you only have the throes of the first awakening of them right now. We've got an embarrassed and ashamed mother bear who's out there because they were duped and now they want to put themselves into action."

"Now the second point. That was the first point of what all the introduction was about. The second point is this. We now have the opportunity to respond to what the people are talking about. Protect our families, we now have the opportunity. This amendment does exactly that by saying, and I read specifically from the amendment, a parent shall not be required to ensure the attendance of their child in sex education classes if the material promotes or otherwise addresses homosexuality or homosexual relationships. And then it says the parents will not be fined or put in jail, or etc. etc."

"The point is, Mr. Speaker, we need to inoculate the children. I mean all of us are adults, no big deal. But when this comes in with graphic

descriptions and practices of masturbation and different positions, we are going overboard, Mr. Speaker. This is not a two-way street, this is a one-way street. We don't have to learn and teach those sexual practices."

"I know some are going to say, 'well we have an opt-out in the DOE', the attorney was asked, 'if we have this as the law of the land, is this controversial policy always going to be something you can opt out of?' Nobody can answer that. And maybe some people will stand up and probably respond to say, 'well that's not the case, we have an opt-out policy.' Well show me where it happened in Massachusetts, show me where it happened in Canada, show me where parents are being told they can't be told when their kids do these things."

"Mr. Speaker, this is all about the *keiki*. This is all about the kids, this is about their future, this is about the way that not only the children can opt out, but you know in my network of people I've got some teachers who dread having to teach this lifestyle."

Representative Johanson rose to yield his time, and the Chair "so ordered."

Representative Ward continued, stating:

"Mr. Speaker, can we have no empathy for those who genuinely believe that God exists, that he is real and he has obligation by which he puts boundaries around behaviors, of which this is not one that a teacher would feel obliged to teach. For the sake of our teachers, Mr. Speaker, this is the half of the amendment, for the sake the *keiki*, this is the other half of the amendment."

"So, Mr. Speaker, this gives us an opportunity to say, yeah we heard you, we want to be *pono*, we want to do the right thing, and we want to protect our families. Hawaii and *aloha* are about our families, it's more about what we are going to do now to protect them either in this session and this amendment, or in the January 2014 session. Because these bears who are now protecting our young, they're not going to be fooled again, Mr. Speaker. So may the right decision be made. Thank you."

Representative McDermott rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, in support of the amendment. There is no dispute that the BOE has a controversial issues policy in place currently. No dispute. There's no dispute that currently it's not part of the curriculum. No dispute in that at all. What we're looking, as we're going forward, once this is passed and becomes the law of the land, what happens then?"

"Now I asked the BOE Chairman and the DOE Superintendent to testify in a written letter, I asked the Judiciary Chair and the Speaker to have them show up and testify. They were not there as part of the official group with the Governor. Department of Health was there, but they were not there. The preponderance, well many of the questions, were regarding education at the hearings."

"Mr. Speaker, the matter is this. It doesn't matter what the law is, but when the law does change, if we have an activist judge, someone brings their child, says, my child goes to school, the illustrations illuminating the learning objectives, a mom and dad, two parents walking a child. And these are particularly at elementary school level, by the way, to illustrate a lesson. He'll say, 'you know, you don't show two homosexual parents there, you really should. And, matter of fact, by not having it, you're creating an environment of prejudice and my son feels a hostile environment, or my daughter, who, of course, we adopted.' So the judge will say, 'yeah, you're right, it's not equal.'"

"I asked Justice Levinson those questions point blank, and I must say he was honest because he didn't answer directly. He obfuscated. He said, 'well this is a marriage bill.' He didn't answer the questions directly. I respected that, because he didn't want to answer because his judicial thought process, that's the kind of judge who would find discrimination in that."

"And if we have one judge, a low level judge that would find that as a discriminatory practice, if the Governor or the state doesn't want to appeal

it, then it's implemented, just like that. It doesn't matter what the Board of Education's controversial policy is, it doesn't matter if there's a court decision. It doesn't matter. It doesn't matter what their current opt-out clause is, if there's a court decision, it doesn't matter.

"Now the crux of the issue, Mr. Speaker, as I see it, is some people, by the way I wrote the BOE a detailed letter asking for responses, detailed responses. One of them, I'm going to paraphrase, 'can a teacher opt out of teaching material?' And it says 'any personal matters pertaining to a teacher's working conditions will be handled on a case-by-case basis.'

"I asked, 'what if we have transgender students, high school students, who want to shower in the opposite-sex bathroom?' Their response was very telling. 'The Department will work closely with the student's family and the school to appropriately address the needs of the students.' Which students? I mean, this is the kind of non-answers I got. And I do believe that's why they didn't testify.

"So what we're looking at is a lawsuit in the future and a court-order from a judge saying, 'you know what, that's discrimination.' I mean, Mr. Speaker, the challenges that the folks equate this behavior with the benign genetic characteristic like skin color. If someone said, 'hey you don't have any white people or brown people or red people in the Dick and Jane books', well, we change that, that's why we don't have Dick and Jane books anymore, we have more up-to-date books that show all peoples of all colors, shapes, and sizes.

"Well, the proponents of this measure think that this private behavior is the same as a benign genetic characteristic and should be treated as such. And if it is the same benign genetic characteristic, then it must be in the textbooks. Therefore they want to inculcate the youth with this new way of thinking.

"It takes one judge, one activist judge, to override a BOE controversial policy, override any opt-out clauses. One decision. That's all it takes. So we didn't get any answers all week and, again, there is a policy in place now, it's not in the curriculum now, but this bill ain't law yet. And once the bill is passed, I will bet you my house, I will bet you my house that within 10 years if we don't have a protection, this will be in the curriculum as an illustrative tool for a lesson plan, and every state that's passed it has had impacts in the Department of Education and how they operate. So anyone who tells you otherwise isn't being truthful. Thank you very much."

Representative Fale rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, in support. I'm very disappointed that during the hearings the Department of Education and the Board of Education were not represented at the hearings. And apparently, Mr. Speaker, that was by design, not by accident, and when the President of the Board of Education arrived to testify, he was told he could not testify, Mr. Speaker. I'm curious, Mr. Speaker, as to why that was the case. Apparently he didn't have a number or something, and that it was unimportant to the matter that we were discussing, Mr. Speaker. But apparently to thousands of mothers and fathers across the State of Hawaii, it is important.

"We've gone through a number of these measures, we've gone through all these amendments, Mr. Speaker. We know there's flaws, we know there's mistakes, yet we insist that the bill is infallible. That there's nothing that needs to be fixed, nothing that may be improved here or there. Mr. Speaker, this amendment is another attempt to try and make sure that we do.

"In this state, Mr. Speaker, in this state, we have probably one of the greatest varieties, one of the most diverse culturally in the entire country. And it's probably very important to mothers and fathers here in the State of Hawaii to pass on cultural values, to pass on legacies and heritage and things like that, Mr. Speaker.

"So I started making some phone calls. I wanted to find out what nations in Asia have passed same-sex marriage. There's none, Mr. Speaker. What nations throughout the Pacific Islands have passed same-sex marriage? There's only two. Former colonies of Western Europe, New Zealand and

Australia. No Polynesian nation, no Micronesian nation, no Melanesian nation, and we have a broad representation of those cultures here, Mr. Speaker. If there's one thing that unites these Pacific Island nations with their Asian cousins, is the importance of a mother and father, and the practices that are held in those countries, Mr. Speaker, that marriage is between one man and one woman.

"If we do not pass this amendment, Mr. Speaker, something of core cultural value and importance to those communities who live in this state, they're told, you are legally inferior, you are morally inferior, and your nation of origin does not believe in equality, you're somehow inferior to what we got here. And what you believe should be taught and passed on to your children cannot be incorporated into our education system. In fact, because you are bigots and haters and homophobic, or whatever it is that has been used to describe those who do support, you can't pass that on to your children. It's incompatible to the education system here in the State of Hawaii. Your beliefs, the cultural beliefs that you have inherited from generations and thousands of years that you have been a recipient of, that you are fortunate enough to be blessed with today, you cannot exempt your children from being taught something else.

"That, Mr. Speaker, is wrong. That, Mr. Speaker, is not *aloha*. If we want to talk about doing something right, talk about doing what's *pono*, is allowing mothers and fathers to continue millennia, decades and generations of family tradition and history, and allow them the opportunity to opt out of things that they believe are inconsistent with their own views.

"This goes beyond religion, Mr. Speaker. So I would certainly hope that myself, I'm the only individual of Tongan ancestry in elected office in the entire United States of America. My background, I come from a nation where marriage is between a man and a woman. And if my children are going to be taught something otherwise, Mr. Speaker, I believe as the parent, my wife is of Hawaiian-Chinese-Portuguese ancestry, I believe that my children should be able to be taught values and principles that are consistent with the culture and the heritage that I am fortunate to be blessed with. Those are also consistent with my Fijian ancestry, with my Samoan ancestry."

Representative Matsumoto rose to yield her time, and the Chair "so ordered."

Representative Fale continued, stating:

"Mr. Speaker, we have thousands, tens of thousands of people, Mr. Speaker, who come from national origins, whose values are consistent with certain things that they believe should be passed on to their children. That includes marriage between a man and a woman, Mr. Speaker. If we can offer parents and children that one small thing, to not say, 'no, you're not bigots. No, you are not legally and morally inferior because you have inherited something different.' I think this is one of the things, this is one of those small things. Let's throw it out there, let's provide that opportunity to these cultures, to these people.

"I think this amendment, Mr. Speaker, is consistent with the values of the State of Hawaii, they're consistent with the values of this Body, they're consistent with who we are as a people, and it is something that should be extended, Mr. Speaker. With that, I conclude my support for this amendment."

Representative Takumi rose to speak in opposition to the proposed floor amendment, stating:

"Thank you very much, Mr. Speaker. I stand in opposition to this floor amendment. I'm really glad that a couple of speakers who are in support of this resolution do acknowledge that the department has a policy of opting out. Currently, the Department of Education has a policy of not teaching marriage. Let me repeat that, Mr. Speaker, the Department of Education, in their curriculum, does not teach about marriage. Heterosexual marriage or otherwise. And there's a reason for that, and I don't see why the reason would fundamentally change if this bill should pass.

"The reason is that we have many, many children in our schools. The previous speaker talked about how we come from a unique culture, a

unique community. We're not Canada. By the way, it's a foreign country. We're not Massachusetts. By the way, it looks like a foreign country. That's not the point. The point is that we are Hawaii and many children in our schools come from foster parents, come from a family where one or both parents are in prison, come from single-family households, *hanai* family, grandparents that are raising their grandchildren. There are many, many kinds of family settings that we have in Hawaii, and children are being raised in those family settings as we speak, like it or not. That's point number one.

"Point number two, is that this proposed amendment is a solution looking for a problem. You're going to have a student or a parent going to a school and say, I don't want my child to be exposed to, as the Representative from Hawaii Kai said, this subculture. Very insulting, very derogatory. But in any event, if you opt out, if you go to the school and say, 'I want my child not to be exposed to the homosexual lifestyle.' Mr. Speaker, they don't teach the homosexual lifestyle so there's nothing to opt out from. That's point number two.

"Point number three is this, under the current Department of Education policy, and I urge my members to read 2210.1, Hawaii has one of the most liberal, broad, opt-out policies in the country. A parent doesn't have to wait. Any parent out there doesn't have to wait before they get a note from the school saying, 'next week we are going to teach about sex education, we're going to teach about abstinence, and birth control, and AIDS, and STDs, and all the rest of it, and if you, as a parent, don't want your child to be exposed to that, you opt out.'

"But here's the thing, Mr. Speaker. You can send to the school, today, you can send to the school today a list of things you don't want your child to experience. Many people don't believe in evolution, write that to the school, when that topic comes up in class, I don't want my child to hear that lesson, I believe in creationism. I don't believe in premarital sex, many faiths and religions in our community consider premarital sex a sin. If you're going to talk about that topic, I don't want my child to be exposed to it. So I'm baffled why this floor amendment is here when there are so many mechanisms that are currently available.

"Lastly, Mr. Speaker, I have not heard of a situation where a parent wanted to take their child out of a school because they're going to talk about birth control or anything like that, and that was denied. So I mean, Mr. Speaker, I can empathize with the thousands of parents and their demanding and their urging and their requesting and their pleading and all of that. Their pleadings, their demands have been answered, Mr. Speaker, in the current policy that we have, thank you."

Representative Fale rose to respond, stating:

"Mr. Speaker, just a brief rebuttal. I really hope that what the previous speaker said was true, Mr. Speaker. Except in my own family experience, I had my two twin sisters locked in an auditorium and went through, it was very problematic, Mr. Speaker. Maybe that's true. I know from practice that that's not true, Mr. Speaker. And given the background that I come from, my family, my little siblings were not given the opportunity to opt out of what went on in that school. And there were hundreds of parents that were outraged because of what happened without parental notification.

"So all of these things, 'oh yeah, well we have this and we have this and we have that.' Mr. Speaker, if we do, it didn't work. So if we have problems there, we need to fix that. And I'm not speaking of something that I heard, it's something that I personally went through. Because the subjects that were discussed in there were wrong and were inconsistent with the values of my family.

"And I asked my little sisters, 'why didn't you leave?' They said, 'they closed the doors and they wouldn't let us leave.' So this isn't something that's being made up. The concerns are real, I've lived through them, hundreds of parents in my community have lived through this, and this is something that will at least give them something. If it already exists then what does it hurt to throw them another bone. Why the opposition? If we already have all these outs, shoot, let's throw in another door. That's all I have to say, Mr. Speaker."

Representative Ward rose to respond, stating:

"Mr. Speaker, I believe we don't have to go to the moon to prove it's there. We learn by learning from others. We are limited as an individual, we can't experience everything. But I believe there's a fantasy that somehow we know better here because we know who we are and where we are. Why do we belong to NCSL? We learn from other states. Hey they made a mistake on this tax issue, we can learn from them. They made the mistake on this one.

"If the good gentleman who said he doesn't like Canada and Massachusetts is a foreign country, take up Konawaena, when the parents never were told about a birth control program, where they were taking students off the campus, a Representative from the Big Island would probably know more about that.

"The example of, and I can't break it because it's in the hopper right now, but it's a curriculum issue that's very explosive in one of our communities that I can't say anything yet because it hasn't been cleared. But the point is, Mr. Speaker, this stuff is real, it's now, the chronology is first you get same-sex marriage, and then this comes, it's just like after the wind stops, the cyclone or the tsunami comes. If we know by experience of others, why would we foolishly not prepare ourselves?

"And if we were not listening, and the good gentleman was not a member of the Finance or Judiciary Committee, he did not hear the pleading mothers, he did not hear the voice of those people. He hears them today, and maybe at another time it may open his eyes, but the point is, Mr. Speaker, we don't have to go to the moon to prove it's there. We know that this curriculum revolution is coming, we should prepare for it, because the people are going to demand it. They're now begging for it, but after begging, it's, for example, some of these people had to beg to urinate this afternoon. We wouldn't even let them leave this building without having a license or an identification given out. We were not going to let them urinate. It was a mother may I. May I *shi-shi*."

"But I'm telling you, when they've said this about their children, they are serious and they're meaningful. You can do it now, in this amendment, or you can do it later, but they're not going to give up, Mr. Speaker. That's the issue. Let us not be naïve, none of us are all going to go to the moon, but we know that Aldrin and all the other ones that went to the moon, we should be able to learn from them and not have to make the same mistakes. Thank you, Mr. Speaker."

Representative Rhoads rose in opposition to the proposed floor amendment and asked that the remarks of Representative Takumi be entered into the Journal as his own, and the Chair "so ordered." (By reference only.)

At this time, Representative Fale requested a roll call vote.

The request for roll call was put to vote by the Chair and upon a show of hands, the request was denied.

The motion that Floor Amendment No. 10, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representatives Rhoads and Takumi voting no, and with Representatives Awana, Cachola, Carroll, Choy, Ing, Lowen and McKelvey being excused.

At this time, Representative Ward offered Floor Amendment No. 12, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the words "Part I" just above Section 1 of the bill.

SECTION 2. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by amending Section 1 to read as follows:

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

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

Therefore, it is the intent of the legislature to:

- (1) Ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State;
- (2) Ensure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying all provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law; and
- (3) Protect religious freedom and liberty by:
  - (A) Ensuring that any clergy, minister, priest, rabbi, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnizations shall not be required to solemnize any marriage or civil union that is against their religious beliefs or faith, in accordance with the Hawaii state constitution and the United States Constitution; and
  - (B) Clarifying that a religious organization or nonprofit organization operated, supervised, or controlled by a religious organization shall not be required to provide goods, services, or its facilities or grounds for the solemnization or celebration of a marriage or civil union that is in violation of its religious beliefs or faith.

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

SECTION 3. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the following new Part immediately after Section 12 of the bill.

### **"Part II**

SECTION 13. The First Amendment to the U.S. Constitution and Article I, section 4 of the Hawaii Constitution both protect the right to free exercise of religion. The legislature finds that if same-sex marriage becomes legal in Hawaii, it will be imperative to protect our nation's long and rich tradition of religious freedom. In particular, many religious communities and religiously committed persons have a deeply held understanding of marriage as a relationship that can exist only between a man and a woman. Without legislative safeguards, many religious individuals will be forced to engage in conduct that violates their deepest religious beliefs.

Therefore, the purpose of this Part is to amend the law on discrimination in public accommodations by ensuring that private individuals, sole proprietors, and owners of small businesses are protected from any type of civil or criminal liability for refusing to provide goods, services, facilities, privileges, advantages, or accommodations that assist or promote the solemnization or celebration of any marriage or civil union, or that directly facilitate the perpetuation of any marriage or civil union, if providing such goods, services, facilities, privileges, advantages, or accommodations would cause such individuals, sole proprietors, or owners of such small businesses to violate their sincerely held religious beliefs.

SECTION 14. Section 489-3, Hawaii Revised Statutes, is amended to read as follows:

**"§489-3 Discriminatory practices prohibition.** (a) Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

(b) Notwithstanding any other law to the contrary, and except as provided in subsection (c), no individual, sole proprietor, or small business shall be required to:

(1) Provide goods or services that assist or promote the solemnization or celebration of any marriage or civil union, or provide counseling or other services that directly facilitate the perpetuation of any marriage or civil union; or

(2) Provide housing or lodging to any couple,

if providing such goods, services, housing, or lodging would cause such individuals, sole proprietors, or owners of such small businesses to violate their sincerely held religious beliefs.

For the purpose of this subsection, "small business" means:

a legal entity other than a natural person that provides services which are primarily performed by an owner of the business; or a legal entity that has five or fewer employees; or in the case of a legal entity that offers housing or lodging for rent, that owns five or fewer units of housing or lodging.

(c) Subsection (b) shall not apply if a party to the marriage or civil union is unable to obtain any similar goods or services, or housing or lodging elsewhere, without substantial hardship.

(d) Notwithstanding any other provision in this chapter, no refusal to provide goods, services, facilities, privileges, advantages, or accommodations pursuant to subsection (b) shall constitute an unfair discriminatory practice and shall not result in any civil or criminal claim or cause of action challenging such refusal, nor result in any action by the State or any of its political subdivisions to penalize or withhold benefits or privileges, including but not limited to tax exemptions or governmental contracts, grants, or licenses, from any protected entity or individual."

SECTION 4. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the words "Part III" immediately following Section 14 of the new Part II of this bill as amended.

SECTION 5. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by renumbering Sections 13, 14, 15, and 16 as Sections 15, 16, 17, and 18, as follows:

SECTION 15. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

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

SECTION 17. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 18. This Act shall take effect on December 2, 2013."

Representative Ward moved that Floor Amendment No. 12 be adopted, seconded by Representative McDermott.

Representative Ward rose to speak in support of the proposed floor amendment, stating:

"Thank you, Mr. Speaker. I rise in support. The supposed superiority of the SB 1, even in its HD 1 form, leaves a lot to be desired. The religious protections are better than it was, but I think I noted that it was a plastic shield, maybe a plastic to a tin shield. But who it really forgets is the believer, or the one of faith, who is a small businessman. This amendment is all about protecting our small businesses, particularly five employees or less.

"We know there are multiple lawsuits. Again, empirical evidence, I'm an empiricist, if it doesn't have numbers or experience, it's all fantasy. This is not fantasy. From cake-makers to florists, to other reception services, Mr. Speaker, those people have asked for help. First was the protection of the clergy, second was the children, and the third are these individuals. Mr. Speaker, I move for the adoption of this for the sake of the individuals, for the sake of those who are uncertain, and those lawsuits, even now, are being under the civil unions, perpetuated, particularly a bed-and-breakfast in my own district.

"This amendment, in effect, is to amend the law of discrimination in public accommodations by ensuring that private individuals, sole proprietorships, and owners of small businesses, as I said under five employees, are protected from any type of civil or criminal liability.

"Mr. Speaker, this is necessary as the clergy may be 1 percent of the faith community, but 99 percent of the faith community is out there. This doesn't even cover a number of them, but some of the professionals, the small business, the self-employed, this will give them some cover to genuinely continue to practice their faith. The way the bill is now, it's a zero-sum game. What rights are given to one are taken away from another, or people feel like they have not been considered or, 'what about me?' That's some of the small business cry that we've heard in the last few days.

"People say, 'well none of the other 14 states who have same-sex marriage have this in their bill.' Mr. Speaker, we always consider ourselves unique, we're different, we're Hawaii, we're *ohana*, we can do it."

The Chair addressed Representative Ward, stating:

"I think it's 15 states, Illinois just passed it."

Representative Ward continued, stating:

"Sorry, 15 states. And the District of Columbia, and Argentina, and so on. Mr. Speaker, we consider ourselves unique. We can be unique by not having to say, 'well they don't have it in, that doesn't mean we can't have it.' But we need to face the small business reality of what's going on.

"Now for lawyers, this is going to be, I think as one of the testifiers said, Judge Elwin, this is a lawyer's dream. Mr. Speaker, we should be taking his consul. He said, 'bad legislation creates much litigation.' And when all this stuff fills the courts, it's going to reflect back on us. We never really did our job. And right now, this is nowhere protective for those who are in small business or those who are individual proprietors. For that sake and for that group, Mr. Speaker, I move for the adoption of this amendment. Thank you."

Representative McDermott rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, I'd like to have the comments of the previous speaker inserted in the Journal as my own. The businessman needs protection. I anticipate we'll hear speeches comparing it to refusing to serve someone, the Selma lunch counter, refusing to serve an African-American based on their benign, genetic skin color. They walk in, 'oh we're not serving you.' As opposed to a private behavior, I'm thinking of someone maybe renting their house, but they don't want that sort of lifestyle and environment and the friends that come along with it, and they have to explain to their kids what's going on. So I stand in strong support, thank you."

Representative Fale rose in support of the proposed floor amendment and asked that the remarks of Representatives Ward and McDermott be entered into the Journal as his own, and the Chair "so ordered." (By reference only.)

The motion that Floor Amendment No. 12, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representatives Awana, Brower, Cachola, Carroll, Choy, Ing, Lee, Lowen, McKelvey, Nishimoto, Takayama and Wooley being excused.

At this time, Representative Ward offered Floor Amendment No. 13, amending S.B. No. 1, HD 1, as follows:

"SECTION 1. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the words "Part I" just above Section 1 of the bill.

SECTION 2. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by amending Section 1 to read as follows:

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

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

Therefore, it is the intent of the legislature to:

- (1) Ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State;
- (2) Ensure that there be no legal distinction between same-sex married couples and opposite-sex married couples with respect to marriage under the laws of this State by applying all provisions of law regarding marriage equally to same-sex couples and opposite-sex couples regardless of whether this Act does or does not amend any particular provision of law; and
- (3) Protect religious freedom and liberty by:
  - (A) Ensuring that any clergy, minister, priest, rabbi, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnizations shall not be required to solemnize any marriage or civil union that is against their religious beliefs or faith, in accordance with the Hawaii state constitution and the United States Constitution; and
  - (B) Clarifying that a religious organization or nonprofit organization operated, supervised, or controlled by a religious organization shall not be required to provide goods, services, or its facilities or grounds for the solemnization or celebration of a marriage or civil union that is in violation of its religious beliefs or faith.

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

SECTION 3. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the following new Part immediately after Section 12 of the bill.

#### **"Part II**

SECTION 13. Section 489-2, Hawaii Revised Statutes, is amended by amending the definition of "place of public accommodation" as follows:

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:

- (1) A facility providing services relating to travel or transportation;
- (2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;
- (3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;
- (4) A shopping center or any establishment that sells goods or services at retail;
- (5) An establishment licensed under chapter 281 doing business under a class 4, 5, 7, 8, 9, 10, 11, or 12 license, as defined in section 281-31;
- (6) A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
- (7) A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment

conducted to serve the health, appearance, or physical condition of persons;

- (8) A park, a campsite, or trailer facility, or other recreation facility;
- (9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;
- (10) A professional office of a health care provider, as defined in section 323D-2, or other similar service establishment;
- (11) A mortuary or undertaking establishment; and
- (12) An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment.

"Public accommodations" do not include the real property, buildings, or other areas owned or leased by a religious organization and regularly used for religious purposes, notwithstanding whether the religious organization permits the community to also use some or all of the real property, buildings or other areas owned or leased by the religious organization.

No place of public accommodation defined in this section shall be requested to reconstruct any facility or part thereof to comply with this chapter.

SECTION 4. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by inserting the words "Part III" immediately following Section 13 of the new Part II of this bill as amended.

SECTION 5. Senate Bill No. 1 H.D. 1 RELATING TO EQUAL RIGHTS, is amended by renumbering Sections 13, 14, 15, and 16 as Sections 14, 15, 16, and 17, as follows:

SECTION 14. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

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

SECTION 16. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 17. This Act shall take effect on December 2, 2013."

Representative Ward moved that Floor Amendment No. 13 be adopted, seconded by Representative McDermott.

Representative Ward rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker I rise in favor of the measure. I am prompted to introduce this because of the testimony of two individuals. One individual spoke for two hours when the Judiciary and the Finance Committees questioned him, this was the Attorney General David Louie. Two hours he submitted to questions, but unfortunately when it came to the public accommodations law and the protection of churches, he, like I'm swaying back-and-forth, was never a steady, 'this is the way it is and this is the way the courts are going to be kept out of it,' or, 'this is the way the churches are going to be protected.'

"His uncertainty, Mr. Speaker, as to the protection of the churches, told me that unless we carve out, and this is what this amendment does, it carves out the churches and says, 'you are not part of the public accommodations,' it makes it very clear.

"The second is a good friend from East Honolulu, he's the head of the Civil Rights Commission. And Mr. Speaker, you know that that is the one that's going to implement this particular bill, or the HD of the SB 1, HD 1. And basically the Civil Rights Commissioner said that no matter what you do, no matter how you do, don't get the churches outside of the civil rights purview of the public accommodations, and implied, 'otherwise we're going to get you some other way, but we're going to end up getting you.'

"Mr. Speaker that was rather disconcerting in a sense that he didn't say yes or no, but he said, 'stay away from getting the churches exempted from

the public accommodations commission,' which meant it's going to be a field day for the churches if they're under the public accommodations. So to make it unequivocal, it seemed right to bring this out as to what the Attorney General and what the Civil Rights Commission couldn't figure out. This bill, amended as such, will make it very, very clear.

"I know the Senate is not particularly happy about any of these particular amendments, but doing the right thing is the most important thing. Because, Mr. Speaker, we don't want to have every piece of legislation we pass end up in court word-for-word having to be defended. Because that's expensive, and I know some of the churches that, at least were here earlier, they spend a lot of their time just doing disclosures and other kinds of affidavits and other discovery. That takes away from their mission, which is serving the people of Hawaii, and serving their other purposes. So, Mr. Speaker, for those reasons, I would encourage the adoption of this. Thank you."

Representative McDermott rose in support of the proposed floor amendment and asked that the remarks of Representative Ward be entered into the Journal as his own, and the Chair "so ordered." (By reference only.)

Representative Fale rose in support of the proposed floor amendment and asked that the remarks of Representative Ward be entered into the Journal as his own, and the Chair "so ordered." (By reference only.)

Representative Oshiro rose to speak in support of the proposed floor amendment, stating:

"Mr. Speaker, thank you very much. In support. I'm looking at this amendment, it's very interesting, and I want to thank the former Minority Leader of the GOP, our Republican Caucus, for this amendment. As I understand it, it seems to support the Hawaii Marriage Equity Act of 2013. So I just proved my point that if you have a vigorous debate and discussion, I think you can turn the hearts and minds of the most ardent opponent of your position. So I'm very curious to see that he does stand in support of equal rights for all people.

"I just want to comment further upon the exemption that he's trying to carve out of the Public Accommodations Law. I think it's in the right direction, Mr. Speaker, certainly not as vibrant and robust and squared with the constitutional rights of due process, equal protection, along with the civil liberties under the current Public Accommodations Law, but it heads in the right direction. It has the value of creating some very clear lines of what's in and what's not in our civil rights code.

"I feel it addresses one of the concerns that's been raised by many people in regarding the submittal of October 17, 2013, what the Hawaii Civil Rights Commission and my good friend, Bill Hoshijo, the Executive Director, who is doing a terrific job as the executive director. And I think the concern that was raised earlier is that, where do you draw the lines as far as what is a public accommodation and what is a not public accommodation? And I turn the people's attention to number three on the jurisdiction and application of the religious exemption on facilities and accommodations.

"Jurisdiction / coverage. The threshold issue is whether the religious facility is a place of public accommodation covered under HRS Chapter 489. The question is: does the religious organization offer the use of the facility to the general public as customers, clients, or visitors? A religious facility that is used only for religious purposes and is not offered to the public is not a place of public accommodation. Welcoming the public to attend religious services does not make the facility a place of public accommodation. But, if a religious organization makes the choice to offer the rental or use of its facility for commercial or public use, it will be a place of public accommodation for that purpose.

"This threshold analysis is similar to the determination of whether a facility is a private club or a place of public accommodation. e.g., the Pacific Club, Elks, and Outrigger Canoe Club are private membership clubs that do not fall under the jurisdiction of HRS Chapter 489, unless they offer their goods, services, facilities, etc. to the general public.

"Now I've had the great fortune of going to some meetings and having some social engagements at the Pacific Club, but that's a members-only club. I'm not a member so I can't, I don't know the intricacies of getting involved in that, I'm not a member of the Elks Club or the Outrigger Canoe Club. But those are private membership clubs. The concern that you have in the current language in the Senate bill, and this one leads in a little better direction, is that churches might have to become members-only organizations to fall outside the public accommodations code, i.e. like the Elk's Club, i.e. like the Pacific Club, i.e. like the Outrigger Canoe Club.

"Now I don't think it certainly comports with the reality regarding any religious denomination or institution, that seats have an open-door policy of welcoming any and all visitors. So I think this leads in the right direction, however it is not as robust and squared with the law as House Bill 6. And for those reasons, good attempt, the former Minority Leader of the GOP Caucus, and his support for equity in marriage. Thank you very much."

Representative Ward rose to respond, stating:

"Mr. Speaker, I appreciate my good friend from Wahiawa and his embellishing my testimony, particularly in supporting of the amendment. However, his repeated, let's say my listening to repeated, 'my good friend in support of same-sex marriage,' that is contrary to my stand and I'm not sure how it fits in to what was said on this Floor. Thank you."

The motion that Floor Amendment No. 13, amending S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be adopted, was put to vote by the Chair and upon a voice vote, failed to carry, with Representatives Awana, Cachola, Carroll, Choy, Ing, Lee, Lowen, McKelvey and Wooley being excused.

At 6:35 o'clock p.m., Representative Oshiro requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 6:54 o'clock p.m., with Speaker Souki presiding.

At this time, the Chair stated:

"I ask everybody to have some decorum as we move along. Respect everyone as you'd want someone to respect you. Thank you very much."

(Main Motion)

Representative Rhoads rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. In support. I just wanted to go over quickly the amendments that the Joint Committee on Judiciary and Finance made to SB 1 after it came over. As we're all aware, there was over 55 hours of hearings. We did make three significant amendments in response to concerns that we heard from the testimony. First off, we deleted the language relating to the gender-neutral application of marriage-derived parentage rights, which was an issue of concern to many people, and especially to the Hawaiian community.

"We also amended the religious exemption to expand it, adopting language from Connecticut's law. It expands religious organizations exemptions to apply to religious organizations and to non-profit organizations operated, supervised, or controlled by a religious organization, establishes that none of these entities shall be required to provide goods or services, or their facilities or grounds, for the solemnization or celebration of a marriage, if the solemnization or celebration is in violation of the religious beliefs or faith. And it expressly provides that these entities shall be immune from any fine, penalty, injunction, administrative proceeding, or any other legal or administrative liability for the failure or refusal to provide goods, services, grounds or facilities pursuant to this measure.

"Of the states, including Illinois, which of course just adopted their same-sex marriage law today, I believe, this is one of the broadest

religious exemptions, if not the broadest. We've already compared it to Illinois, and it's at least as broad and doesn't match up exactly so it's a little hard to tell, but it looks like it's a little broader than the Illinois exemption.

"We also applied the same standards as civil unions. You'll still be able to form a civil union after this bill passes. And we applied the religious exemption to the civil unions as well because we didn't want to have two separate standards for civil unions versus marriage.

"We did change the effective date to December 2, to give the Department of Health, because of the delay and the length of the hearings, obviously the session has gone longer than we had originally hoped, but that's the democratic process, so be it. That's it in a nutshell, the amendments that we made in Judiciary/Finance. Thank you, Mr. Speaker."

Representative McDermott rose, stating:

"Mr. Speaker, listening to the people upstairs and listening to the testimony all week, it seems to me that, well I'd like to make a motion to postpone this indefinitely. Thank you."

At this time, Representative McDermott moved that S.B. No. 1 be postponed indefinitely, seconded by Representative Ward.

At 6:59 o'clock p.m., Representative Saiki requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 7:00 o'clock p.m.

Representative McDermott rose to speak in support of the motion, stating:

"Mr. Speaker, I stand in strong support of this. I'm sitting in this chair after many hours and I'm tired. I don't have the passion I once brought to the microphone at the beginning of the day. But I hear those people still out there, and they're still telling us, they're begging us to let them have a vote. We are going to make a major societal change in their community and they're saying, just enfranchise us with the opportunity to have a say. The constitution allows us to do that. Justice Moon said that is the ultimate authority, from the people. They're saying, 'stop, don't do this, please.'

"Mr. Speaker, I've heard them all day. They've been here all week. If the legislation doesn't have the support of the community, as best as I can tell, as best as I can tell. I don't know why we're moving forward with it. They are not happy, as best as I can tell. So I would ask that we postpone this indefinitely. Furthermore, when we're done with that, I think we should just shut the whole thing down. Thank you, sir."

Representative Fale rose to speak in support of the motion, stating:

"Mr. Speaker, in support of the motion, and when I'm done speaking, if I can ask for a roll call vote.

"Mr. Speaker, I believe I'm correct when it's been told to me that nothing like this has been seen in the history of Hawaii. With the hearing that we had, with the outpouring of opposition. And every day we as a Body tell people your voice makes a difference, your voice needs to be heard, come to the State Legislature. We've seen numbers that 55 percent or however many people support same-sex marriage in Hawaii, and therefore we should support this, but we don't need to let the people weigh in on this.

"I'm very confused, the people who are here today are confused, Mr. Speaker. Apparently, we have a perfect bill. I mean, this is perfect. We've submitted amendment after amendment. This is a perfect bill. Wow, I'm blown away, and thankfully it was almost perfect when it came from the Senate. Almost perfect. But fortunately they sent it to us, so we just needed to tweak it here, tweak it there, and now it's perfect. All of these issues that hours and hours of thought have been poured into in the short amount of time that it's been presented to us, Mr. Speaker, apparently they're all just misguided. Apparently these guys don't know what they're talking about. There are no flaws, it's perfect.

"My little sister just texted me, asked me a question about some stuff. You know, she asked this Body. We have perfection rolling out of this Body right here, Mr. Speaker. I've got to say, this is the first time I've ever been around something that's been so perfectly put together that there's no need for any other amendment, there's no need to take this to our communities to discuss it with them, and we just need to move it right along.

"So of course I'm asking myself, maybe I'm the one that's wrong, maybe I just need to vote up on this. Is that where I'm at? No? Are the people outside misguided, for those who showed up for five days and set a record for the history of Hawaii, over 55 hours of testimony with 80 to 90 percent in opposition, stating many flaws that are in this? And then we take it and we decision-make within an hour or so. Wow, that's incredible. I mean, the people of Hawaii must be very impressed.

"We can't fix our roads, we have problems with education facilities and schools and stuff and everything. Trying to get the Department of Education to solve a traffic problem in my district."

The Chair addressed Representative Fale, stating:

"Representative, please stick to merits of the motion that's before you."

Representative Fale continued, stating:

"Mr. Speaker, I am not convinced, nor are the people of Hawaii convinced that we cannot do better, or that this is something that needs to be moved out of this Body, Mr. Speaker. Nobody's convinced. But this is a dog and pony show, Mr. Speaker. Why have they come here? Why have they made history, and we're not going to listen.

"It's very problematic, Mr. Speaker. This needs to be delayed indefinitely, we need to do our responsibilities and listen to the voice of the people, Mr. Speaker, and make sure that we're the people's representatives. For those reasons, Mr. Speaker, I support the motion to delay indefinitely. Thank you."

Representative Oshiro rose to speak in support of the motion, stating:

"Mr. Speaker, I rise in support of this motion. I think there is no secret in the building and outside the building, in the community, on the neighbor islands and the rural community that I've never supported coming to a special session. And to this very day, until we leave, I will stand on that objection.

"I've told people that this is the first time in my 20 years of being here, I got elected back in 1994, that the Governor has unilaterally used his authority, which is rightfully given through the constitution, to summon the Legislature into a special session like this. The other was back in 2001, Mr. Speaker, and you were there with us, along with Speaker Emeritus Say and Governor Cayetano, and I think President Mizuguchi.

"Well, we came into a special session to address the effects of the terrorist attacks upon our country. And then six years later, in 2007, we came in to address a Hawaii Supreme Court decision to basically stop the Super Ferry from sailing between the islands.

"What's interesting, Mr. Speaker, you and I were key members of that committee that had a public hearing on that particular issue. But one thing that you and I agreed upon, and will agree upon today, is that even in 2007, although we may have disagreed upon the merits of the bill, we had an agreement between the Governor, who was Linda Lingle at the time, Speaker Emeritus Say, and I believe Senate President, then Colleen Hanabusa, who's now a congresswoman.

"But this is the first time that I can recall in 20 years that a governor has unilaterally used his authority to summon us in. So that's where I start from.

"Mr. Speaker, I find it astounding that we would attempt to do this in such a short period of time, knowing that we've only used about 10 days, given that of 30 days unconditional, we have 45 days per approval by the

Governor. And that there's still some time to go and look at a constitutional amendment, there's still some time to look at other amendments, there's still some time to approve this bill, there's still some time to seek clarification from the Attorney General, Civil Rights Commission, ACLU, just a few members who might have further questions.

"There's still some time to consult with alternatives regarding the ERISA exemption under our Prepaid Health Care Act. There's still some time to seek the input from the Judiciary regarding the family court, and how the rules and procedures might change with the domicile residency waiver for same-sex couples coming in. There's still some time for us to go and consult with other members of our community, especially on the neighbor islands.

"There's still some time, Mr. Speaker, we can go back and call a regular five-day recess, in a regular session we'll call that pursuant to constitution, a five-day recess to consult with our communities, to reflect and to seek their input, there's still some time for that.

"Throughout the last eight weeks, Mr. Speaker, people have been asking me, 'what is the rush? What is the compelling rush?' And that is part of the frustration. Initially I voted for a constitutional amendment, Mr. Speaker, but normally I don't on these kinds of issues. But I felt compelled because of this process that's being rushed. I have grave reservations about the bias and prejudice of the community at large regarding the homosexual and gay community.

"So if it is approved, I'd probably argue against it at the polls. But insofar I've seen the same bias and prejudice among my own colleagues here in the House and Senate. I can ascribe no other recourse to address the constitution as I see it, but again turning to the wisdom of the people, from which all political power is derived.

"So whatever I might do, to stop this special session, even on this procedural motion, for that reason I stand. I mean no umbrage against my colleagues, or the Senators. It lies with the Governor. But again, members, Mr. Speaker, this might be a means for us to take pause and reflect before we make this final decision. Thank you very much."

Representative Jordan rose to speak in support of the motion, stating:

"Thank you, Mr. Speaker. I'd like to speak in support. I too, Mr. Speaker, came kicking, dragging and screaming into this special session. My heart sunk when I heard that news on the TV that we were going to be in special session. I've been pondering every day, coming into this special session, and about a week before I got here, it all settled in me. It is what it is, we are here now. But when I saw the testimony of five days, and I only had one opportunity to talk to our AG in our hearing, one opportunity to talk to Department of Taxation, the Deputy Director, not even the Director who has the experience of the Internal Revenue Service behind her. And we couldn't have another question asked of those administrative individuals with this institutional knowledge. Once we heard from all these constituents coming before us, we had to go and ask them separately.

"It's kind of difficult when we're sitting in hearings, with the community expecting us to be there in those hearings and listen to them when I need to talk to individuals that have expert knowledge on this. I too say we need to slow down. And no disrespect to our leadership, no disrespect to our great Senators, no disrespect to our two chairs that held long hearings for us, I appreciate all that work. But I really would like to go out and talk to my community.

"Yesterday was the first day that I got to drive another block in my community and realize, oh my god, they're going to fix my police station after 10 years. That's how much time I've spent here, Mr. Speaker, that I didn't even remember a block from my house and that they were going to start a construction project.

"So how can I go out and listen to my constituents? I can't speak to them at 10 p.m. at night, Mr. Speaker. That's inappropriate. I like to talk to people face-to-face. I don't want to talk email to them. They want to call me. And I have a difficult time explaining to them what is going on.

"Many of these people up here are from my and the Representative from Nanakuli's districts, Mr. Speaker. They want to see us. And I'm very appreciative they spent the last five days with us. I'm very humbled by that, and I do owe explanations to them before I take a final vote. Many of them expect me to go 'yes' on this. Many of them expect me to go 'no.' But if I can't have that discussion with them, how am I doing my duty, Mr. Speaker?"

"That was my turmoil coming into this. I must uphold the Constitution of the United States as well as the state. My oath of office, to do my best ability. And right now, I'm not so sure if I'm doing my best ability, when I can tell them 'I'm sorry, we can only hear 1 bill, I'm sorry, we can't hear HB 5, I'm sorry, we can't hear HB 6.' Why, Representative? Why can't you hear these other measures?' I'm sorry, I've been told they're not going to hear them.' And this is what happens when we can't explain to the public who brings us here. I just want faith, faith in the government, and I want our people to have faith in our government. Thank you, Mr. Speaker."

Representative Har rose to speak in support of the motion, stating:

"Thank you, Mr. Speaker. In support of the motion. As we began this journey, many of the proponents said that as a result of the Supreme Court of the United States decision in the Windsor case, that's how we ended up here. And respectfully, Mr. Speaker, I would submit this. The Supreme Court of the United States did not, in fact, find Hawaii in violation of any federal laws.

"So as members recall, when we began this journey, we did not have the requisite 34 votes to go back into special session. I repeat, there were not 34 Members of the House of Representatives who were willing to go into special session to deal with this bill. Because our colleagues understood, number one, what the Supreme Court's decision was in DOMA, but secondly, that procedurally, it was not the right thing to do.

"Mr. Speaker, unfortunately a member our Body did, in fact, go behind your back, as the leader of our caucus, and urged the Governor to call us back into special session. As a result, we are here. And Mr. Speaker, again, nobody can deny what's been happening these past five days. This is the single most contentious, divisive issue of our history. We will undo thousands of years of culture, customs, tradition and history, which is why the Native Hawaiian people are so upset and feel so disrespected by this process.

"Mr. Speaker, this motion is being brought because those of us in the minority feel desperate at this point. People keep saying, 'we don't trust government, government doesn't listen to the people, government can't be trusted.' And we heard that in the testimony over the five days. Why are we not being heard?"

"And so now we're stuck with this motion. Does it do justice for both sides? No. It doesn't do justice for the proponents, but we have no choice. We had choices at the beginning of this session, Mr. Speaker, and I would urge you, we still have choices. House Bill 5, House Bill 6, House Bill 7. They can still be heard. We have choices. It's not the end of special session at this point, Mr. Speaker. I don't want to stand in favor of this motion, but I have no choice at this point. But we as a leadership still have choices. We can still allow the people to be heard, give them that choice so they don't believe that their government did not listen to the people.

"For those reasons, Mr. Speaker, I respectfully stand in support of the motion to postpone. Thank you."

Representative Awana rose in support of the motion and asked that the remarks of Representative Har be entered into the Journal as her own, and the Chair "so ordered." (By reference only.)

Representative Evans rose to speak in opposition to the motion, stating:

"Thank you, Mr. Speaker. I stand in opposition. I just want to note that, I looked up to see when the Governor announced special session and what it was going to be about, and it was on September 9th that he announced why we were coming back in special session and what the topic was going to be. I know that in my community, the discussions started way back when.

"In terms of hearing what the people feel about this, it was with great honor, I'm proud of the House, that we had over 5,000 people sign up to testify. That even in my emails, I started getting 3,000 emails a day last week, and I'm now averaging about 1,000 a day. It's tapered off a little bit, but I suspect that it will go back up now that people know that we're going to go for Third Reading vote here soon, assuming that we pass this forward. And I really recommend that we pass this forward.

"All the previous speakers said we're not listening to the people. Again, I want to say, I do believe we're listening to the people and hearing from the people. And I do believe we should not support this motion. Thank you."

Representative Fukumoto rose to speak in support of the motion, stating:

"Thank you, Mr. Speaker. In support of the motion. I was going to save my comments for the underlying bill, but I think they're more fitting here, because the major problem that I have with this bill is the process that we've taken it through. And this is not to malign anybody's character here, I think everybody tried really hard. But we were put here by the Governor in a process that was impossible. We were never going to be able to do this well. Last night I said that I did think that there was more transparency, and in that transparency, we saw how ugly this process actually is. The public being involved, and the public was able to see what actually happens in this building, Mr. Speaker. And they're unhappy with it, they didn't like what they saw, they're angry.

"I think that the best thing we can do at this point is to put this off and say, 'okay we're going to give you a real process, a good process.' Because when we ask for transparency, all we do is open it up so that more people can see what we do and how we do it. And what they've seen is that this process is unfair and that it's broken, and they're upset. And I think the only thing that we can do at this point is to give it more time, Mr. Speaker. So I ask that all the other members consider this motion to postpone. Thank you."

Representative Belatti rose to speak in opposition to the motion, stating:

"Thank you, Mr. Speaker. I rise in opposition to this motion to postpone indefinitely. I truly believe that the time for delay has come and gone. I'm genuinely sorry that we're at a point where we just have to agree to disagree. I do agree that this is the single most contentious, divisive measure that's come before this Body, at least in the time that I've been in here. But I also believe that we are a duly elected Legislative Body who's called upon to make tough decisions. This is probably going to be the toughest vote of any of our political careers. But we are elected to do this job.

"We were called by the Governor. September 9, 2013. The DOMA decision came down in July. The day the DOMA decision came down, with my understanding, that this would be an issue that would come up. I began immediately to do my due diligence as a full-time legislator, as a full-time Representative of the people my district, to begin to understand what were the options in front of us.

"Over 30 of us sat in hearings. We listened, we heard, we amended the bill. We provided a bill that will satisfy many of the concerns that were raised. I am very proud of the process that this House has engaged in, and I think, again, the time for delay has come and gone, let us take the vote, justice delayed is justice denied. Thank you, Mr. Speaker."

Representative Jordan rose to respond, stating:

"Thank you, Mr. Speaker. As we all know, Illinois just passed, the House of Representatives just voted it out. But do we all know that their Senate Body voted it out in February. In February, Mr. Speaker. Almost six months. I don't know why the delay was there, maybe they had to garner the numbers. But at least they had time to go out and talk to the people. The constituents in our state can't even look at SB 1, HD 1. They can't come back and comment on this.

"This is what I'm trying to express, true transparency. I mean, I can argue the point, I've been talking to my constituents since before DOMA fell. In fact, I was asked at a neighborhood board, 'how do you stand?'"

Right after DOMA fell. And I've been engaging with my clergy, my pastors, my community members that had no clue what this was all about. But now we do have a measure before us, and I feel it's my obligation to at least explain what the changes were made.

"I don't think I have that opportunity at this point in time. I have a challenge, I don't even think this was being televised today, so I'm going to have more people saying, 'hey, what happened?' I was supposed to be at a meeting right now and somebody said, 'are you going to make it?' and I said, 'no, I am not.' Well, what are you guys doing?' 'Well, we're still on the Floor because they couldn't hear it.'

"Transparency, I'm sad to say, that I'm going to have to just say, it is what it is. Thank you, Mr. Speaker."

Representative Brower rose to speak in opposition to the motion, stating:

"Thank you, Mr. Speaker. We've been talking about the issue of same-sex marriage since the conversation started over civil unions, and that's been a few years. And in my opinion, we're not undoing 1,000s of years of marriage tradition, because we're not eliminating marriage between a man and a woman. If anything, the definition of marriage is growing. And ironically, Mr. Speaker, putting this off, we would be undoing decades of how we've done local legislative processes here in Hawaii. Thank you."

Representative Fale rose to respond, stating:

"Mr. Speaker, once again in support and just with a brief rebuttal. We've been told that we need to accept same-sex marriage, Mr. Speaker, because we need to *aloha* all. But the people who make *aloha* what it is cannot be trusted to vote on that. So we come to you because of who you are, what you represent, and the unique culture that you have in the State of Hawaii, but that's nice, we're not going to trust you to actually voice with *aloha* how you feel on this measure. This delay, Mr. Speaker, will allow that opportunity.

"Those are local people outside. You hear those voices? Those aren't people from Connecticut, those aren't people from Massachusetts, those aren't people from Washington. Those are people born and raised on these islands, who foster, who nurture, who care for what we call *aloha*. And we're saying, 'we can't trust you, we can't trust you to share *aloha*.' And we say, we come out, 'trust us guys.'"

The Chair addressed Representative Fale, stating:

"Would you please restrict yourself to the merits of this motion, which is to postpone indefinitely, whether it's meritorious or not in the particular nuances with the bill?"

Representative Fale continued, stating:

"Yes, Mr. Speaker, and that goes exactly to my point. SB 1, HD 1 came out yesterday. And the only people from my community who have had a chance to look at it, Mr. Speaker, which isn't everybody, because everybody isn't paid to do the political thing that we are paid to do, they're busy living their lives, who haven't had the opportunity, who haven't even gotten a break from work, school, or family to look at this bill. Haven't had an opportunity to look at it. And we're supposed to say, 'hey, just trust us, we're the guys who passed PLDC over here, trust us.'"

"What I'm saying, Mr. Speaker, is that not enough time has passed. And we have scrambled to repeal bills that have gotten less outrage than what we're seeing today. And we are just railroading this through. What a time to be a freshman, Mr. Speaker. Can you remember those days when you were a freshman, Mr. Speaker?"

"So what I'm saying is, Mr. Speaker, District 47, and the people who live there, have not been able to review what has been done, and the few who have, have said that the amendments that were made have been inadequate. And too many times have we had to backtrack and try and fix mistakes because we move things through that shouldn't have been moved through. And there is no excuse, there is no reason, when we know we have 30

days, the people know we have 30 days, but because somebody said, 'we are just going to pass this through.'"

Representative Lee rose to a point of order, stating:

"Mr. Speaker, point of order, I believe the speaker is out of time."

The Chair addressed Representative Fale, stating:

"Representative, you have been called out of order. Would you please close your remarks?"

Representative Fale continued, stating:

"Okay, I just want to say, Mr. Speaker, I hope my time as a freshman will be just as good as yours was, and we do the right thing. Thank you very much, Mr. Speaker."

Representative Har rose to respond, stating:

"Thank you, Mr. Speaker. Just a brief rebuttal. The Representative from Makiki said that she's proud of this process. That we heard, we listened, and we amended the bill. But, Mr. Speaker, I would submit, the overwhelming voices that resonated for me in that hearing, and she sat right next to me, was not 'amend the bill,' it was, 'vote no, kill the bill, let the people decide.' The people did not ask to amend the bill. That was the overall message, Mr. Speaker.

"So when we talk about transparency, openness in government, public engagement, again, I will submit, we are failing the public, and this is why people don't trust government. For these reasons, Mr. Speaker, I support the motion to postpone indefinitely. Thank you, Mr. Speaker."

Representative Oshiro rose to respond, stating:

"Mr. Speaker, this is a quite extraordinary motion, as you know, because it has the effect of killing the bill in the process. But extraordinary circumstances require extraordinary measures like this. And there is a clear and present danger that we might do something that can never be undone.

"I've been sharing this with the community at large and those colleagues who choose to seek out my counsel. But I too, like the Representative from Makiki, have been studying the Defense of Marriage Act, decision of the Supreme Court, the Kennedy decision. I have studied the Pery v. Schwarzenegger, the Hollingsworth decision that was entered in the close of the Supreme Court's last session.

"A couple of things I take away from it. First of all, in the Windsor case, there was no establishment of fundamental right of a civil right to same-sex marriage. It stands for its basic proposition, a federalism. Where our state determines and defines marriage between a man and a woman, or between people of same-sex, Congress does not have the authority or the power to supersede the decision of the state. Mr. Speaker, I agree with that decision. I think it's the prerogative of the states to decide how they'll define marriage. I think that's the correct decision.

"Also in the decision, Mr. Speaker, is this important point, that if a couple gets married in a state where you have same-sex marriage, and they move to a different state to domicile and set up their household and live as a couple, the same rights and privileges that they acquired in the celebration state, or the celebration place, will go with them. I talked about it earlier, but that's the basic premise of the Defense of Marriage Act case, the Windsor case.

"The Pery case is interesting, Mr. Speaker, it stands for this proposition. That once the legislature approves same-sex marriage, and once the first marriage license is issued, there's no going back. You will have a vested property right, that I will have to defend under the state constitution, that most courts will see under the state constitution, and to take that away and be a violation of one's due process. Life, liberty, property without due process. And that's what they held in the Hollingsworth v. Pery decision.

"Furthermore, even with Proposition 8, even with a constitutional amendment, to change the decision of their court. Even that could not change it because the basic principle there, Mr. Speaker, once a property right is acquired by a person or group, it can never be taken away. And that's why this is a substantive motion, has substantive effects on where we are today. I stand again in strong support. Thank you."

Representative McDermott rose to respond, stating:

"Mr. Speaker, I'll give you two concrete reasons why we shouldn't proceed. One, as you know, there's litigation pending on the meaning of the 1998 constitutional amendment. There's Supreme Court law that says the people's intent supersedes any committee report, any statutory language, any shenanigans buried deep inside. We have had people, not me, acknowledge that the language was, well, bad at best, if not confusing. So we have litigation pending. Number one.

"Number two, despite the best efforts of leadership, and you're all good people, there have been a blizzard of House Rules violated. Unintentionally, most of them. Secondly, according to Mason's, when rules are violated, and/or there's an act of bad faith, that statute can be thrown out.

"Now I refer you, sir, to earlier this week when we went through the, and this is why we should adjourn and not come back, the membership kurluffle in here that we had. House Rules were never waived. Two House Rules were never waived relating to minority rights to reorganize, and committee rights. That in itself alone is not fatal. But what, Mr. Speaker, I'm giving you a reason why we should adjourn, pending legal action, if you'd like me to explain it I can. It might give you pause, and members of your caucus pause. I have one lawsuit, and I've got another one in the queue.

"The committee assignments, the majority replaced a known 'no' through public utterances with a known 'yes' through public utterances. Subsequently, we tried to replace a known 'yes' through public utterances with a known 'no'. We were forbidden from doing that, so the deck was effectively stacked against us. Relieving us of the dynamic that might occur in a one-vote split where that person who casts the deciding vote would be the person who casts the deciding vote.

"So you see, that's the bad faith issue. We weren't allowed to do what we wanted to do. You never polled the members, Mr. Speaker, you never polled the minority members to see how they felt. A verbal assurance is not the same thing as someone being on record, you also send a letter.

"So the actions spoke of that faith. That and the blizzard of violation of rules provides a, and I'm not insulting you, sir, I love you and you know that. The action itself, it provides a basis for legal action because it's an extraordinary circumstance.

"So you have two issues, one currently under litigation and one that could come of litigation, as soon as we get rolling through tomorrow. So a prudent man would pause."

At this time, the Chair stated:

"Members, I believe we have had sufficient debate. There has been a call for roll call. Mr. Clerk, would you check if there are the required votes for a roll call."

The request for roll call was put to vote by the Chair and upon a show of hands, the request was granted.

Roll call having been approved, the motion that S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," be postponed indefinitely, was put to vote by the Chair, and on the following show of ayes and noes, failed to carry:

Ayes, 19: Aquino, Awana, Cabanilla, Carroll, Cullen, Fale, Fukumoto, Har, Ito, Johanson, Jordan, Matsumoto, McDermott, Oshiro, Tokioka, Tsuji, Ward, Woodson and Yamane.

Noes, 30: Belatti, Brower, Coffman, Evans, Hanohano, Hashem, Ichiyama, Ing, Kawakami, Kobayashi, Lee, Lowen, Luke, McKelvey, Mizuno, Morikawa, Nakashima, Nishimoto, Ohno, Onishi, Rhoads, Saiki, Say, Souki, Takai, Takayama, Takumi, Thielen, Wooley and Yamashita.

Excused, 2: Cachola and Choy.

(Main Motion)

At 7:40 o'clock p.m., Representative Fale requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 7:42 o'clock p.m.

Representative Matsumoto rose to speak in opposition to the measure, stating:

"Mr. Speaker, I'll keep it very brief, this is the first time I've stood up today. In opposition, and I just wanted to say a few brief comments. On this Floor we often hear the statement, 'my community feels' or 'my constituents feel,' but how can we say with certainty what our constituents feel? As a young legislator I believe in public involvement, and that's why I was so encouraged this last week to see how many people came out on both sides to have their voice be heard. I didn't sit on the committee, I'm not on Finance or Judiciary, and so instead I went around and thanked each and every person for coming out, and gave them a Snickers or a Kit-Kat, because I believe in public involvement.

"Many members of this Body have made the point that a vote is the greatest equalizer, and I believe that. We also talk about the 1998 vote. In 1998, I was 11-years-old, Mr. Speaker. I was not old enough to vote. And I believe there was an entire generation that wasn't old enough to vote on this issue. And on something that is so polarizing, I feel that it is so important to put it in the people's hands of Hawaii. I'm not against equal benefits, but I am for putting it to a public vote. Thank you so much."

At 7:44 o'clock p.m., Representative McDermott requested a recess and the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 7:44 o'clock p.m.

Representative Jordan rose to speak in opposition to the measure, stating:

"Thank you, Mr. Speaker. I know I've said a lot today. Some of it was meant for right now, so I won't put you through that. People have been here for a long time today. Probably earlier than I got here. But you know, Mr. Speaker, everybody has heard my vote, they heard what I voted. I'm going to stand by my vote in opposition to SB 1, HD 1.

"I just want to share with you, Mr. Speaker, there was a woman that came on Halloween evening and testified. And I hadn't seen this woman in maybe 20 years. You see, Mr. Speaker, I was so amazed, there were many people I hadn't seen in 13 years, in 10 years, and it's not because we're not friends, it's just that we all get busy with our lives, and I'm like, wow. And some of them move out of our communities, you don't see them any longer. But I was quite surprised and very honored that these people remembered me and came up to me, and they didn't even realize that I was a legislator at this point in time in my life.

"This woman that came and spoke, obviously in opposition to the measure, she went home because some things were said to her out in the hallways. See, she didn't know me on a personal level, she knew me by my professional level. And I didn't know her on a personal level, I knew her family because it's quite large. And she had mentioned that she had a sister-in-law that was in the hospital with a massive stroke. So I took it upon myself to go outside and say hello, and 'which sister-in-law were you talking about?'

"While she was out there waiting to testify, there were some people chattering in the halls. And it was so amazing to see people for and against, chattering out in those halls, and coming to some kind of understanding. And I think that's what we really need to do, Mr. Speaker. There's a lot of people that do support this issue, they just don't know a lot about it right now. And many people testify, we should be doing some *ho'oponopono*, and I don't disagree to that.

"But I'm not going to share the whole email with you, because it does get rather personal. But she felt compelled, after what was said about me in the hallway, to write me, and she even apologized for writing me. But at the end of it she said, 'is this an act? Will you sincerely vote according to all the testimonies given, or have you already decided to vote for SB 1, because of pressures you may sustain if you don't support it?'"

"Mr. Speaker, she was talking about my personal life. I felt so bad for her. I cried. Yes, Mr. Speaker, I sat in my office and cried when I read this. And I'm still trying to figure out the words to respond to her. Because I owe her. No, nobody's going to beat me up. Nobody's going to throw me out of my GLTB community. Not quite sure of that. But I do owe a response to her. And yes, for her satisfaction, I listened to the testimony. I kept my heart and my conscience clear. I set aside my personal beliefs. I said that on the day I stood at that rostrum being sworn in three years ago. I will set aside any of my personal beliefs, any of my personal thoughts, even if I can benefit from this. And I listened to individuals, I listened to testimonies, I listened to experts, and I might vote against something that I personally believe in.

"I personally believe I should have the right. You know how hard it is for me to say 'no'? I have to say 'no'. And I said it earlier. If I need to upraise minorities, I cannot erode anybody else's rights. I personally haven't come to that in the current measure we have before us, Mr. Speaker. I always have my four agreements with me. Be impeccable with my word."

Representative Say rose to yield his time, and the Chair "so ordered."

Representative Jordan continued, stating:

"My four agreements that I shared with you guys twice, up at that rostrum with invocations. And I always go back to it. In fact, I have my book with me, so I can remind myself, because there were some hurtful things said in those hearings, that weren't directed at me because they didn't understand. Be impeccable with my word. Don't take anything personal, Mr. Speaker, and I didn't, I walked away from those hearings not taking anything personal. Don't make assumptions. Everybody made an assumption about who I was and how I was going to vote on this issue. Shame on everybody. Including the media and my fellow legislators here. Don't you have faith in me? Always do my best. I'm doing my best. Yes, I am who I am, and I'm speaking on this Floor doing the best I can. And I will vote no, as the measure is written, and I'm praying that it can be resolved. Thank you, Mr. Speaker."

Representative Johanson rose to speak in opposition to the measure, stating:

"Thank you, Mr. Speaker. I rise in opposition. This has been a very emotional and difficult issue for both the public to grapple with, as well as all of us in the Legislature here. I do think we are called to make difficult decisions, and I think that is what we are all trying to do. I, like many, do not necessarily want to see people in loving relationships denied certain benefits. But I also think that that can be accomplished in ways that we have yet to explore, because it is not necessarily expedient in this special session. I personally think that relief may also come at the federal level, if the IRS or the federal government were to just expand its definition of what would be included for federal tax benefits.

"I think there are myriad ways that we can potentially try to redress a lack of equitability and benefits. This bill, however, in ostensibly trying to grant those benefits, engenders what I think are a whole host of unresolved and unreconciled issues that we are all still grappling with today. My opposition to this bill primarily rests on two points.

"Firstly, this bill does not reconcile the natural tension that is created with the passage of this bill between a newly created state-sanctioned right and First Amendment rights as guaranteed in our time-honored federal constitution. What happens when they conflict? How do we reconcile them? I'm not sure that any one of us 51 members knows how to answer those questions with certainty. And I understand that we may not have those answers, but because this fundamental clash will exist, those answers are things that we need to struggle with, and we need to find, and we need to ascertain with some degree of certainty before moving forward in this course.

"Secondly, I also feel that in a democracy, how do we potentially dismiss the will and the consent of the governed? I don't think we can, nor should we. Under normal circumstances in this Body, the sheer level of opposition to this issue would have been enough to, at the very least, warrant additional time and consideration, if not doom the bill.

"I wholly recognize that many good people will disagree with what I'm saying. But in deference to all of the disagreement, the unreconciled issues, and a bill that may contravene the peoples' will, I must respectfully oppose this bill. Thank you."

Representative Brower rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. In support. I believe, members, if you support the bill, you will find a way to vote up. And if you don't support it, you'll find a way to vote down. No excuses. For me, a good legislator isn't on either side of the issue. He or she is objective.

"And that's in part why I attended, what I will call, quote, 'the House-sponsored Informational Briefing' held prior to special session. And I asked its featured guest there, a professor on constitutional law who flew in to give testimony. My question to him was, would it be better to allow Hawaii's courts to decide the issue of same-sex marriage, or to allow the State Legislature to decide? And I added, couldn't the Legislature provide more protections to the churches? And his response, 'yes, it is much better for the Legislature to make that determination. These types of decisions are part of your responsibilities as a lawmaker.'

"Ironically members, for me, a vote against this bill is a vote in favor of the courts to decide the issue. And as much as I would prefer that the Legislature not have to make this decision, I fear the decision of the courts more. Thank you, Mr. Speaker."

Representative McDermott rose and asked that the Clerk record a no vote for him, and the Chair "so ordered."

Representative Ward rose to speak in opposition to the measure, stating:

"Mr. Speaker, I rise in opposition. As a legislator, I expect that we can do better, we can do better than any state. We're the most beautiful state, we excel in just about everything. But I think this is not the approach that we can take, we need something a little bit more reciprocal, something a bit more balanced, something a bit more of a two-way street. Something where, when I took Peace Corp training on the Big Island when they said, 'something that respects the human value and personal worth of every individual.' The human value and personal worth of every individual. Mr. Speaker, this means if you believe, you don't believe, you're heterosexual, homosexual, whatever sexual, it means all of them.

"We have a bill that's dividing families and people. We are a 237-year-old experiment in self-government. We are now going up to the edge to see whether we can keep ourselves together, where we can be a solid, united, as we do our pledge of allegiance. 'One nation, under God, indivisible.' These are the tears in the social fabric that we are about to bring about.

"Mr. Speaker, I come from a bit of a different background, half of my relatives are Muslims. Half of my relatives don't eat pork. Half of my relatives say, 'how can government tell you to eat pork or that you should be now eating pork?' This is the equivalent of what we're telling a lot of these people here. Everything in this particular bill is acceptable now,

because it's stamped by the state. The state is, in effect, overshadowing, eclipsing, if not taking over the churches.

"Yes, this protects the churches or protects the pastors in a small way, while they're marrying or they're celebrating. What about burying and christening and all the other things? Pastor, it's not there. If the gay couple wanted to have their adopted kid come in there and they said 'no', then people say, 'well that's the First Amendment.' We shouldn't have to defend our First Amendment. Who do we think we are overturning the First Amendment with this bill? Who do we think we are that we can be superior to the First Amendment that 237 years ago, made this country what it is?"

"Mr. Speaker, what we're going to do, we're going to turn each other against each other, and we're going to be in court. We're going to fight this out, word for word, and all the interpretations, public accommodations this, public accommodations that, this is covered, that's not covered. We have a very loosey-goosey bill here for the solidarity of the people of this society. We are legislators responsible for that.

"Mr. Speaker, this is not a responsible bill. It leaves totally silent the human value and personal worth of those who are convicted as individual small businesses. Those who are going to be serving the community. Those are entirely unprotected. The teachers of conscience are unprotected. The mothers who are crying, and as I said will be back as mother bears, who have their children under threat. They are totally amiss of this particular bill, they're not here. But, Mr. Speaker, you know they're coming back.

"This bill marks a dividing line in the sand. We've heard from the Hawaiian community, we've heard from the Polynesian community, we've heard people say things that they never even thought that they would say, we've seen people who gave testimony who never even thought they could speak in public.

"Mr. Speaker, this is a new Hawaii under your jurisdiction. When this bill passes, Hawaii is never the same as we knew it, just like 9/11 was never the same America after the bombs and the planes hit the twin towers. Mr. Speaker, that's a heavy responsibility for all of us. I suggest we all weigh very heavily as we vote for this bill, as we push it on. The responsibility of those who have been elected, to choose the direction of which their society should go. We have a heavy responsibility ahead of us. We are a grand experiment, but Mr. Speaker, we should be very, very mindful of how fragile it's becoming. We love our people, we love our families, let's keep them together. Be a peacemaker, not a divider. Thank you, Mr. Speaker."

Representative Fale rose to speak in opposition to the measure, stating:

"Mr. Speaker, in opposition to the measure. I think a lot of what, there's not much more we can say. I'm tired. The people who are here are tired. We have had an outpouring from the public that has never been seen in the history of Hawaii. And as a matter of deference, Mr. Speaker, I believe that at the very least, we should delay this a little longer to encourage, to let people know, that when you come to your government, they'll hear you.

"This could all be avoided. Nobody wants to deny benefits to anybody. Nobody wants to take away religious rights from somebody. But everybody agrees the manner in which this is being driven forward is wrong. We could take a few more days, we could take a couple more weeks to look at this. We could give the communities around the State of Hawaii an opportunity to weigh in. If I had the opportunity to take this HD 1 back to my community, we could get a different answer back. But until we give people the opportunity, we should not take it away.

"Just on the sheer fact that we have never seen this, ever, in the history of Hawaii, where people are crying out, 'just wait, hold on a second there.' If we are going to completely dismiss that, if we are going to say, 'you came and you spoke.' I hear that phrase more than anything else in this building, that one voice counts and we need to listen to our people. It's just a matter of deference for that. Let's at minimum use the 30 days that we're given, and maybe even the 15-day extension. Just to show the people of

Hawaii that we have heard you say, 'hey, just one second there. Let us look at this. Don't divide us this way.'

"The divisions, the wedges that are being driven into families, into communities, and into this state, Mr. Speaker, will be there for a very long time. Those feelings of hurt, of pain, will be there for a very long time because of the way this is being done. This isn't the way we do things in Hawaii, we don't divide people. And yet we are here standing side-by-side with the Governor upstairs, driving a wedge through the hearts of tens, of hundreds of thousands of people.

"When my little brothers, when my little sister, or anybody in my family comes to me and asks me for a second, I say, 'sure, I got a second.' If thousands of people come out in record numbers to the State Legislature and say, 'hey, can you guys hold on for a second? Can you hear what we have to say? Can we sort through this maybe in a different way? Can we satisfy both sides in such a way where everybody can say, yeah I can live with that?' We haven't even afforded that opportunity, Mr. Speaker.

"I'm concerned about the precedence that this sets. If we can take the most divisive issue, that many people are hurting over, and we can say, if it's okay for our leaders to cause this much pain, to cause this much division, to cause this much hurt, what's the message we are sending to our communities? What's the message we're sending when we have historical, I will never see this turn out, probably, in my entire career in politics. Probably not a single person will ever see what happened at this time, Mr. Speaker."

Representative Fukumoto rose to yield her time, and the Chair "so ordered."

Representative Fale continued, stating:

"So it just doesn't make sense to me. And it doesn't make sense to anybody, whether they're for or against this. Why are you going to pummel this through? I believe that the message we have sent merits a little more time. Merits a little more discussion, merits a little more debate, merits maybe a couple visits to the neighbor islands.

"We're exhausted. The only reason why we're delayed as far as we are is because the people of Hawaii decided to speak. And so here we are today. We know that the intention was to rush this through much faster. And the only reason why it didn't get rushed through the way it was intended was because the people of Hawaii took a stand and said, 'one second.' So I cannot dishonor the amount of effort the children who slept on cold, concrete floors, the mothers and fathers who gave up hundreds of dollars of work.

"I don't know if we understand what they went through. Through this entire process, we were paid to be here. And for those thousands of people who came, cars towed, parking tickets, hundreds of dollars, well maybe that's hundreds of dollars good to the city or whoever collects the money out of the parking meters. But nobody, that time that was spent here, nobody is going to give that time back to the people. Nobody is going to give that money back to the people. And nobody is going to be able to wipe away the memory from those children who came here and learned the lesson that even if you come speak with all your heart, might, mind and strength to your Legislature, they will not listen. Nobody can remove that. That's going to go down in the history books, Mr. Speaker, right along 'record turnout at Legislature in the State of Hawaii. Nothing changed.'

"I think it merits further discussion. This bill shouldn't go through right now, and people should give, this Legislature should give the people of Hawaii a little more credit, as we just received a lesson about from the good Representative from Waianae. Let's give people a little more credit. That's all I have to say, Mr. Speaker."

Representative Brower rose to respond, stating:

"Thank you, Mr. Speaker, just briefly. The previous legislator talked about us creating division and hurt. I would ask members, if you sat in the auditorium in the last few days, who do you think has experienced more hurt in their lives? The people wearing the leis, or the people not wearing

the leis? And who has demonstrated more anger throughout these proceedings? And that's just a rhetorical question. Thank you, Mr. Speaker."

Representative Evans rose to speak in support of the measure, stating:

"Thank you, Mr. Speaker. I stand in support of the bill. I just want to say that the people that showed up to talk were for it and against it. But they all came and they participated in government, and what democracy is all about. And that was very exciting for me to see that.

"I've been at the Legislature for 11 years and I've always seen people get involved at whatever level they want to get involved, on issues that somehow grab them. I know we had just as many people show at the Legislature, just as much chanting, just as much rallying over the GMO taro bill that we had some years back.

"So there's issues that grab the community, grab them, and we don't know what they'll ever be. We introduce bills, we introduce thoughts, we introduce ideas, and so I don't see this at all like the other legislator that spoke before, I see this as a very exciting time in Hawaii's history, and that is where people became more empowered learning how to have a voice, and learning a lot more about democracy and what our process is about.

"I've always told people when I talk to people in my community, it's really interesting how the West Hawaii Today talks an awful lot about the council meetings and what's happening at the council level. You always hear about the rows and the dogs barking, some land use decision about a development, rail transit, you're going to hear about it because it's a local issue. Now how about the congressional. Obama, he talks about things, the federal government, they talk about things and they get a lot of press.

"But I'll tell you, West Hawaii Today normally doesn't talk a whole lot about what we do at the state level. The type of stuff that we vote on, the issues that we try to pass, we get very little coverage. But this one got an awful lot of coverage. And when it got coverage, it engaged people, they found their voice. I'm telling you, hundreds and hundreds and hundreds of people wrote emails or called from district. It was very exciting to understand that people finally felt that, 'I really want to weigh in on this, I really want to say what I want to say.' To me, it was just exciting. To think this won't happen again, of course it will. Physician-assisted suicide, gambling, issues like that that just pull and tug on people and their beliefs. We'll have this again.

"I want to say for the freshmen that came here, my goodness, who would have thought your freshman year you would be involved in something of this magnitude. But you know, we can't ever predict. But I want to say for the people that took the time to network, to get the word out across the state and tell them to get involved, they did a fabulous job. There were so many people that were for it and so many people that were against it, and then a lot of people that were just saying, 'can you find balance? Can you give civil rights, equal rights, and at the same time protect the church?'

"So I really believe this bill tried to find the balance, and I'm very pleased that the Judiciary and the Finance members and the chairs really weighed in on, what I believe, is a bill that tried to strike that balance. For that reason I support the bill. Thank you."

Representative Ward rose to respond, stating:

"Mr. Speaker, just a couple of more comments. I think the phenomenon that we're witnessing is rare. But I think a lot of people came, wanting to remind us that, 'we've already told you guys about this, but I'll show up and try to reinforce it, and let you know that look, this is what we voted on and this is what you should be doing.' Unfortunately, Mr. Speaker, I don't think that they're going to be satisfied with how we voted today, or what direction we are now headed in.

"I find the difficulty is where they're not going to know where to turn. I think the one thing that is the big result of these five days is that they have reached political puberty over five days of seeing the legislative process. You can make up what you want of what political puberty is, but to me it's an awakening to the political process, which they've seen very close, which

they've tried to be convincingly influencing, which they found that they have not been able to. And because of that, and now that they are aware of the system and their eyes are opened, we have got to be prepared for the consequences of that. I think that's where things may be turning. Thank you, Mr. Speaker."

Representative Kobayashi rose to speak in support of the measure, stating:

"Mr. Speaker, I'd like to speak in support. I'd like to explain what I think has been a major problem. We have come from such passionate and different points of view that we are unable to see past our own beliefs. We believe we are right. Each of us, whether we're on this side or on that side. And in a sense, we have gotten to a point where almost no information, no statement, can change our beliefs. Justice Levinson, in joint committee in the auditorium, said in response to a question, 'people believe what they want to believe.'

"Now, on four points, I think this is true. One point, what is the majority? Number two point, is homosexuality a lifestyle choice or somehow rooted in our biology? And on that point hinges the question of whether this is a civil right or not. The third point is people's understanding of God, church and faith. Particularly Christian faith, as was so often mentioned in the auditorium. And the fourth point is process. Is the process fair?

"Now, I don't want to get too academic, but some of us know about something called cognitive dissonance. And cognitive dissonance is that, when we have a discrepancy or a conflict between two things, one set of beliefs and perhaps another set of information or beliefs, we try our hardest to preserve our beliefs, and reject, or explain away, or avoid the new information or the new beliefs of the new things that might change our beliefs. And this, I think, is what has happened on those four points. Who is the majority, lifestyle choice or not, belief in church, God, faith, and is the process fair?

"I don't think there's anything that we can say right now that will change many people's minds, because we are clinging to our own beliefs, and we are protecting those beliefs by shutting out, by avoiding, negating, everything else that is contrary to our beliefs. And I'm afraid that is often the case in many things.

"I once was involved in a very difficult issue having to do with traffic. And many people, on many islands have said, 'traffic is just terrible, terrible' on their island, whether it's Kauai or Big Island or Maui or Honolulu. East Honolulu or West Honolulu. There's a notion of a perceived rightness, or perceived majority. People believe, sometimes, that there is a majority based on what they see. And sometimes, we believe that we have the worst or one of the worst traffic jams because of what we see. We see cars around us all the time, we see the time ticking away. Of course, you can measure traffic jams, but then you get into an argument, how do you measure it? There's a big difference between commuting on the Big Island and commuting here."

Representative Mizuno rose to yield his time, and the Chair "so ordered."

Representative Kobayashi continued, stating:

"I appreciate that. But nonetheless, I would submit that there is much to say about the huge outpouring of real people that showed up in the auditorium. The level of commitment, the level of intensity, the level of passion was huge. But we have seen similar situations where this gallery has been packed on other issues. We don't know whether those people in the gallery represent the majority. I can remember union issues, where you had people all over, and I can tell you sitting here, I couldn't tell you whether the union members there represented the majority of the people.

"I can remember the Hawaii Convention Center, if you remember that. That had a demonstration upstairs the likes of which far exceeded what we saw out there. I mean literally, people thought that the floor was going to collapse because of the thundering and the numbers of people were so huge.

"So the difficulty, of course, is that with a cognitive dissonance kind of thing, a perceived majority becomes a self-reinforcing perceived majority. I think that cannot be avoided. We each here, legislators, I hope are of sound judgment, sincere belief to do the public good, and I think had paid great attention to the details of the bill, to the arguments left and right, and exercised their very best to come up with a decision, 'yes' or 'no'. I think the people have to respect that, because I believe that legislators here have tried their best, are sincere, and want to do the public good.

"But we have a fundamental difference that perhaps cannot be bridged in terms of our beliefs and how we are protecting these beliefs, on those four points that I mentioned. I would suggest to you that we have to say at the end that we tried our level best to figure out who was the majority in each of our districts and in the State of Hawaii. That we looked at the question of whether homosexuality is a lifestyle choice or not. That we heard people express their understanding of God, church and faith. Of course, there were many churches there, some here and some there.

"Lastly, that we believe that we looked at the process, and while any process is not perfect, it was a fair process. So on these four points, I think you have to give the legislators here, who are going to vote, the benefit of the doubt. That they did their very best in coming up with their decision. So on that basis, I would suggest that we continue with discussion, and respect that we all have differences in our beliefs, and we all have differences in the facts that we choose to support our beliefs. Thank you."

Representative Tokioka rose, stating:

"Thank you, Mr. Speaker. Can I ask for a point of information? As a neighbor island Representative, and there's many of us in here, is Third Reading going to be televised on 'Ōlelo? If it is, I'll reserve my comments for Third Reading."

The Chair then stated:

"Yes, it is."

Representative Tokioka continued to speak in opposition to the measure, stating:

"But, Mr. Speaker, as I have the Floor right now, I want to say a couple of things. I rise in opposition to the bill. Second point, and the most important point for me of the day is today is my daughter's 14th birthday. She's not watching because it's not on, but I want to wish her a happy birthday.

"So thank you for allowing the opportunity for 'Ōlelo to broadcast this, because the people from my district, and I'm sure on every neighbor island, want to see what we're doing. And I think most people know me, I'm not a camera hogger, but they want to know what we have to say. So thank you very much, Mr. Speaker."

Representative Aquino rose and asked that the Clerk record a no vote for him, and the Chair "so ordered."

Representative Cullen rose and asked that the Clerk record a no vote for him, and the Chair "so ordered."

Representative Yamane rose to speak in opposition to the measure, stating:

"Mr. Speaker, I'm standing up in opposition with very brief comments. My opposition is a reflection of my community, Mr. Speaker. My community has contacted me in various ways, and we have a clear ratio of over 3.5 to every 1 support, in opposition. My staff, Danielle, can attest to that. She went through hundreds and hundreds and thousands of phone calls, emails, postcards and letters, all around her planning of a wedding, to make sure that every voice of our community was recorded.

"Mr. Speaker, as we have to decide how we're going to choose if we're voting up or down, a lot of people have stated on this Floor that they're making it because of maybe their perception of this value, their perception of that value. However, Mr. Speaker, I want it to be noted that I talked to

many people. Many of our colleagues in this Chamber, I've talked to social workers for and against, doctors for and against, I've talked to my students who are for and against. Many people have expressed very deep feelings about the definition of marriage.

"Mr. Speaker, I think as we went through this process, you've heard families, parents, fearful of what this measure would do, as well as, we've heard, of those people who have felt that their rights and privileges were denied. To both of those sides, we feel for you, we acknowledge that you have a value and your voice is heard. But Mr. Speaker, as many of us are here and contemplating our final vote that'll come up hopefully in a couple of days, I just wanted to note that in many of our communities, this is an issue. This has drawn out a lot of discussion both at home and amongst the community. Many of us here had to decide, which vote is more important? Those that are for and those that are against.

"I even asked my wife what her position is. But because I see her every day, does she equate to 10 people in the community? Right, I have to live with her, so you should take her opinion a little bit more than others. However, Mr. Speaker, as I struggled to decide how I would take every vote, every opinion, every rationale behind this moral or ethical, religious and civil rights issue, it came down to looking at what I was charged to do as an elected official of my community. So, Mr. Speaker, on behalf of my community, I'm in opposition."

Representative Oshiro rose to speak in opposition to the measure, stating:

"Thank you very much, Mr. Speaker. I appreciate the opportunity to use the public forum of debate and discussion to articulate the concerns that I have in the most impassioned way I can based upon my knowledge of the law and my reading of the constitution.

"Just a couple of things to point out in the bill. I don't begrudge my colleagues because of the pressure they were put under to come up with something. It's different from the Senate draft, it's a little bit better, but it's far, far from perfect.

"It merely covers the solemnization ceremony. Nothing more, nothing less. House Bill 6 covered everything, what I call wall-to-wall, within the religious establishment. Whether it's a bar mitzvah, whether it's a baptism, whether it's a funeral, whether it's counseling, whether it's post- or premarital support. This is just a solemnization of marriage. Non-religious solemnizers are not covered, the judges are not covered, that concerns.

"Again, the House bill covered employees and their freedom of conscience, freedom of religion outside of the church grounds in their public walk of life. So I have concerns about this and I'll articulate it even more.

"Let's look at what's not covered here. Individuals of conscience who run a small business, such as a wedding planner, photographer, florist, banquet hall, or making wedding cakes even in one's home, that's like my neighbor, can be sued under public accommodations law for refusing to offer their services in connection with a same-sex marriage ceremony. Religious daycare centers, counseling centers, meeting halls, and adoption agencies can be sued under public accommodations law for refusing to offer their facilities or services to members of the same-sex marriage.

"A church or other religious non-profit that dismisses an employee for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination based on marital status, directly conflicting with the current ministerial exemption under federal and state law. A religious college, hospital, social service organization, that refuses to provide its employees with same-sex spousal benefits can be denied access to government contracts or grants on the grounds that it is engaging in discrimination that contravenes public policy. That provision is not in this draft, it is in House Bill 6. In other words, it protects the organizations, the churches organizations of 501(c)(3), to gain and have access to public funds through grants, contracts, etc.

"A religious charity or fraternal organization that opposes same-sex marriage can be denied access to government facilities, such as a lease on

government property, or participate in government-sponsored employee charitable campaign. It has already occurred in several states. Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage, can have their license revoked. Religious fraternal organizations, or other non-profits, that object to same-sex marriage can be denied food service license, adoption agency license, child care licenses, or liquor licenses, on the grounds that they are engaged in unlawful discrimination.

"Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriage. Church-affiliated organizations can have their tax-exempt status stripped because of their conscientious objecting to same-sex marriage.

"Mr. Speaker, I know that the Chair of the Judiciary Committee never intended that in his draft, but again, this is part and parcel of this ill-conceived, ill-advised special session that we're in, to rush this thing through. It also leaves protections for religious organizations for loss of government benefits, who refuse to recognize same-sex marriage. It provides no protection for individual objectors other than ministers, priests, or other officials of the religious denomination of society. It provides no protection to religious organizations from private lawsuits brought under Hawaii's non-discrimination laws other than for refusal to solemnize a marriage.

"It is not the most robust protections. The most robust protections are found in House Bill 6, based upon the learned scholar and research of the same-sex marriage religious liberty scholars in this text right here.

"I'm just going to wrap this thing up with some closing comments, Mr. Speaker. Conflicts between same-sex marriage and religious conscience are reasonably foreseeable, and for that very reason unnecessary when a prudent legislature acts decisively to protect complimentary human values, liberty and equality, by adopting language that enables both interests to be protected realistically. Without such legislative safeguards, many religious individuals will be forced to engage in conduct that violates their deepest religious beliefs.

"A religious organization will be constrained in crucial aspects of their religious exercise. Hence, the Legislature should take care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of religious liberty. This is entirely consistent with the Hawaii State Constitution that each member of the State Legislature has sworn to uphold and protect. Since its adoption in 1950 and ratification in 1959, the Hawaii Constitution has always protected religious freedom in the strongest of terms."

Representative Say rose to yield his time, and the Chair "so ordered."

Representative Oshiro continued, stating:

"Thank you very much. I cite the Hawaii Constitution, Article I, Section 4. 'No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof'. Hawaii Constitution, Article I, Section 5, and this is the discussion I had with the Attorney General at the hearing last week. 'No person shall be ... denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.' Race, I'm classified as Japanese. My religion might be Christian-Buddhist. Sex, I'm a male. Ancestry, Okinawan.

"Sexual minorities and religious minorities make essentially parallel claims on the larger society, Mr. Speaker, and the strongest features for our case for same-sex marriage make an equally strong case for protecting the religious liberties of dissenters. These parallels have been elaborated by scholars who work principally on religious liberty, and also by scholars who work principally on sexual orientation.

"First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to the individual, free of all non-essential regulation, even when manifested in conduct. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression, in a multi-faceted intimate

relationship with the person they love. For religious believers, the conduct at issue is to live and act consistently with the demands made by the Being, capital B, that they believe in, that made us and holds the whole world together.

"No person who wants to enter same-sex marriage can change their sexual orientation by an act of will, and no religious believer can change his understanding of divine command by any act of will. Religious beliefs can change over time. Far less commonly, sexual orientation may change over time. But these things do not change because government says they must, or because an individual decides they should. Same-sex partners cannot change their sexual orientation, and the religious believer cannot change God's mind.

"In fighting rights to same-sex marriage, state courts have rejected a distinction between sexual orientation and sexual conduct because they have correctly found both orientation and conduct follows from the orientation central to the person's identity. Religious believers also face attempts to dismiss their claims as involving mere conduct outside of scope of any constitutional right and subject to any and all state regulation. This is the premise of denying judicial review to religiously burden laws that are truly general applicability.

"But believers cannot fail to act on God's will. It is no more reasonable for the state to demand that they do so, for the state to demand celibacy of all gays and lesbians. But religious believers and same-sex couples feel compelled to act on these things, part and parcel of their identity. Both same-sex couples and religious dissenters seek to live out their identities in public. Same-sex couples claim a right beyond private behavior in their homes. They claim their right to participate in social institutions, civil marriage. Likewise, religious believers claim a right to follow their faith, not just in worship service, but also in the charitable services provided through their religious organization and in their daily lives.

"Finally, both same-sex couples and religious dissenters face the problems that what they experience among the highest virtues is condemned by others as grave evil. Indeed, Mr. Speaker, I've shared this many, many times, they share so much in common, both are distinct, discrete minorities. Where same-sex couples see loving commitments of mutual care and support, many religious believers see discordant conduct that violates natural law and scriptural command.

"And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry and hate. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risk of intolerant, unjustifiable, burdensome regulation. There is no reason to let either side oppress the other, Mr. Speaker. Same-sex couples can have civil rights, and the state should not force dissenting religious organizations to recognize and facilitate same-sex marriage."

The Chair addressed Representative Oshiro, stating:

"Representative you have stretched your time. Would you please wrap it up?"

Representative Oshiro: "Yes, Mr. Speaker."

Representative Takai rose to a point of order, stating:

"Mr. Speaker, point of order, it's been over 10 minutes, Mr. Speaker."

Speaker Souki: "Please wrap it up."

Representative Oshiro continued, stating:

"Mr. Speaker, when the Defense of Marriage Act was issued, our President, our own *keiki o ka 'aina*, President Obama, made a statement. He applauded the decision of the United States Supreme Court. But in the same proclamation or issuance of his public statement, he made this comment. That as we move forward based upon the Supreme Court's ruling, we cannot, and should not, overextend and abridge the freedom of

religions that are protected within state and our federal constitution. And I think we should take wise and heed the advice of our President Obama, our own *keiki o ka 'aina*. Thank you, Mr. Speaker."

At this time, the Chair stated:

"I think we've had extensive debate and the Chair will now be asking for you to submit, if you want to submit your comments for the record, rather than debate. It will be exclusively for that. I think we've had extensive debate for the last seven hours or so."

Representative Har rose, stating:

"Mr. Speaker, may I please be allowed to speak? This is the single most contentious issue of our time. Thank you, Mr. Speaker. I would appreciate it if you would recognize me to please speak in opposition."

Speaker Souki: "You shall be the last one. Let it be known. Please proceed."

Representative Har rose to speak in opposition to the measure, stating:

"Thank you, Mr. Speaker. I rise in opposition to Senate Bill 1, House Draft 1, and in fact, Standing Committee Report Number 4. I rise in opposition first and foremost, on page 7 of Standing Committee Report Number 4 it states, 'the United States Supreme Court's recent decision in *United States v. Windsor*, held the federal Defense of Marriage Act, unconstitutional on the grounds that it violates basic due process and equal protection principles.'

"Mr. Speaker, the fact of the matter is this. The United States Supreme Court did not invalidate or find DOMA unconstitutional. They found Section 3 unconstitutional. So this is a misrepresentation, this is factually incorrect information. So I would submit that this committee report has factually incorrect information and should be changed. Again, nobody can dispute, the Supreme Court did not strike down DOMA, the Supreme Court only held that Section 3 was unconstitutional. So respectfully, Mr. Speaker, I would ask that the committee report be amended to accurately reflect the facts.

"Secondly, Mr. Speaker, I object to the passage of Senate Bill 1, House Draft 1, because of the process. Going back to the committee report, Mr. Speaker, on page 4, the standing committee report says, 'your Committees find that the over twenty-year history of Hawaii's consideration of this issue is particularly relevant in light of the concerns expressed by some testifiers that the condensed time frame of a special session is inadequate to address such an important issue.'

"Mr. Speaker, let's look at the facts once again, you know I'm an attorney, I can't help myself. Mr. Speaker, first and foremost, the last time this issue was discussed was in 1997, 1998, when you, Mr. Speaker, were in office at that time. Let's look at the numbers. Of the 51 Members in the House of Representatives, only 10 members were a part of this Body in 1997, 1998 when we were having this discussion. So the fact of the matter is, when people say 'we've been debating this issue', 'we', the 41 of us, have not debated this issue. And so when people say, 'no, civil unions, we discussed it in civil unions', Mr. Speaker, as I recall, civil unions were not marriage. We did not have the debate on same-sex issue in civil unions. And that was made very clear when we voted on that bill.

"The fact of the matter is this. No same-sex marriage bill has been heard since 1997. So to say we've been debating this issue amongst all of us is factually incorrect. Consequently, Mr. Speaker, because no bill has been heard since 1997, the public has not had an opportunity to be engaged in the issue of same-sex marriage. Yes, they may have debated it outside, maybe the public just talked about it at the dining room table or at the cooler, but the fact of the matter is the public has not had the opportunity to weigh in on a bill since 1997.

"Secondly, Mr. Speaker, regarding the process. I'm sad to say this, this was raised earlier, I think some of the members know that had we let the process ensue, that perhaps a different result may have come out of the Judiciary Committee. I don't want to embarrass anyone, but we all know

what happened on the Judiciary Committee. We refused to respect the wishes of the minority, which in my opinion is unprecedented, so far as I'm concerned we always rubber stamp whatever the minority does, we respect what they want with respect to their lineup. We replaced a member on the Judiciary Committee who was a well-known 'no' vote with a 'yes' vote. So I would submit, had we let the process ensue, we could be in a very different situation right now, Mr. Speaker.

"We refused to hear House Bill 5, House Bill 6 and House Bill 7. Again, Mr. Speaker, why? We're in special session. When the outcome is preordained, has the process really been respected? We had a lot of debate over the infamous, now defunct, Public Land Development Corporation. And at that time, which by the way I'd like to note was passed in regular session, and at that time people screamed. We listened to the people, we repealed PLDC because we listened to the people. We don't like PLDC because it's not transparent. There's no openness in government, it doesn't allow the public to be engaged, it violates the public process. The same people who waved that flag to repeal PLDC have no comment on this issue when it comes to the public.

"Mr. Speaker, as an attorney, and many of those who are attorneys in this room, when we prepare for a substantive motion, it takes months and months of preparation."

Representative Say rose to yield his time, and the Chair "so ordered."

Representative Har continued, stating

"Thank you, Speaker Emeritus. It takes months and months of time, and as such, before we go before a judge, oftentimes that judge doesn't make a decision immediately, Mr. Speaker. What the judge does is, take it under advisement. And we have to wait."

Representative Ing rose to a point of order, stating:

"Point of order, Mr. Speaker, she's over her time. The Representative, Speaker Emeritus, has already used up his two times to speak."

Representative Ito rose to yield his time, and the Chair "so ordered."

Representative Har continued, stating:

"Thank you, Representative. And so, Mr. Speaker, I'll wrap it up. Again, the judge rarely ever immediately grants that motion then and there after oral arguments. We often have to wait weeks before we have a decision. And here in this situation, after 57-plus hours of testimony, approximately an hour and a half later we went into decision-making. We had a new House Draft 1 and we voted the bill out. Did we really read the 15,000 pages of testimony that we got? It's the equivalent of three reams of Xerox paper. Did we do our due diligence?

"Mr. Speaker, I think the thing that frustrates me the most in this entire process was, a young girl who I met along the way, she testified, Annora Ng, she was number 2585. I asked her, well what's the big deal if we pass this bill during this special session? She said, 'if you pass this it proves that our government doesn't care, our government doesn't listen, our government is disgusting.' Mr. Speaker, I don't want to be a part of a disgusting government. I want our public to be proud of us. And again, I submit, I truly believe that QMark poll is correct. One of our members went on television touting that QMark poll. I believe that the people of Hawaii have in fact changed their views. So what is the harm in allowing them to vote? For these reasons, Mr. Speaker, I respectfully stand in opposition. Thank you."

Representative Fukumoto rose to speak in opposition to the measure, stating:

"Mr. Speaker, I know I already yielded my time so I just wanted to register my opposition in addition to, since I didn't get the opportunity to speak for myself, I wanted to adopt the words of the Representatives from Kapolei, Laie, Moanalua, as well as both Representatives from Mililani, minus our senior Representative's comments about his wife. Thank you," and the Chair "so ordered." (By reference only.)

Representative Carroll rose in opposition to the measure and asked that the remarks of Representative Har be entered into the Journal as her own, and the Chair "so ordered." (By reference only.)

Representative Awana rose in opposition to the measure and asked that the remarks of Representative Har be entered into the Journal as her own, and the Chair "so ordered." (By reference only.)

Representative Fale rose in opposition to the measure and asked that the remarks of Representatives Har and Oshiro be entered into the Journal as his own, and the Chair "so ordered." (By reference only.)

Representative Oshiro rose to disclose a potential conflict of interest, stating:

"Mr. Speaker, I have a question on a potential conflict of interest. I'm a licensed attorney in the State of Hawaii and I need to disclose the possibility of, given the law that we might be passing, it will probably lead to some legal service opportunities for myself. Thank you," and the Chair ruled, "no conflict."

Representative Ing rose to speak in support of the measure, stating:

"Mr. Speaker, I'd just like to ask for the wise comments of the Representative professor from Makiki to be inserted into the Journal as my own. I'd also like a ruling on a potential conflict of interest. I'm a straight man who will be voting on gay rights," and the Chair ruled, "no conflict."

Representative Thielen rose to speak in support of the measure, stating:

"Mr. Speaker, I'm sorry, I just wanted to make sure I cast my 'aye' vote. I thought we were going to have a roll call."

At this time, Representative Fale requested a roll call vote.

The request for roll call was put to vote by the Chair and upon a show of hands, the request was granted.

Roll call having been approved, the motion that S.B. No. 1, HD 1, entitled: "A BILL FOR AN ACT RELATING TO EQUAL RIGHTS," pass Second Reading and be placed on the calendar for Third Reading, was put to vote by the Chair, and on the following show of ayes and noes, carried:

Ayes, 30: Belatti, Brower, Coffman, Evans, Hanohano, Hashem, Ichiyama, Ing, Kawakami, Kobayashi, Lee, Lowen, Luke, McKelvey, Mizuno, Morikawa, Nakashima, Nishimoto, Ohno, Onishi, Rhoads, Saiki, Say, Souki, Takai, Takayama, Takumi, Thielen, Wooley and Yamashita.

Noes, 18: Aquino, Awana, Carroll, Cullen, Fale, Fukumoto, Har, Ito, Johanson, Jordan, Matsumoto, McDermott, Oshiro, Tokioka, Tsuji, Ward, Woodson and Yamane.

Excused, 3: Cabanilla, Cachola and Choy.

#### ADJOURNMENT

At 8:55 o'clock p.m., on motion by Representative Saiki, seconded by Representative Fukumoto and carried, the House of Representatives adjourned until 10:00 o'clock a.m. tomorrow, Thursday, November 7, 2013. (Representatives Cabanilla, Cachola, Choy and Fale were excused.)