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October 14, 2013

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

Dear Senator Ihara:

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

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

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

I. QUESTIONS PRESENTED

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

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

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

II. SHORT ANSWER

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

III. BACKGROUND

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

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

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

Act 217 was the first of several legislative actions taken in response to Baehr, culminating with the passage and ratification of an amendment to the Hawaii Constitution that empowers the Legislature to reserve marriage to opposite-sex couples. Article I, section 23, of the Hawaii Constitution was proposed by the Legislature as House Bill No. 117, 1997 Haw. Sess. Laws 1246, and approved by the electorate on November 3, 1998.¹ The marriage amendment succinctly provides: "The legislature shall have the power to reserve marriage to opposite-sex couples."

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

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

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

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

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

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

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

IV. ANALYSIS

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

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

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

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

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

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

The legislature further finds that the question of whether or not the State should issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people. This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes.

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

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

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

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

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

The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States. [Emphasis added.]

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

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

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

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. . . . The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities.

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

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

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

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

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

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

V. CONCLUSION

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

The Honorable Les Ihara, Jr.
October 14, 2013
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Please do not hesitate to contact me if you have additional questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Louie", with a stylized, cursive flourish.

David M. Louie
Attorney General