FOIA Number: 2013-0028-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Marvin Krislov

Subseries: Steve Neuwirth

OA/ID Number: 8190

FolderID:

Folder Title:
Same Sex Marriage: Caselaw

Stack:	Row:	Section:	Shelf:	Position:
S	113	3	9	2

LEVEL 1 - 2 OF 2 CASES

NINIA **BAEHR**, GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, JOSEPH MELILIO, Plaintiffs-Appellants, v. JOHN C. **LEWIN**, in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellee

No. 15689

Supreme Court of Hawaii

74 Haw. 530; 852 P.2d 44; 1993 Haw. LEXIS 26; 93 Cal. Daily Op. Service 3657

May 5, 1993

May 5, 1993, Filed

SUBSEQUENT HISTORY: [***1] Motion for Reconsideration Denied May 27, 1993, Reported at: *1993 Haw. LEXIS 30.*

PRIOR HISTORY:
Appeal from the First Circuit Court; Civ. No. 91-1394.

DISPOSITION: Vacated and remanded.

HEADNOTES:
PRETRIAL PROCEDURE -- dismissal -- involuntary dismissal -- pleading, defects in general -- clear and certain nature of insufficiency -- availability of relief under any state of facts provable.
PRETRIAL PROCEDURE -- dismissal -- involuntary dismissal -- proceedings and effect -- construction of pleadings.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. The duty of the appellate court is therefore to view the plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing an order dismissing the plaintiff's complaint for failure to state a claim, the appellate court's consideration is strictly limited to the allegations of the complaint, which must be deemed to be true.
PLEADING [***2] -- motions -- judgment on pleadings -- in general.
PLEADING -- motions -- judgment on pleadings -- application and proceedings thereon -- time for pleadings.

A motion for judgment on the pleadings serves much the same purpose as a motion to dismiss for failure to state a claim, except that it is made after the pleadings are closed. A motion for judgment on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and questions of law alone remain.
PLEADING -- motions -- judgment on pleadings -- in general.

A claim that is evidentiary in nature and requires findings of fact to resolve cannot properly be disposed of under the rubric of a motion for judgment on the pleadings.

JUDGMENT -- on motion or summary proceeding -- hearing and determination.

Consideration of matters outside the pleadings transforms a motion seeking dismissal of a complaint into a motion for summary judgment. But resort to matters outside the record, by way of unverified statements of fact in counsel's memorandum or representations made in oral argument or otherwise, cannot accomplish such a transformation.
CONSTITUTIONAL LAW -- personal, [***3] civil, and political rights -- constitutional guarantees in general -- privacy in general.

It is now well established that a right to personal privacy, or a guarantee of certain areas or zones of privacy, is implicit in the United States Constitution.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- privacy in general.

Article I, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." The privacy concept embodied in this constitutional principle is to be treated

as a fundamental right.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- privacy in general.

At a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- privacy in general.
CONSTITUTIONAL LAW -- personal, [***4] civil, and political rights -- constitutional guarantees in general -- marriage, sex, and family.
MARRIAGE -- persons who may marry.

The federal construct of the fundamental right to marry -- subsumed within the right to privacy implicitly protected by the United States Constitution -- presently contemplates unions between men and women.
CONSTITUTIONAL LAW -- construction, operation, and enforcement of constitutional provisions -- general rules of construction -- relation to former or other Constitutions.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- privacy in general.

As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, the Hawaii Supreme Court is free to give broader privacy protection under article I, section 6 of the Hawaii Constitution than that given by the United States Constitution.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- privacy in general.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- marriage, [***5] sex, and family.
MARRIAGE -- persons who may marry.

A right to same-sex marriage is not so rooted in the traditions and collective conscience of Hawaii's people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither is a right to same-sex marriage implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- privacy in general.
CONSTITUTIONAL LAW -- personal, civil, and political rights -- constitutional guarantees in general -- marriage, sex, and family.
MARRIAGE -- persons who may marry.

Article I, section 6 of the Hawaii Constitution does not give rise to a fundamental right of persons of the same sex to marry.
MARRIAGE -- power to regulate and control.
MARRIAGE -- nature of the obligation.
MARRIAGE -- persons who may marry.
MARRIAGE -- licenses and licensing officers.
MARRIAGE -- solemnization or celebration.
DIVORCE -- grounds [***6] -- causes for divorce in general.

The power to regulate marriage is a sovereign function reserved exclusively to the respective states. By its very nature, the power to regulate the marriage contract includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution. In other words, marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship.
MARRIAGE -- nature of the obligation.

Marriage is a partnership to which both partners bring their financial resources as well as their individual energies and efforts.
MARRIAGE -- power to regulate and control.
CONSTITUTIONAL LAW -- construction, operation, and enforcement of constitutional provisions, validity of statutory provisions.

Notwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible state regulation of the [***7] right of access to the marital relationship is subject to constitutional limitations or constraints.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- sex discrimination -- in general.

By its plain language, article I, section 5 of the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.
STATUTES -- construction and operation -- general rules of construction.

The fundamental starting point for statutory interpretation is the language of the statute itself. Where statutory language is plain and unambiguous, it must be construed according to its plain and obvious meaning.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights; sex discrimination -- particular discrimina-

tory practices.
MARRIAGE -- persons who may marry.

On its face, Hawaii Revised Statutes (HRS) § 572-1 (1985) restricts the marital relation to a male and a female. Accordingly, on its face and as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights [***8] -- sex discrimination -- particular discriminatory practices.

It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- bases for discrimination effected in general -- rational or reasonable basis; relation to object or compelling interest.

Whenever a denial of equal protection of the laws is alleged, as a rule the initial inquiry has been whether the legislation in question should be subjected to "strict scrutiny" or to a "rational basis" test.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- bases for discrimination effected in general -- rational or reasonable basis; relation to object or compelling interest.

"Strict scrutiny" analysis is applied to laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the constitution, in which case the laws are presumed to be unconstitutional unless the [***9] state shows compelling state interests which justify such classifications and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- bases for discrimination effected in general -- rational or reasonable basis; relation to object or compelling interest.

Where suspect classifications or fundamental rights are not at issue, the appellate courts of this state have traditionally employed the rational basis test. Under the rational basis test, the inquiry is whether a statute furthers a legitimate state interest.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- sex discrimination -- in general.

HRS § 572-1 establishes a sex-based classification.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- sex discrimination -- in general.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- sex discrimination -- "strict scrutiny" analysis.

Sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution; HRS § 572-1 is therefore subject to the "strict scrutiny" test. [***10]
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- sex discrimination -- "strict scrutiny" analysis.
CONSTITUTIONAL LAW -- equal protection of laws; equal rights -- sex discrimination -- "strict scrutiny" analysis.

HRS § 572-1 is presumed to be unconstitutional unless it can be shown that the statute's sex-based classification is justified by compelling state interests and that it is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

COUNSEL: Daniel R. Foley (Partington & Foley) for plaintiffs-appellants Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melilio.

Sonia Faust (Judy M. C. So with her on the briefs), Deputy Attorneys General, for defendant-appellee John C. Lewin.

On the briefs:

Kirk Cashmere and Evan Wolfson, for amicus curiae Lambda Legal Defense and Education Fund, Inc.

Carl M. Varady (William B. Rubenstein, Ruth E. Harlow, and Matthew A. Coles of American Civil Liberties Union Foundation with him on the brief) for amicus curiae American Civil Liberties Union Foundation of Hawaii.

Lloyd James Hochberg, Jr. (Donald A. Beck and Robert R. Taylor [***11] of Beck & Taylor with him on the brief) for amicus curiae Rutherford Institute of Hawaii.

JUDGES: Moon, Acting C.J., Levinson, J., Intermediate Court of Appeals Chief Judge Burns, in place of Lum, C.J., Recused, Intermediate Court of Appeals Judge Heen, in place of Klein, J., Recused, and Retired Justice Hayashi, * Assigned by Reason of Vacancy. Opinion by Levinson, J., in which Moon, C.J., Joins; Burns, J., concurring in the Result. Concurring Opinion by Burns, J. Dissenting Opinion by Heen, J.

* Retired Associate Justice Hayashi, who was assigned by reason of vacancy to sit with the justices of the supreme court pursuant to article VI, § 2 of

the Constitution of the State of Hawaii and HRS § 602-10 (1985), and whose temporary assignment expired prior to the filing of this opinion, would have joined in the dissent with Associate Judge Heen.

OPINIONBY: LEVINSON

OPINION: [*535] [**48] The plaintiffs-appellants Ninia **Baehr (Baehr)**, Genora Dancel (Dancel), Tammy Rodrigues (Rodrigues), Antoinette Pregil (Pregil), Pat Lagon (Lagon), and Joseph Melilio (Melilio) (collectively "the plaintiffs") appeal the circuit court's order (and judgment entered pursuant thereto) granting the motion of the defendant-appellee [***12] [*536] John C. **Lewin (Lewin)**, in his official capacity as Director of the Department of Health (DOH), State of Hawaii, for judgment on the pleadings, resulting in the dismissal of the plaintiffs' action with prejudice for failure to state a claim against **Lewin** upon which relief can be granted. Because, for purposes of **Lewin's** motion, it is our duty to view the factual allegations of the plaintiffs' complaint in a light most favorable to them (i.e., because we must deem such allegations as true) and because it does not appear beyond doubt that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to the relief they seek, we hold that the circuit court erroneously dismissed the plaintiffs' complaint. Accordingly, we vacate the circuit court's order and judgment and remand this matter to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

On May 1, 1991, the plaintiffs filed a complaint for injunctive and declaratory relief in the Circuit Court of the First Circuit, State of Hawaii, seeking, inter alia: (1) a declaration that Hawaii Revised Statutes (HRS) § 572-1 (1985) n1 -- the section of [***13] the Hawaii Marriage Law enumerating the [r]equisites of [a] valid marriage contract" -- [*537] is unconstitutional insofar as it is construed and applied by the DOH to justify refusing to issue a marriage license on the sole basis that the applicant couple is of the same sex; and (2) preliminary and permanent injunctions prohibiting the future withholding of marriage licenses on that sole basis.

n1 HRS § 572-1 provides:

Requisites of valid marriage contract. In order to make valid the marriage contract, 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 of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;

(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 court 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 [relating to consent of parent or guardian];

(3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;

(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) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained 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 woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

HRS § 572-1 (1985) (emphasis added). In 1984, the legislature amended the statute to delete the then existing prerequisite that "[n]either of the parties is impotent or physically incapable of entering into the marriage state[.]" Act 119, § 1, 1984 Haw. Sess. Laws 238-39 (emphasis added). Correlatively, section 2 of Act 119 amended HRS § 580-21 (1985) to delete as a ground for annulment the fact "that one of the parties was impotent or physically incapable of entering into the marriage state" at the time of the marriage. Id. at 239 (emphasis added). The legislature's own actions thus belie the dissent's wholly unsupported declaration, at 594-95 n.8, that "the purpose of HRS § 572-1 is to promote and protect propagation . . . ."

[***14]

In addition to the necessary jurisdictional and venuerelated averments, the plaintiffs' complaint alleges the [*538] following facts: (1) on or about December 17, 1990, Baehr/Dancel, Rodrigues/Pregil, and Lagon/Melilio (collectively "the applicant couples") filed applications for marriage licenses with the DOH, pursuant to HRS § 572-6 (Supp. 1992); n2 (2) the DOH denied the applicant couples' [*539] marriage license applications solely on the ground that the applicant couples were of the same sex; n3 (3) the applicant couples have complied with all marriage contract requirements and provisions under HRS ch. 572, except that each applicant couple is of the same sex; (4) the applicant couples are otherwise eligible to secure marriage licenses from the DOH, absent the statutory prohibition or construction of HRS § 572-1 excluding couples of the same sex from securing marriage licenses; and (5) in denying the applicant couples' marriage license applications, the DOH was acting in its official capacity and under color of state law.

n2 HRS § 572-6 provides:

> 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, residence; their relationship, if any; the full names of parents; and that all prior marriages, if any, have been dissolved by death or dissolution. If all prior marriages 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 issue 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 the facts required to be stated in such manner and on such form as the department may prescribe.
>
> HRS § 572-6 (Supp. 1992).
>
> HRS § 572-5(a) (Supp. 1992) provides in relevant part that "[t]he department of health shall appoint . . . one or more suitable persons as agents authorized to grant marriage licenses . . . in each judicial circuit."

[***15]

n3 Exhibits "A," "C," and "D," attached to the plaintiffs' complaint, purport to be identical letters dated April 12, 1991, addressed to the respective applicant couples, from the DOH's Assistant Chief and State Registrar, Office of Health Status Monitoring, which stated:

> This will confirm our previous conversation in which we indicated that the law of Hawaii does not treat a union between members of the same sex as a valid marriage. We have been advised by our attorneys that a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes, must be one in which the parties to the marriage contract are of different sexes. In view of the foregoing, we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract within the meaning of ch. 572. Even if we did issue a marriage license to you, it would not be a valid marriage under Hawaii law.
>
> (Emphasis added.)

Based on the foregoing factual allegations, the plaintiffs' complaint avers that: (1) the DOH's interpretation [***16] and application of HRS § 572-1 to deny same-sex couples access to marriage licenses violates the plaintiffs' right to privacy, as guaranteed by article I, section 6 of the Hawaii [*540] Constitution, n4 as well as to the equal protection of the laws and due process of law, as guaranteed by article I, section 5 of the Hawaii Constitution; n5 (2) the plaintiffs have no plain, adequate, or complete remedy at law to redress their alleged injuries; and (3) the plaintiffs are presently suffering and will continue to suffer irreparable injury from the DOH's acts, policies, and practices in the absence of declaratory and injunctive relief.

n4 Article I, section 6 of the Hawaii Constitution provides:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Haw. Const. art. I, § 6 (1978).

n5 Article I, section 5 of the Hawaii Constitution provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor 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.

Haw. Const. art. I, § 5 (1978).

[***17]

On June 7, 1991, **Lewin** filed an amended answer to the plaintiffs' complaint. In his amended answer, **Lewin** asserted the defenses of failure to state a claim upon which relief can be granted, sovereign immunity, qualified immunity, and abstention in favor of legislative action. n6 With regard to the plaintiffs' factual allegations, **Lewin** admitted: (1) his residency and status as the director of the DOH; (2) that on or about December 17, 1990, the applicant couples personally appeared before an [*541] authorized agent of the DOH and applied for marriage licenses; (3) that the applicant couples' marriage license applications were denied on the ground that each couple was of the same sex; and (4) that the DOH did not address the issue of the premarital examination required by HRS § 572-7(a) (Supp. 1992) n7 "upon being advised" that the applicant couples were of the same sex. **Lewin** denied all of the remaining allegations of the complaint.

n6 **Lewin's** motion for judgment on the pleadings relied exclusively on the ground that the plaintiffs' complaint failed to state a claim upon which relief could be granted, and the circuit court granted the motion and entered judgment in **Lewin's** favor on that basis alone. Accordingly, the merits of **Lewin's** other defenses are not at issue in this appeal, and we do not reach them.

[***18]

n7 In substance, HRS § 572-7(a) (Supp. 1992) requires "the female" to accompany a marriage license application with a signed physician's statement verifying that she has been given a serological test for immunity against rubella and has been informed of the adverse effects of rubella on fetuses. The statute exempts from the examination requirement those females who provide proof of live rubella virus immunization or laboratory evidence of rubella immunity, "or who, by reason of age or other medically determined condition [are] not and never will be physically able to conceive a child." Id.

On July 9, 1991, **Lewin** filed his motion for judgment on the pleadings, pursuant to Hawaii Rules of Civil Procedure (HRCP) 12(h)(2) (1990) n8 and 12(c) (1990), n9 and to dismiss the plaintiffs' complaint, pursuant to HRCP [*542] 12(b)(6) (1990), n10 and memorandum in support thereof in [*543] the circuit court. The memorandum was unsupported by and contained no references to any affidavits, depositions, answers to interrogatories, or admissions on file. Indeed, the record in this case suggests that [***19] the parties have not conducted any formal discovery.

n8 HRCP 12(h)(2) (1990) provides in relevant part that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made . . . by motion for judgment on the pleadings . . . ."

n9 HRCP 12(c) provides:

Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

HRCP 12(c) (1990).

HRCP 56 provides in relevant part:

(b) For Defending Party. A party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the plead-

ings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in any affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. . . .

HRCP 56 (1990).

[***20]

n10 HRCP 12(b) provides in relevant part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

HRCP 12(b) (1990).

In his memorandum, **Lewin** urged that the plaintiffs' complaint failed to state a claim upon which relief could be granted for the following reasons: (1) the state's [***21] marriage laws "contemplate marriage as a union between a man and a woman"; (2) because the only legally recognized right to marry "is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages"; n11 (3) the state's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships"; (4) the state is under no obligation "to take affirmative steps to provide homosexual unions with its official approval"; (5) the state's marriage laws "protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to [*544] children born to married persons" and, in addition, "constitute a statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs"; (6) assuming the plaintiffs are homosexuals (a fact not pleaded in the plaintiffs' complaint), n12 they "are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude"; and (7) even if heightened judicial solicitude is warranted, the [***22] state's marriage laws "are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained."

n11 "Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. A "homosexual" person is defined as "[o]ne sexually attracted to another of the same sex." Taber's Cyclopedic Medical Dictionary 839 (16th ed. 1989). "Homosexuality" is "sexual desire or behavior directed toward a person or persons of one's own sex." Webster's Encyclopedic Unabridged Dictionary of the English Language 680 (1989). Conversely, "heterosexuality" is "[s]exual attraction for one of the opposite sex," Taber's Cyclopedic Medical Dictionary at 827, or "sexual feeling or behavior directed toward a person or persons of the opposite sex." Webster's Encyclopedic Unabridged Dictionary of the English Language at 667. Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

[***23]

n12 **Lewin** is correct that the plaintiffs' complaint does not allege that the plaintiffs, or any of them, are homosexuals. Thus it is **Lewin**, who, by virtue of his motion for judgment on the pleadings, has sought to place the question of homosexuality in issue.

The plaintiffs filed a memorandum in opposition to **Lewin's** motion for judgment on the pleadings on August 29, 1991. Citing *Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981)*, and *Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 368 P.2d 887 (1962)*, they argued that,

for purposes of Lewin's motion, the circuit court was bound to accept all of the facts alleged in their complaint as true and that the complaint therefore could not be dismissed for failure to state a claim unless it appeared beyond doubt that they could prove no set of facts that would entitle them to the relief sought. Proclaiming their homosexuality and asserting a fundamental constitutional right to sexual orientation, the plaintiffs reiterated their position that the DOH's refusal to [***24] issue marriage licenses to the applicant couples violated their rights to privacy, equal protection of the laws, and due process of law under article I, sections 5 and 6 of the Hawaii Constitution.

[*545] The circuit court heard Lewin's motion on September 3, 1991, and, on October 1, 1991, filed its order granting Lewin's motion for judgment on the pleadings on the basis that Lewin was "entitled to judgment in his favor as a matter of law" and dismissing the plaintiffs' complaint with prejudice. n13 The plaintiffs' timely appeal followed.

n13 A final and appealable judgment in Lewin's favor and against the plaintiffs was filed contemporaneously with the order granting the motion for judgment on the pleadings.

II. JUDGMENT ON THE PLEADINGS WAS ERRONEOUSLY GRANTED.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. *Ravelo v. County of Hawaii, 66 Haw. 194, 198, 658 P.2d 883, 886 (1983)* [***25] (quoting *Midkiff, 45 Haw. at 414, 368 P.2d at 890); Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 185-86*, cert. denied, *67 Haw. 686, 744 P.2d 781 (1985)*. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. *Ravelo, 66 Haw. at 199, 658 P.2d at 886*. For this reason, in reviewing the circuit court's order dismissing the plaintiffs' complaint in this case, our consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true. *Au, 63 Haw. at 214, 626 P.2d at 177 (1981)*.

An HRCP 12(c) motion serves much the same purpose as an HRCP 12(b)(6) motion, except that it is made after [*546] the pleadings are closed. *Marsland, 5 Haw. App. at 474, 701 P.2d at 186*. "'A Rule 12(c) motion . . . for [***26] a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain.'" *Id. at 475, 701 P.2d at 186* (citing 5 Wright and Miller, Federal Practice and Procedure: Civil § 1357 (1969)).

Based on the foregoing authority, it is apparent that an order granting an HRCP 12(c) motion for judgment on the pleadings must be based solely on the contents of the pleadings. A claim that is evidentiary in nature and requires findings of fact to resolve cannot properly be disposed of under the rubric of HRCP 12(c). Cf. *Nawahie v. Goo Wan Hoy, 26 Haw. 111 (1921)* ("Only such facts as were properly before the court below at the time of the rendition of the decree appealed from and which appear in the record . . . on appeal will be considered. All other matters will be treated as surplusage and of course will be disregarded.") We have recognized that consideration of matters outside the pleadings transforms a motion seeking dismissal of a complaint into an HRCP 56 motion for summary judgment. See *Au, 63 Haw. at 213, 626 P.2d at 176;* [***27] *Del Rosario v. Kohanuinui, 52 Haw. 583, 483 P.2d 181 (1971);* HRCP 12(b) (1990); cf. HRCP 12(c) (1990). But resort to matters outside the record, by way of "[u]nverified statements of fact in counsel's memorandum or representations made in oral argument" or otherwise, cannot accomplish such a transformation. See *Au, 63 Haw. at 213, 626 P.2d at 177;* cf. *Asada v. Sunn, 66 Haw. 454, 455, 666 P.2d 584, 585 (1983); Mizoguchi v. State Farm Mut. Auto. Ins. Co., 66 Haw. 373, 381-82, 663 P.2d 1071, 1076-77 (1983);* HRCP 56(e) (1990).

[*547] A. The Circuit Court Made Evidentiary Findings of Fact.

Notwithstanding the absence of any evidentiary record before it, the circuit court's October 1, 1991 order granting Lewin's motion for judgment on the pleadings contained a variety of findings of fact. For example, the circuit court "found" that: (1) HRS § 572-1 "does not infringe upon a person's individuality or lifestyle decisions, and none of the plaintiffs has provided testimony to the [***28] contrary"; (2) HRS § 572-1 "does not . . . restrict [or] burden . . . the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "the plaintiffs have failed to show that they have been ostracized or oppressed in Hawaii and have opted instead to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of 'political powerlessness.' . . . [T]here is no evidence that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; (6) the

"[p]laintiffs have failed to show that homosexuals constitute a suspect class for equal protection analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution;" (7) "the issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community"; n14 and (8) HRS § 572-1 "is obviously designed to promote the general welfare interests of the [*548] community by sanctioning traditional man-woman family units and procreation." [***29] (Emphasis added.)

n14 For the reasons stated, infra, in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes "an immutable trait" because it is immaterial whether the plaintiffs, or any of them, are homosexuals. Specifically, the issue is not material to the equal protection analysis set forth in section II. C of this opinion, infra at 557-580. Its resolution is unnecessary to our ruling that HRS § 572-1, both on its face as applied, denies same-sex couples access to the marital status and its concomitant rights and benefits. Its resolution is also unnecessary to our conclusion that it is the state's regulation of access to the marital status, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution. See infra at 558-571. And, in particular, it is immaterial to the exercise of "strict scrutiny" review, see infra at 571-580, inasmuch as we are unable to perceive any conceivable relevance of the issue to the ultimate conclusion of law -- which, in the absence of further evidentiary proceedings, we cannot reach at this time -- regarding whether HRS § 572-1 furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights. See infra at 580-81.

In light of the above, we disagree with Chief Judge Burns's position that "questions whether heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated' are relevant questions of fact[.]" Concurring opinion at 587. This preoccupation seems simply to restate the immaterial question whether sexual orientation is an "immutable trait."

[***30]

Although not expressly denominated as such, the circuit court's order also contained a number of conclusions of law. n15 These included: (1) "[t]he right to enter into a homosexual marriage is not a fundamental right protected by [a]rticle I, [s]ection 6 of the Hawaii State Constitution"; (2) the right to be free from the denial of a person's [*549] civil rights or from discrimination in the exercise thereof because of "sexual orientation [is] . . . covered under [a]rticle I, [s]ection 5 of the State Constitution"; (3) HRS § 572-1 "permits heterosexual marriages but not homosexual marriages" and "does not violate the due process clause of [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (4) HRS § 572-1 "represents a legislative decision to extend the benefits of lawful marriage only to traditional family units which consist of male and female partners"; (5) "[b]ecause [entering into a] homosexual marriage [is not] a fundamental [constitutional] right . . ., the provisions of section 572-1 do not violate the due process clause of [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (6) "[h]omosexuals do not constitute a 'suspect class' for purposes of equal protection [***31] analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (7) "a group must have been subject to purposeful, unequal treatment or have been relegated to a position of political powerlessness in order to be considered a 'suspect class' for the purposes of constitutional analysis"; (8) "[a] law which classifies on the basis of race deserves the utmost judicial scrutiny because race clearly qualifies as a suspect classification. The same cannot be convincingly said with respect to homosexuals as a group"; (9) "the classification created by section 572-1 must meet only the rational relationship test"; (10) "[t]he classification of section 572-1 meets the rational relationship test"; (11) "[s]ection 572-1 is clearly a rational, legislative effort to advance the general welfare of the community by permitting only heterosexual couples to legally marry"; and, finally, (12) Lewin "is entitled to judgment in his favor as a matter of law[.]"

n15 A "conclusion of law," for present purposes, is either: (1) a "[f]inding by [the] court as determined through application of rules of law"; (2) "[p]ropositions of law which [the] judge arrives at after, and as a result of, finding certain facts in [the] case[;]" or (3) "[t]he final judgment or decree required on [the] basis of facts found[.]" Black's Law Dictionary 290 (6th ed. 1990). The second category may constitute such "mixed questions of fact and law" as "are dependent upon the facts and circumstances of each individual case[.]" See *Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991).*

[***32]

In reviewing the circuit court's order on appeal, as noted above, we must deem all of the factual allegations

of [*550] the plaintiffs' complaint as true or admitted, see *Au, 63 Haw. at 214, 626 P.2d at 177; Marsland, 5 Haw. App. at 475, 701 P.2d at 186,* and, in the absence of an evidentiary record, ignore all of the circuit court's findings of fact. See *Au, 63 Haw. at 213, 626 P.2d at 177; Marsland, 5 Haw. App. at 475, 701 P.2d at 186;* cf. *Asada, 66 Haw. at 455, 666 P.2d at 585; Mizoguchi, 66 Haw. at 381-82, 663 P.2d at 1076-77; Nawahie, 26 Haw. at 111;* HRCP 12(c) and 56(e). Ultimately, our task on appeal is to determine whether the circuit court's order, stripped of its improper factual findings, supports its conclusion that Lewin is entitled to judgment as a matter of law and, by implication, that it appears beyond doubt that the plaintiffs [***33] can prove no set of facts in support of their claim that would entitle them to relief under any alternative theory. See *Ravelo, 66 Haw. at 198-99; Au, 63 Haw. at 214, 626 P.2d at 177; Marsland, 5 Haw. App. at 474-75.*

We conclude that the circuit court's order runs aground on the shoals of the Hawaii Constitution's equal protection clause and that, on the record before us, unresolved factual questions preclude entry of judgment, as a matter of law, in favor of Lewin and against the plaintiffs. Before we address the plaintiffs' equal protection claim, however, it is necessary as a threshold matter to consider their allegations regarding the right to privacy (and, derivatively, due process of law) within the context of the record in its present embryonic form.

B. The Right to Privacy Does Not Include a Fundamental Right to Same-Sex Marriage.

It is now well established that "'a right to personal privacy, or a guarantee of certain areas or zones of privacy,' is implicit in the United States Constitution." *State v. Mueller, 66 Haw. 616, 618, 671 P.2d 1351, 1353 [*551] (1983)* [***34] (quoting *Roe v. Wade, 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973)).* And article I, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Haw. Const. art. I, § 6 (1978). The framers of the Hawaii Constitution declared that the "privacy concept" embodied in article I, section 6 is to be "treated as a fundamental right[.]" *State v. Kam, 69 Haw. 483, 493, 748 P.2d 372, 378 (1988)* (citing Comm. Whole Rep. No. 15, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 1024 (1980)).

When article I, section 6 of the Hawaii Constitution was being adopted, the 1978 Hawaii Constitutional Convention, acting as a committee of the whole, clearly articulated the rationale for its adoption:

> By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. . . . This [***35] right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut, [381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)], Eisenstadt v. Baird, [405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)],* Roe v. Wade, etc. It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding [*552] this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.

Comm. Whole Rep. No. 15, 1 Proceedings, at 1024. This court cited the same passage in *Mueller, 66 Haw. at 625-26, 671 P.2d at 1357-58,* in an attempt to determine the "intended scope of privacy [***36] protected by the Hawaii Constitution." *Id. at 626, 671 P.2d at 1358.* We ultimately concluded in Mueller that the federal cases cited by the Convention's committee of the whole should guide our construction of the intended scope of article I, section 6. Id.

Accordingly, there is no doubt that, at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. In this connection, the United States Supreme Court has declared that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail, 434 U.S. 374, 384, 98 S. Ct. 673, 680, 54 L. Ed. 2d 618 (1978).* The issue in the present case is, therefore, whether the "right to marry" protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because [***37] there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in Mueller, looks to federal cases for guidance.

The United States Supreme Court first characterized the right of marriage as fundamental in *Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).* In Skinner, the right to marry [*553] was inextricably linked to the right of procreation. The dispute before the court arose out of

an Oklahoma statute that allowed the state to sterilize "habitual criminals" without their consent. In striking down the statute, the Skinner court indicated that it was "dealing . . . with legislation which involve[d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id. at 541, 62 S. Ct. at 1113* (emphasis added). Whether the court viewed marriage and procreation as a single indivisible right, the least that can be said is that it was obviously contemplating unions between men and women when it ruled [***38] that the right to marry was fundamental. This is hardly surprising inasmuch as none of the United States sanctioned any other marriage configuration at the time.

The United States Supreme Court has set forth its most detailed discussion of the fundamental right to marry in Zablocki, supra, which involved a Wisconsin statute that prohibited any resident of the state with minor children "not in his custody and which he is under obligation to support" from obtaining a marriage license until the resident demonstrated to a court that he was in compliance with his child support obligations. *434 U.S. at 376, 98 S. Ct. at 675.* The Zablocki court held that the statute burdened the fundamental right to marry; applying the "strict scrutiny" standard to the statute, the court invalidated it as violative of the fourteenth amendment to the United States Constitution. *Id. at 390-91, 98 S. Ct. at 683.* In so doing, the Zablocki court delineated its view of the evolution of the federally recognized fundamental right of marriage as follows:

Long ago, in *Maynard v. Hill, 125 U.S. 190[, 8 S. Ct. 723, 31 L. Ed. 654]* [***39] (1888), the Court characterized marriage as "the most important relation [*554] in life," *id., at 205, [8 S. Ct., at 726,]* and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id., at 211[, 8 S. Ct., at 729].* In *Meyer v. Nebraska, 262 U.S. 390[, 43 S. Ct. 625, 67 L. Ed. 1042]* (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause, *id., at 399, [43 S. Ct., at 626,]* and in *Skinner v. Oklahoma ex rel. Williamson, supra,* marriage was described as "fundamental to the very existence and survival of the race," *316 U.S., at 541[, 62 S. Ct., at 1113].*

. . . .

It is not surprising that the decision to marry has been placed on the same level of importance as [***40] decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe v. Wade, supra,* or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings . . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only [*555] relationship in which the State of Wisconsin allows sexual relations legally to take place.

Id. at 384-86, 98 S. Ct. at 680-81 (citations and footnote omitted). Implicit in the Zablocki court's link between the right to marry, on the one hand, and the fundamental rights of [***41] procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others.

The foregoing case law demonstrates that the federal construct of the fundamental right to marry -- subsumed within the right to privacy implicitly protected by the United States Constitution -- presently contemplates unions between men and women. (Once again, this is hardly surprising inasmuch as such unions are the only state-sanctioned marriages currently acknowledged in this country.)

Therefore, the precise question facing this court is whether we will extend the present boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right. There is no doubt that "[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection [under article I, section 6 of the Hawaii Constitution] than that given by the federal [***42] constitution." *Kam, 69 Haw. at 491, 748 P.2d at 377* (citations omitted). However, we have also held that the privacy right found in article I, section 6 is similar to the federal right and that no "purpose to lend talismanic effect" to abstract phrases such as "intimate decision" or "personal autonomy" can "be inferred from [article I, section 6], any more than . . . from [*556] the federal decisions." *Mueller, 66 Haw. at 630, 671 P.2d at 1360.*

In Mueller, this court, in attempting to circumscribe the scope of article I, section 6, found itself ultimately "led back to" the landmark United States Supreme Court

cases "in [its] search for guidance" on the issue. *Id. at 626, 671 P.2d at 1358.* In the case that first recognized a fundamental right to privacy, *Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965)*, the court declared that it was "deal[ing] with a right . . . older than the Bill of Rights[.]" *Id. at 486, 85 S. Ct. at 1682.* [***43] And in a concurring opinion, Justice Goldberg observed that judges "determining which rights are fundamental" must look not to "personal and private notions," but to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ."
Id. at 493, 85 S. Ct. at 1686-87 (Goldberg, J., concurring) (citations omitted). n16

n16 In Mueller, this court cited *Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937)*, for the proposition that only rights that are implicit in the concept of ordered liberty can be deemed fundamental. Pursuant to that standard, this court held that a prostitute did not have a fundamental right under article I, section 6 of the Hawaii Constitution to conduct business in her own home. *66 Haw. at 628, 630, 671 P.2d at 1359-60.*

[***44]

Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our [*557] people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.

Our holding, however, does not leave the applicant couples without a potential remedy in this case. As we will discuss below, the applicant couples are free to press their equal protection claim. If they are successful, the State of Hawaii will no longer be permitted to refuse marriage licenses to couples merely on the basis that they are of the same sex. But there is no fundamental right to marriage for same-sex couples under article I, section 6 of the Hawaii Constitution.

C. Inasmuch as the Applicant [***45] Couples Claim That the Express Terms of HRS § 572-1, which Discriminates against Same-Sex Marriages, Violate Their Rights under the Equal Protection Clause of the Hawaii Constitution, the Applicant Couples Are Entitled to an Evidentiary Hearing to Determine Whether Lewin Can Demonstrate that HRS § 572-1 Furthers Compelling State Interests and Is Narrowly Drawn to Avoid Unnecessary Abridgments of Constitutional Rights.

In addition to the alleged violation of their constitutional rights to privacy and due process of law, the applicant couples contend that they have been denied the equal protection of the laws as guaranteed by article section 5 [*558] of the Hawaii Constitution. On appeal, the plaintiffs urge and, on the state of the bare record before us, we agree that the circuit court erred when it concluded, as a matter of law, that: (1) homosexuals do not constitute a "suspect class" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution; n17 (2) the classification created by HRS § 572-1 is not subject to "strict scrutiny," but must satisfy only the "rational relationship" test; and (3) HRS § 572-1 satisfies the rational relationship [***46] test because the legislature "obviously designed [it] to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."

n17 For the reasons stated, infra, in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a "suspect class" because it is immaterial whether the plaintiffs, or any of them, are homosexuals. See supra note 14.

1. Marriage is a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation.

The power to regulate marriage is a sovereign function reserved exclusively to the respective states. *Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980);* see *O'Neill v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973).* By its very nature, the power to regulate the marriage relation includes the power [***47] to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the [*559] grounds for marital dissolution. Id.; see also *Maynard v. Hill, supra.*

In other words, marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship. This court construes marriage as "'a partnership to which both partners bring their financial resources as well as their individual energies and efforts.'" *Gussin v. Gussin, 73 Haw. 470, 483, 836 P.2d 484, 491 (1992)* (citation omitted); *Myers v. Myers, 70 Haw. 143, 154, 764 P.2d 1237, 1244,* reconsideration denied, *70 Haw. 661, 796 P.2d 1004 (1988); Cassiday v. Cassiday, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986).* [***48] So zealously has this court guarded the state's role as the exclusive progenitor of the marital partnership that it declared, over seventy years ago, that "common law" marriages -- i.e., "marital" unions existing in the absence of a state-issued license and not performed by a person or society possessing governmental authority to solemnize marriages -- would no longer be recognized in the Territory of Hawaii. *Parke v. Parke, 25 Haw. 397, 404-05 (1920).* n18

n18 In Parke, a "common law" petitioner sought unsuccessfully to derive the benefits of inheritance rights unique to a married spouse, apparently having affirmatively chosen not to seek the state-conferred status of a lawful marriage "partner." *Id. at 398, 405.* A "same sex spouse" suffered the identical fate in *De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984)* (two persons of same sex cannot contract common law marriage, notwithstanding state's recognition of common law marriage between persons of different sex), a decision on which Lewin relies in his answering brief. It is ironic that, in arguing before the circuit court that Hawaii's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships" and in urging before this court that their "relationships are not disturbed in any manner by" HRS § 572-1, Lewin implicitly suggests that the applicant couples should be content with a de facto status that the state declines to acknowledge de jure and that lacks the statutory rights and benefits of marriage. See infra at 560-62.

[***49]

[*560] Indeed, the state's monopoly on the business of marriage creation has been codified by statute for more than a century. HRS § 572-1(7), descended from an 1872 statute of the Hawaiian Kingdom, conditions a valid marriage contract on "[t]he marriage ceremony be[ing] performed in the State by a person or society with a valid license to solemnize marriages[.]" HRS § 572-11 (1985) accords the DOH sole authority to grant licenses to solemnize marriages, and HRS § 572-12 (1985) restricts the issuance of such licenses to clergy, representatives of religious societies (such as the Society of Friends) not having clergy but providing solemnization by custom, and judicial officers. Finally, HRS §§ 572-5 and 572-6 vest the DOH with exclusive authority to issue licenses to marriage applicants and to ensure that the general requisites and procedures prescribed by HRS chapter 572 are satisfied.

The applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status. Although it is unnecessary in this opinion to engage in [***50] an encyclopedic recitation of all of them, a number of the most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates, under HRS chapter 235 (1985 and Supp. 1992); (2) public assistance from and exemptions relating to the Department of Human Services under HRS chapter 346 (1985 and Supp. 1992); (3) control, division, acquisition, and disposition of community [*561] property under HRS chapter 510 (1985); (4) rights relating to dower, curtesy, and inheritance under HRS chapter 533 (1985 and Supp. 1992); (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, HRS chapter 560 (1985 and Supp. 1992); (6) award of child custody and support payments in divorce proceedings under HRS chapter 571 (1985 and Supp. 1992); (7) the right to spousal support pursuant to HRS § 572-24 (1985); (8) the right to enter into premarital agreements under HRS chapter 572D (Supp. 1992); (9) the right to change of name pursuant to HRS § 574-5(a)(3) (Supp. 1992); (10) the right to file a nonsupport action under HRS chapter 575 (1985 and Supp. 1992); [***51] (11) post-divorce rights relating to support and property division under HRS chapter 580 (1985 and Supp. 1992); (12) the benefit of the spousal privilege and confidential marital communications pursuant to Rule 505 of the Hawaii Rules of Evidence (1985); (13) the benefit of the exemption of real property from attachment or execution under HRS chapter 651 (1985); and (14) the right to bring a wrongful death action under HRS chapter 663 (1985 and Supp. 1992). For present purposes, it is not disputed that the applicant couples would be entitled to all of these marital rights and benefits, but for the fact that they are denied access to the state-conferred legal status of marriage.

2. HRS § 572-1, on its face, discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal

protection clause of article I, section 5 of the Hawaii Constitution.

Notwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible [*562] state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints. See, e.g., *Zablocki, 435 U.S. at 388-91, 98 S. Ct. at 682-83;* [***52] *Loving v. Virginia, 388 U.S. 1, 7-12, 87 S. Ct. 1817, 1821-24, 18 L. Ed. 2d 1010 (1967); Salisbury, 501 F. Supp. at 107* (citing *Johnson v. Rockefeller, 58 F.R.D. 42 (S.D.N.Y. 1972)).* It has been held that a state may deny the right to marry only for compelling reasons. *Salisbury, 501 F. Supp. at 107; Johnson, supra.* n19

n19 For example, states, including Hawaii, may and do prohibit marriage for such "compelling" reasons as consanguinity (to prevent incest), see, e.g., HRS § 572-1(1), immature age (to protect the welfare of children), see, e.g., HRS §§ 572-1(2) and 572-2 (1985), presence of venereal disease (to foster public health), see, e.g., HRS § 572-1(5), and to prevent bigamy, see, e.g., HRS § 572-1(3). See also *Zablocki, 434 U.S. at 392, 98 S. Ct. at 684* (concurring opinion of Stewart, J.); *Salisbury, 501 F. Supp. at 107.*

[***53]

The equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution somewhat concisely provides, in relevant part, that a state may not "deny to any person within its jurisdiction the equal protection of the laws." Hawaii's counterpart is more elaborate. Article I, section 5 of the Hawaii Constitution provides in relevant part that "[n]o person shall . . . be denied the equal protection of the laws, nor 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." (Emphasis added.) Thus, by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly [*563] pursuit of happiness by free [people]." *Loving, 388 U.S. at 12, 87 S. Ct. at 1824.* So "fundamental" does the United States Supreme Court consider the [***54] institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of [men and women.]'" Id. (quoting *Skinner, 316 U.S. at 541, 62 S. Ct. at 1113).*

Black's Law Dictionary (6th ed. 1990) defines "civil rights" as synonymous with "civil liberties." Id. at 246. "Civil liberties" are defined, inter alia, as "[p]ersonal, natural rights guaranteed and protected by Constitution; e.g., . . . freedom from discrimination . . . . Body of law dealing with natural liberties . . . which invade equal rights of others. Constitutionally, they are restraints on government." Id. This court has held, in another context, that such "privilege[s] of citizenship . . . cannot be taken away [on] any of the prohibited bases of race, religion, sex or ancestry" enumerated in article I, section 5 of the Hawaii Constitution and that to do so violates the right to equal protection of the laws as guaranteed by that constitutional provision. *State v. Levinson, 71 Haw. 492, 499, 795 P.2d 845, 849-50 (1990)* (exclusion of female jurors solely because of [***55] their sex denies them equal protection under Hawaii Constitution) (emphasis added).

Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female. "'[T]he fundamental starting point for statutory interpretation is the language of the statute itself. . . . [W]here the statutory language is plain and unambiguous,'" we construe it according "'to its plain and obvious meaning.'" *Schmidt v. Board of Directors of Ass'n of Apartment Owners of The Marco Polo Apartments, 73 Haw. 526, 531-32, 836 P.2d 479, 482 (1992); In re Tax Appeal of Lower Mapunapuna Tenants Ass'n, [*564] 73 Haw. 63, 68, 828 P.2d 263, 266 (1992).* The nonconsanguinity requisite contained in HRS § 572-1(1) precludes marriages, inter alia, between "brother and sister," "uncle and niece," and "aunt and nephew[.]" The anti-bigamy requisite contained in HRS § 572-1(3) forbids a marriage between a "man" or a "woman" as the case may be, who, at the time, has a living and "lawful wife . . . [or] husband[.]" And the [***56] requisite, set forth in HRS § 572-1(7), requiring marriage ceremonies to be performed by state-licensed persons or entities expressly speaks in terms of "the man and woman to be married[.]" n20 Accordingly, on its face and (as Lewin admits) as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

n20 That the legislature, in enacting HRS ch. 572,

obviously contemplated marriages between persons of the opposite sex is not, however, outcome dispositive of the plaintiffs' claim. Legislative action, whatever its motivation, cannot sanitize constitutional violations. Cf. *City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448, 105 S. Ct. 3249, 3259, 87 L. Ed. 2d 313 (1985)* ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order . . . action violative of the Equal Protection Clause.")

[***57]

Relying primarily on four decisions construing the law of other jurisdictions, n21 **Lewin** contends that "the fact that [*565] homosexual [sic -- actually, same-sex] n22 partners cannot form a state-licensed marriage is not the product of impermissible discrimination" implicating equal protection considerations, but rather "a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire." **Lewin's** answering brief at 21. Put differently, **Lewin** proposes that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." Id. at 7. We believe **Lewin's** argument to be circular and unpersuasive.

n21 The four decisions are *Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)*, appeal dismissed, *409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); De Santo v. Barnsley, supra;* and *Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187*, review denied, *84 Wash. 2d 1008 (1974).*

[***58]

n22 See supra note 11.

Two of the decisions upon which **Lewin** relies are demonstrably inapposite to the appellant couples' claim. In *Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)*, appeal dismissed, *409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972)*, the questions for decision were whether a marriage of two persons of the same sex was authorized by state statutes and, if not, whether state authorization was compelled by various provisions of the United States Constitution, including the fourteenth amendment. Regarding the first question, the Baker court arrived at the same conclusion as have we with respect to HRS § 572-1: by their plain language, the Minnesota marriage statutes precluded same-sex marriages. Regarding the second question, however, the court merely held that the United States Constitution was not offended; apparently, no state constitutional questions were raised and none were addressed.

De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984), [***59] is also distinguishable. In De Santo, the court [*566] held only that common law same-sex marriage did not exist in Pennsylvania, a result irrelevant to the present case. The appellants sought to assert that denial of same-sex common law marriages violated the state's equal rights amendment, but the appellate court expressly declined to reach the issue because it had not been raised in the trial court.

Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973), and *Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187*, review denied, *84 Wash. 2d 1008 (1974)*, warrant more in-depth analysis. In Jones, the appellants, both females, sought review of a judgment that held that they were not entitled to have a marriage license issued to them, contending that refusal to issue the license deprived them of the basic constitutional rights to marry, associate, and exercise religion freely. In an opinion acknowledged to be "a case of first impression in Kentucky," the Court of Appeals summarily affirmed, ruling as follows:

> Marriage was a custom long before the state commenced [***60] to issue licenses for that purpose. . . . [M]arriage has always been considered as a union of a man and a woman . . . .
>
> It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.
>
> . . . .
>
> In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

501 S.W.2d at 589-90.

[*567] Significantly, the appellants' equal protection rights -- federal or state -- were not asserted in Jones, and, accordingly, the appeals court was relieved of the necessity of addressing and attempting to distinguish the decision of the United States Supreme Court in Loving. Loving involved the appeal of a black woman and a caucasian man (the Lovings) who were married in the District of Columbia and thereafter returned to their home state of Virginia to establish their marital abode. *388 U.S. at 2, 87 S. Ct. at 1819.* The Lovings [***61] were duly indicted for and convicted of violating Virginia's miscegenation laws, n23 which banned

interracial marriages. *Id. n24* In his sentencing decision, the trial judge stated, in substance, that Divine Providence had not intended that the marriage state extend to interracial unions:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Id. at 3, 87 S. Ct. at 1819 (quoting the trial judge) (emphasis added).

n23 Virginia's miscegenation laws "arose as an incident to slavery and [were] common . . . since the colonial period." *388 U.S. at 6, 87 S. Ct. at 1820-21.* It is noteworthy that one of the "central provisions" of the statutory miscegenation scheme automatically voided all marriages between "a white person and a colored person" without the need for any judicial proceeding. *Id. at 4, 87 S. Ct. at 1820.*

[***62]

n24 As of 1949, the following thirty of the forty-eight states banned interracial marriages by statute: Alabama; Arizona; Arkansas; California; Colorado; Delaware; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; North Dakota; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; West Virginia; and Wyoming. *388 U.S. at 6 n.5, 87 S. Ct. at 1820 n.5.* When the Lovings commenced their lawsuit on October 28, 1964, sixteen states still had miscegenation laws on the books. *Id. at 3, 6 n.5, 87 S. Ct. at 1819, 1820 n.5.* The first state court to recognize that miscegenation statutes violated the right to the equal protection of the laws was the Supreme Court of California in *Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948). 388 U.S. at 6 n.5, 87 S. Ct. at 1820-21 n.5.*

[*568] [***63] The Lovings appealed the constitutionality of the state's miscegenation laws to the Virginia Supreme Court of Appeals, which, inter alia, upheld their constitutionality and affirmed the Lovings' convictions. *Id. at 3-4, 388 S. Ct. at 1819.* n25 The Lovings then pressed their appeal to the United States Supreme Court. Id.

n25 See *Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966).* The Virginia Supreme Court of Appeals, however, modified as "so unreasonable as to render the sentences void" the trial court's twenty-five year suspension of the Lovings' jail sentences "upon the condition that they leave the . . . state 'at once and . . . not return together or at the same time to [the] . . . state for a period of twenty-five years.'" *Id. at 930, 147 S.E.2d at 82-83.* The Virginia high court deemed it sufficient that the Lovings be prohibited from "again cohabit[ing] as man and wife in [the] state" in order to achieve the objectives of "securing the rehabilitation of the offender[s and] enabling [them] to repent and reform so that [they] may be restored to a useful place in society." *Id. at 930, 147 S.E.2d at 83.*

[***64]

In a landmark decision, the United States Supreme Court, through Chief Justice Warren, struck down the Virginia miscegenation laws on both equal protection and due process grounds. The court's holding as to the former is pertinent for present purposes:

[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. . . .

[*569] There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. . . . At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . .

There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification. . . . We have [***65] consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

Id. at 10-12, 87 S. Ct. at 1823 (emphasis added and citation omitted). n26

n26 As we have noted in this opinion, unlike the equal protection clause of the fourteenth amendment

to the United States Constitution, article I, section 5 of the Hawaii Constitution, inter alia, expressly prohibits discrimination against persons in the exercise of their civil rights on the basis of sex.

The facts in Loving and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the reasoning of Jones and unmask the tautological and [*570] circular nature of Lewin's argument that HRS § 572-1 does not implicate article I, section 5 of the Hawaii Constitution because same sex [***66] marriage is an innate impossibility. Analogously to Lewin's argument and the rationale of the Jones court, the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, *388 U.S. at 3, 87 S. Ct. at 1819,* and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.

Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, review denied, *84 Wash. 2d 1008 (1974),* suffers the same fate as does Jones. In Singer, two males appealed from a trial court's order denying their motion to show cause by which they sought to compel the county auditor to issue [***67] them a marriage license. On appeal, the unsuccessful applicants argued that: (1) the trial court erred in concluding that the Washington state marriage laws prohibited same-sex marriages; (2) the trial court's order violated the equal rights amendment to the state constitution; and (3) the trial court's order violated various provisions of the United States Constitution, including the fourteenth amendment.

The Washington Court of Appeals affirmed the trial court's order, rejecting all three of the appellants' contentions. Predictably, and for the same reasons that we have reached the identical conclusion regarding HRS § 572-1, the Singer court determined that it was "apparent from a [*571] plain reading of our marriage statutes that the legislature has not authorized same-sex marriages." *Id. at 249, 522 P.2d at 1189.* Regarding the appellants' federal and state claims, the court specifically "[did] not take exception to the proposition that the Equal Protection Clause of the Fourteenth Amendment requires strict judicial scrutiny of legislative attempts at sexual discrimination." *Id. at 261, 522 P.2d at 1196* [***68] (emphasis added). n27 Nevertheless, the Singer court found no defect in the state's marriage laws, under either the United States Constitution or the state constitution's equal rights amendment, based upon the rationale of Jones: "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself." Id. As in Jones, we reject this exercise in tortured and conclusory sophistry.

n27 Accordingly, but for the fact that the Singer court was unable to discern sexual discrimination in the state's marriage laws, it would have engaged in a "strict scrutiny" analysis. See infra at 571-72.

3. Equal Protection Analysis under Article I, Section 5 of the Hawaii Constitution

"Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a 'rational basis' test." *Nakano v. Matayoshi, 68 Haw. 140, 151, 706 P.2d 814, 821 (1985)* [***69] (citing *Nagle v. Board of Educ., 63 Haw. 389, 392, 629 P.2d 109, 111 (1981)).* This court has applied "strict scrutiny" analysis to "'laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the [c]onstitution,'" in which case [*572] the laws are "'presumed to be unconstitutional n28 unless the state shows compelling state interests which justify such classifications,'" *Holdman v. Olim, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978)* (citing *Nelson v. Miwa, 56 Haw. 601, 605 n.4, 546 P.2d 1005, 1008 n.4 (1976)),* and that the laws are "narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Nagle, 63 Haw. at 392, 629 P.2d at 111* (citations omitted).

n28 The presumption of statutory constitutionality, to which Judge Heen refers at 595 of his dissenting opinion, does not apply to laws, which, on their face, classify on the basis of suspect categories. *Washington v. Fireman's Fund Ins. Cos., 68 Haw. 192, 199, 708 P.2d 129, 134 (1985),* cert. denied, *476 U.S. 1169, 106 S. Ct. 2890, 90 L. Ed. 2d 977 (1986),* on which the dissent relies, is not authority to the contrary inasmuch as the statute in question did not involve any suspect categories and was reviewed under the "rational basis" standard.

[***70]

By contrast, "[w]here 'suspect' classifications or fun-

damental rights are not at issue, this court has traditionally employed the rational basis test." Id. at 393, 629 P.2d at 112. "Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest." *Estate of Coates v. Pacific Engineering, 71 Haw. 358, 364, 791 P.2d 1257, 1260 (1990).* "Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment." Id.

As we have indicated, HRS § 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. See supra at 563-64. As such, HRS § 572-1 establishes a sex-based classification.

HRS § 572-1 is not the first sex-based classification with which this court has been confronted. In *Holdman v. Olim, supra,* a woman prison visitor (Holdman) brought an action against prison officials seeking injunctive, [*573] monetary, and declaratory relief arising from a prison matron's refusal to admit Holdman [***71] entry when she was not wearing a brassiere. The matron's refusal derived from a directive, promulgated by the Acting Prison Administrator, that "visitors will be properly dressed. Women visitors are asked to be fully clothed, including undergarments. Provocative attire is discouraged." *59 Haw. at 347-48, 581 P.2d at 1166* (emphasis added). Holdman proceeded to trial, and the circuit court dismissed her action at the close of her case in chief. *Id. at 347, 581 P.2d at 1165-66.*

On appeal, this court affirmed the dismissal of Holdman's complaint. The significance of Holdman for present purposes, however, is the rationale by which this court reached its result:

> This court has not [heretofore] dealt with a sex-based classification. In *Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973),* a plurality of the United States Supreme Court favored the inclusion of classifications based upon sex among those considered to be suspect for the purposes of the compelling state interest test. However, subsequent [***72] cases have made it clear that the current governing test under the Fourteenth Amendment [to the United States Constitution] is a standard intermediate between rational basis and strict scrutiny. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren, 429 U.S. 190, 197[, 97 S. Ct. 451, 457, 50 L. Ed. 2d 397]* (1976). Also see *Califano v. Goldfarb, 430 U.S. 199, 2*[10 n.8, *97 S. Ct. 1021, 1028, n.8, 51 L. Ed. 2d 270]* (1977) and *Califano [*574] v. Webster, 430 U.S. 313, 316-17[, 97 S. Ct. 1192, 1194, 51 L. Ed. 2d 360]* (1977).
>
> . . . .
>
> Dress standards are intimately related to sexual attitudes. . . . The dress restrictions imposed upon women visitors by the directive derived their relation to prison security out of the assumption that these attitudes were present among the residents. Whether or not this assumption was correct, it is manifest that the directive was substantially [***73] related to the achievement of the important governmental objective of prison security and met the test under the Fourteenth Amendment.
>
> . . . .
>
> [Holdman's] challenge to the directive under the state constitution requires separate consideration. Article I, Section 4 n29 of the Hawaii Constitution declares that no person shall be "denied the equal protection of the laws, nor 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." Article I, Section 21 n30 provides: "Equality of rights under the law shall not be denied or abridged by the State on account of sex." We are presented with two questions, either of which might be dispositive of the present case. We must first inquire whether the treatment [Holdman] received denied to her the equal protection of the laws [*575] guaranteed by the Hawaii Constitution under a more stringent test than that applicable under the Fourteenth Amendment. If the more general guarantee of equal protection does not sustain [Holdman's] claims, we must then inquire whether the specific guarantee of equality of rights under the law contained in Article I, Section [***74] 21, has been infringed.
>
> It is open to this court, of course, to apply the more stringent test of compelling state interest to sex-based classifications in assessing their validity under the equal protection clause of the state constitution. *State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).* [Holdman] urges that we do so, arguing both from *Frontiero v. Richardson, supra,* and from the presence of sex with race, religion and ancestry as a category specifically named in Article I, Section 4.
>
> We need not deal finally with that issue, and reserve it for future consideration, since we conclude that the compelling state interest test would be satisfied in this case if it were to be held applicable. . . .
>
> . . . .
>
> Survival under the strict scrutiny test places the directive beyond [Holdman's] challenge under her asserted . . . right to equal protection . . . . It does not necessarily place the directive beyond challenge under

the equal rights provision of Article I, Section 21.

Article I, Section 21, is substantially identical with the proposed Equal Rights Amendment of [***75] the United States Constitution. . . . The standard [*576] of review to be applied under an ERA has not been clearly formulated by judicial decision. . . .

. . . Unless we are to attempt in this case to define the standard of review required under Hawaii's ERA, no purpose will be served by analysis of the considerable body of decisions which fall short of dealing with that question. . . . We have concluded that the treatment of which [Holdman] complains withstands the test of strict scrutiny by reason of a compelling State interest. We are not prepared to hold in this case that . . . . a more stringent test should be applied under Article I, Section 21 . . . .

Id. at 349-54, 581 P.2d at 1167-69 (emphasis added and citations and footnote omitted).

n29 In 1978, article I, section 4 was renumbered article I, section 5.

n30 In 1978, article I, section 21 was renumbered article I, section 3.

Our decision in Holdman is key to the present case in several respects. First, we clearly and unequivocally [***76] established, for purposes of equal protection analysis under the Hawaii Constitution, that sex-based classifications are subject, as a per se matter, to some form of "heightened" scrutiny, be it "strict" or "intermediate," rather than mere "rational basis" analysis. n31 Second, we assumed, arguendo, that such sex-based classifications were subject to "strict scrutiny." Third, we reaffirmed the longstanding principle that this court is free to accord greater protections to Hawaii's citizens under the state constitution than are recognized under the United States [*577] Constitution. n32 And fourth, we looked to the then current case law of the United States Supreme Court for guidance.

n31 In subsequent decisions, we have reaffirmed that sex-based classifications are subject, at the very least, to "intermediate scrutiny" under the equal protection clause of the Hawaii Constitution. *State v. Tookes, 67 Haw. 608, 614, 699 P.2d 983, 988 (1985); State v. Rivera, 62 Haw. 120, 123, 612 P.2d 526, 529 (1980).*

[***77]

n32 See, e.g., *State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967); State v. Grahovac, 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971); State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971); State v. Kaluna, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); State v. Manzo, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); State v. Miyasaki, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980); Huihui v. Shimoda, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); State v. Fields, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); State v. Wyatt, 67 Haw. 293, 304 n.9, 687 P.2d 544, 552 n.9 (1984); State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985); State v. Kim, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988); State v. Quino, 74 Haw. 161, 164 n.2, 840 P.2d 358, 364 n.2 (1992),* cert. denied, *U.S. , 113 S. Ct. 1849, 123 L. Ed. 2d 472 (1993)* (Levinson, J., concurring).

[***78]

Of the decisions of the United States Supreme Court cited in Holdman, Frontiero v. Richardson, supra, was by far the most significant. In Frontiero, a married woman air force officer and her husband (the Frontieros) filed suit against the Secretary of Defense seeking declaratory and injunctive relief against enforcement of federal statutes governing quarters allowances and medical benefits for members of the uniformed services. The statutes provided, solely for administrative convenience, that spouses of male members were unconditionally considered dependents for purposes of obtaining such allowances and benefits, but that spouses of female members were not considered dependents unless they were in fact dependent for more than one-half of their support. The Frontieros' lawsuit was precipitated by the husband's inability to satisfy the statutory dependency standard. A three-judge district court panel denied the Frontieros' claim for relief, and they appealed.

[*578] Noting that "[u]nder these statutes, a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support[,]" but that "[a] servicewoman [***79] . . . may not claim her husband as a 'dependent' . . . unless he is in fact dependent upon her for over one-half of his support[,]" a plurality of four, through Justice Brennan (the Brennan plurality), framed the issue on appeal as "whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen . . . ." *411 U.S. at 678-79, 93 S. Ct. at 1766.* By an eight-to-one majority, the court concluded that the statutes established impermissibly differential treatment

between men and women and, accordingly, reversed the judgment of the district court.

The disagreement among the eight-justice majority lay in the level of judicial scrutiny applicable to instances of statutory sex-based discrimination. The Brennan plurality agreed with the Frontieros' contention that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id. at 682, 93 S. Ct. at 1768* (footnotes omitted). Thus, the Brennan plurality applied the [***80] "strict scrutiny" standard to its review of the illegal statutes. Justice Stewart concurred in the judgment, "agreeing that the statutes . . . work[ed] an invidious discrimination in violation of the Constitution." *Id. at 691, 93 S. Ct. at 1772-73.*

Particularly noteworthy in Frontiero, however, was the concurring opinion of Justice Powell, joined by the Chief Justice and Justice Blackmun (the Powell group). The Powell group agreed that "the challenged statutes constitute[d] an unconstitutional discrimination against servicewomen," but deemed it "unnecessary for the Court [*579] in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." *Id. at 691-92, 93 S. Ct. at 1773* (emphasis added and citation omitted). Central to the Powell group's thinking was the following explanation:

There is another . . . reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance [***81] of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, . . . the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems . . . that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Id. at 692, 93 S. Ct. at 1773 (emphasis added).

The Powell group's concurring opinion therefore permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the Frontiero court would have subjected statutory sex-based classifications to "strict" judicial scrutiny.

In light of the interrelationship between the reasoning of the Brennan [***82] plurality and the Powell group in [*580] Frontiero, on the one hand, and the presence of article I, section 3 -- the Equal Rights Amendment -- in the Hawaii Constitution, on the other, it is time to resolve once and for all the question left dangling in Holdman. Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution n33 and that HRS § 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

n33 Our holding in this regard is not, as the dissent suggests, "[t]hat Appellants are a 'suspect class.'" Dissenting opinion at 592.

4. The dissenting opinion misconstrues [***83] the holdings and reasoning of the plurality.

We would be remiss if we did not address certain basic misconstructions of this opinion appearing in Judge Heen's dissent. First, we have not held, as Judge Heen seems to imply, that (1) the appellants "have a 'civil right' to a same sex marriage[,]" (2) "the civil right to marriage must be accorded to same sex couples[,]" and (3) the applicant couples "have a right to a same sex marriage[.]" Dissenting opinion at 588-89. These conclusions would be premature. We have, however, noted that the United States Supreme Court has recognized for over fifty years that marriage is a basic civil right. See supra at 562-64. That proposition is relevant to the prohibition set forth in article I, section 5 of the Hawaii Constitution against [*581] discrimination in the exercise of a person's civil rights, inter alia, on the basis of sex. See id. at 562.

Second, we have not held, as Judge Heen also seems to imply, that HRS § 572-1 "unconstitutionally discriminates against [the applicant couples] who seek a license to enter into a same sex marriage[.]" Dissenting opinion at 588. Such a holding would likewise be premature [***84] at this time. What we have held is that, 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. See supra at 564.

We understand that Judge Heen disagrees with our

between men and women and, accordingly, reversed the judgment of the district court.

The disagreement among the eight-justice majority lay in the level of judicial scrutiny applicable to instances of statutory sex-based discrimination. The Brennan plurality agreed with the Frontieros' contention that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id. at 682, 93 S. Ct. at 1768* (footnotes omitted). Thus, the Brennan plurality applied the [***80] "strict scrutiny" standard to its review of the illegal statutes. Justice Stewart concurred in the judgment, "agreeing that the statutes . . . work[ed] an invidious discrimination in violation of the Constitution." *Id. at 691, 93 S. Ct. at 1772-73.*

Particularly noteworthy in Frontiero, however, was the concurring opinion of Justice Powell, joined by the Chief Justice and Justice Blackmun (the Powell group). The Powell group agreed that "the challenged statutes constitute[d] an unconstitutional discrimination against servicewomen," but deemed it "unnecessary for the Court [*579] in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." *Id. at 691-92, 93 S. Ct. at 1773* (emphasis added and citation omitted). Central to the Powell group's thinking was the following explanation:

> There is another . . . reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance [***81] of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, . . . the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems . . . that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Id. at 692, 93 S. Ct. at 1773 (emphasis added).

The Powell group's concurring opinion therefore permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the Frontiero court would have subjected statutory sex-based classifications to "strict" judicial scrutiny.

In light of the interrelationship between the reasoning of the Brennan [***82] plurality and the Powell group in [*580] Frontiero, on the one hand, and the presence of article I, section 3 -- the Equal Rights Amendment -- in the Hawaii Constitution, on the other, it is time to resolve once and for all the question left dangling in Holdman. Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution n33 and that HRS § 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

n33 Our holding in this regard is not, as the dissent suggests, "[t]hat Appellants are a 'suspect class.'" Dissenting opinion at 592.

4. The dissenting opinion misconstrues [***83] the holdings and reasoning of the plurality.

We would be remiss if we did not address certain basic misconstructions of this opinion appearing in Judge Heen's dissent. First, we have not held, as Judge Heen seems to imply, that (1) the appellants "have a 'civil right' to a same sex marriage[,]" (2) "the civil right to marriage must be accorded to same sex couples[,]" and (3) the applicant couples "have a right to a same sex marriage[.]" Dissenting opinion at 588-89. These conclusions would be premature. We have, however, noted that the United States Supreme Court has recognized for over fifty years that marriage is a basic civil right. See supra at 562-64. That proposition is relevant to the prohibition set forth in article I, section 5 of the Hawaii Constitution against [*581] discrimination in the exercise of a person's civil rights, inter alia, on the basis of sex. See id. at 562.

Second, we have not held, as Judge Heen also seems to imply, that HRS § 572-1 "unconstitutionally discriminates against [the applicant couples] who seek a license to enter into a same sex marriage[.]" Dissenting opinion at 588. Such a holding would likewise be premature [***84] at this time. What we have held is that, 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. See supra at 564.

We understand that Judge Heen disagrees with our

view in this regard based on his belief that "HRS § 572-1 treats everyone alike and applies equally to both sexes[,]" with the result that "[n]either sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has." Dissenting opinion at 590-91 (emphasis in original). The rationale underlying Judge Heen's belief, however, was expressly considered and rejected in Loving:

Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race. . . . [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications [***85] from the Fourteenth Amendment's proscriptions of all invidious discriminations . . . . In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application [*582] does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

388 U.S. at 8, 87 S. Ct. at 1821-22. Substitution of "sex" for "race" and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached.

As a final matter, we are compelled to respond to Judge Heen's suggestion that denying the appellants access to the multitude of statutory benefits "conferred upon spouses in a legal marriage . . . is a matter for the legislature, which can express the will of the populace in deciding whether such benefits should be extended to persons in [the applicant couples'] circumstances." Dissenting opinion at 597. In effect, we are being accused of engaging in judicial legislation. We are not. The result we reach today is in complete harmony [***86] with the Loving court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws. *388 U.S. at 7, 87 S. Ct. at 1821.* If it should ultimately be determined that the marriage laws of Hawaii impermissibly discriminate against the appellants, based on the suspect category of sex, then that would be the result of the interrelation of existing legislation.

[W]hether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it . . . work[s] well or work[s] ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its [*583] destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483, 54 S. Ct. 231, 256, 78 L. Ed. 413 (1934) [***87] (Sutherland, J., dissenting).

III. CONCLUSION

Because, for the reasons stated in this opinion, the circuit court erroneously granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint, we vacate the circuit court's order and judgment and remand this matter for further proceedings consistent with this opinion. On remand, in accordance with the "strict scrutiny" standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights. See *Nagle, 63 Haw. at 392, 629 P.2d at 111; Holdman, 59 Haw. at 349, 581 P.2d at 1167.*

Vacated and remanded.

CONCURBY: BURNS

CONCUR: [*584] CONCURRING OPINION BY BURNS, J.

I concur that the circuit court's October 1, 1991 order erroneously granted the State's motion for judgment on the pleadings and erroneously dismissed the plaintiffs' complaint with prejudice. My concurrence is based on my conclusion that this case involves genuine issues of material fact. [***88] "Constitutional and other questions of a large public import should not be decided on an inadequate factual basis." 6 J. Moore and J. Lucas, Moore's Federal Practice para. 56[10] (2d ed. 1982) (citation omitted).

The marriage at issue in this case is the marriage specifically authorized by Hawaii's statutes. My label for this marriage is the "Hawaii Civil Law Marriage." The issue is whether the Hawaii Constitution permits the State to discriminate against same-sex couples by extending the right to enter into a Hawaii Civil Law Marriage to opposite-sex couples and not to same-sex couples.

The Hawaii Constitution mandates, in article I, section 3, that "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex." It also mandates, in article I, section 5, that "[n]o person

shall be . . . denied the equal protection of the laws, . . . or be discriminated against in the exercise thereof because of . . . sex[.]" Thus, any State action that discriminates [*585] against a person because of his or her "sex" is subject to strict scrutiny.

As used in the Hawaii Constitution, to what does the word "sex" refer? In my view, the Hawaii Constitution's [***89] reference to "sex" includes all aspects of each person's "sex" that are "biologically fated." The decision whether a person when born will be a male or a female is "biologically fated." Thus, the word "sex" includes the male-female difference. Is there any other aspect of a person's "sex" that is "biologically fated"?

In March 1993, the Cox News Service reported in relevant part as follows:

The issue of whether people become homosexuals because of "nature or nurture" is one of the most controversial subjects scientists have confronted in recent years.

* * *

Until the middle 1980s, the prevailing view among most scientists was that homosexual "tendencies" were mostly the result of upbringing. . . .

* * *

Later, researchers at the Salk Institute in San Diego found anatomical differences between homosexual and heterosexual men in parts of the brain noted for differences between men and women.

Theories gravitate to the role of male sex hormones.

* * *

The Honolulu Advertiser, March 9, 1993, at A-8, col. 1.

In March 1993, the Associated Press reported in relevant part as follows:

[*586] CHICAGO - Genes appear to play an important role in determining whether women [***90] are lesbians, said a researcher who found similar results among gay men.

* * *

"I think we're dealing with something very complex, perhaps the interaction between hormones, the environment and genetic components," [Roger] Gorski [an expert in biological theories of homosexuality] said yesterday.

* * *

The Honolulu Advertiser, March 12, 1993, at A-24, col. 1.

On the other hand, columnist Charles Krauthammer reports as follows:

It is natural, therefore, that just as parents have the inclination and right to wish to influence the development of a child's character, they have the inclination and right to try to influence a child's sexual orientation. Gay advocates argue, however, that such influence is an illusion. Sexual orientation, they claim, is biologically fated and thus entirely impervious to environmental influence.

Unfortunately, as E. L. Pattullo, former director of Harvard's Center for the Behavioral Sciences, recently pointed out in Commentary magazine, the scientific evidence does not support such a claim. . . .

* * *

The Honolulu Advertiser, May 2, 1993, at B-2, cols. 3, 4 and 5.

If heterosexuality, homosexuality, bisexuality, and asexuality are "biologically [***91] fated[,]" then the word "sex" [*587] also includes those differences. Therefore, the questions whether heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated" are relevant questions of fact which must be determined before the issue presented in this case can be answered. If the answers are yes, then each person's "sex" includes both the "biologically fated" male-female difference and the "biologically fated" sexual orientation difference, and the Hawaii Constitution probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages. If the answers are no, then each person's "sex" does not include the sexual orientation difference, and the Hawaii Constitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.

DISSENTBY: HEEN

DISSENT: DISSENTING OPINION BY HEEN, J.

I dissent. n1 Although the lower court judge may have engaged in "verbal overkill" in arriving at his decision, the [***92] result he reached was correct and should be affirmed. See *State v. Taniguchi, 72 Haw. 235, 815 P.2d 24 (1991).*

n1 Retired Associate Justice Yoshimi Hayashi, whose appointment as a substitute justice in this case expired before this dissent was filed, concurs with this dissent.

[*588] I agree with the plurality's holding that Appellants do not have a fundamental right to a same sex marriage protected by article I, § 6 of the Hawaii State Constitution.

However, I cannot agree with the plurality that (1) Appellants have a "civil right" to a same sex marriage; (2) Hawaii Revised Statutes (HRS) § 572-1 unconstitutionally discriminates against Appellants who seek a license to enter into a same sex marriage; (3) Appellants are entitled to an evidentiary hearing that applies a "strict scrutiny" standard of review to the statute; and (4) HRS § 572-1 is presumptively unconstitutional. Moreover, in my view, Appellants' claim that they are being discriminatorily denied statutory [***93] benefits accorded to spouses in a legalized marriage should be addressed to the legislature.

1.

Citing *Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)*, the plurality holds that Appellants have a civil right to marriage. I disagree. "'It is axiomatic . . . that a decision does not stand for a proposition not considered by the court.'" *People v. Superior Court, 8 Cal. App. 4th 688, 703, 10 Cal. Rptr. 2d 873, 881 (1992)* (quoting *People v. Harris, 47 Cal. 3d 1047, 1071, 255 Cal. Rtpr. 352, 767 P.2d 619 (1989)).*

Loving is simply not authority for the plurality's proposition that the civil right to marriage must be accorded to same sex couples. Loving points out that the right to marriage occupies an extremely venerated position in our society. So does every other case discussing marriage. However, the plaintiff in Loving was not claiming a right to a same sex marriage. Loving involved a marriage between a white male and a black female whose marriage, which took place in Washington, [***94] D.C., [*589] was refused recognition in Virginia under that state's miscegenation laws. n2

n2 Since race has historically been considered a "suspect class," the Supreme Court applied the strict scrutiny standard of review to Virginia's statute. See note 6, infra, for the definition of suspect class.

The plurality also cites *Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978)*, as establishing constitutional limits on the states' right to regulate marriage. That is an undeniable principle. In Zablocki an application for a marriage license by a male and a female was denied because the male was not able to show, pursuant to a Wisconsin statute's requirement, that he was in compliance with all existing obligations for child support.

Loving and Zablocki neither establish the right to a same sex marriage nor limit a state's power to prohibit any person from entering into such a marriage. The plurality's conclusion [***95] here that Appellants have a right to a same sex marriage and, therefore, an evidentiary hearing is completely contrary to the clear import of Zablocki and Loving.

Although appellants suggest an analogy between the racial classification involved in Loving and Perez and the alleged sexual classification involved in the case at bar, we do not find such an analogy. The operative distinction lies in the relationship which is described by the term "marriage" itself, and that relationship is the legal union of one man and one woman. Washington statutes, specifically those relating to marriage . . . and marital (community) property . . ., are clearly founded upon the presumption that marriage, as a legal relationship, may exist only [*590] between one man and one woman who are otherwise qualified to enter that relationship.

* * *

[A]ppellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.

Singer v. Hara, 11 Wash. App. 247, 253-55, 522 P.2d 1187, 1191-92, [***96] review denied, *84 Wash. 2d 1008 (1974)* (footnotes omitted).

The issue of a right to a same sex marriage has been considered by the courts in four other states. Those courts arrive at the opposite conclusion from the plurality here. See *Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)*, appeal dismissed, *409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984); Singer v. Hara, supra.* I do not agree with the plurality's contention that those cases are not precedent for this case. The basic issue in each of those four cases, as in this one, was whether any person has the right to legally marry another person of the same sex. Neither do I agree

with the plurality that Loving refutes the reasoning of the courts in those four cases.

2.

HRS § 572-1 treats everyone alike and applies equally to both [***97] sexes. The effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or [*591] asexuals, and does not effect an invidious discrimination. n3

n3 Appellants' sexual preferences or lifestyles are completely irrelevant. Although the plurality appears to recognize the irrelevance, the real thrust of the plurality opinion disregards the true import of the statute. The statute treats everyone alike and applies equally to both sexes.

The constitutional guarantee of equal protection of the laws means that no person or class of persons shall be denied the same privileges and benefits under the laws that are enjoyed by other persons or other classes of persons in like circumstances. *Mahiai v. Suwa, 69 Haw. 349, 742 P.2d 359 (1987).*

HRS § 572-1 does not establish a "suspect" classification based on gender n4 because all males and females are treated alike. A male cannot obtain a license to marry [***98] another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has.

n4 The plurality recognizes that the U.S. Supreme Court does not recognize sex or gender as a "suspect" classification, and thus gender has not historically been afforded the elevated "strict scrutiny" standard of review.

My thesis is well illustrated by the case of *Phillips v. Wisconsin Personnel Comm'n, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).* In that case, the plaintiff, an unmarried female, was denied medical benefits for her unmarried female "dependent" lesbian companion because Phillips' state health plan defined "dependent" as spouse or children. Phillips appealed the commission's dismissal of her gender discrimination complaint and the Wisconsin Court of Appeals, in striking down her claim, stated that

[*592] dependent [***99] insurance coverage is unavailable to unmarried companions of both male and female employees. A statute is only subject to a challenge for gender discrimination under the equal protection clause when it discriminates on its face, or in effect, between males and females.

Id. 167 Wis. 2d at 227, 482 N.W.2d at 129 (emphasis in original and citations omitted).

Similarly, HRS § 572-1 does not discriminate on the basis of gender. The statute applies equally to all unmarried persons, both male and female, who desire to enter into a legally recognized marriage. n5 Thus, no evidentiary hearing is required.

n5 Indeed, it may be said that the statute establishes one classification: unmarried persons.

The cases cited by the plurality to support its holding that Appellants are a "suspect class" are inapposite. n6 Unlike the instant case, the facts in both cases show government regulations preferring one gender (class) over another. In *Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978),* [***100] the prison regulation requiring female visitors to wear proper undergarments clearly affected only female visitors to the state prison system. Male visitors to the prison were not subject to such a regulation. The supreme court explicitly referred to the regulation as [*593] being a sex-based classification. While the reasoning in Holdman is very interesting, it does not support the plurality's conclusion in this case that HRS § 572-1 creates a suspect class.

n6 The plurality does not define "suspect class." A suspect classification exists where the class of individuals formed by a statute, on its face or as administered, has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294, 36 L. Ed. 2d 16, 40,* reh'g denied, *411 U.S. 959, 93 S.Ct. 1919, 36 L. Ed. 2d 418 (1973).*

[***101]

Likewise, in *Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973),* the federal statutes required that female members of the military service, but not male members, prove that they provided over one-half of their spouse's support in order to have

the spouses classified as "dependents." The statutes were clearly discriminatory, since male members of the military were favored over female members.

3.

Since HRS § 572-1 is not invidiously discriminatory and Appellants are not members of a suspect class, this court should not require an evidentiary hearing. n7 Neither should this court mandate that HRS § 572-1 be subjected to the "strict scrutiny" test. If anything, Appellants' challenge subjects the statute only to the "rational basis" test. *Estate of Coates v. Pacific Engineering, 71 Haw. 358, 791 P.2d 1257 (1990).* Thus, the issue is whether the statute rationally furthers a legitimate state interest. Id. [*594] There is no question that such a rational relationship exists; therefore, the statute is a constitutional exercise of the legislature's [***102] authority.

n7 The apparent result of the plurality opinion is that Appellants do not have any burden of proof on remand. According to the plurality opinion, all Appellants need to do is appear in court and say, "Here we are. The statute discriminates against us on the basis of our sex (whether male or female) and sex is a suspect class." Even in cases alleging racial discrimination (a suspect class), "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose[,]" and the burden is on the plaintiff to prove that discriminatory purpose. *Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 2048, 48 L. Ed. 2d 597, 607-08 (1976);* see *State v. Tookes, 67 Haw. 608, 699 P.2d 983 (1985).* The plurality opinion has eliminated the need for Appellants to prove purposeful discrimination.

In my view, the purpose of HRS § 572-1 is analogous [***103] to the purpose of Washington's marriage license statute as stated in *Singer, supra.*

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.

. . . [M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex." Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to appellants, notwithstanding the prohibition contained in the ERA, because it is founded upon the unique physical characteristics of the sexes and appellants are not [***104] being discriminated against because of their status as males per se. n8

[*595] *Id. 11 Wash. App. at 259-60, 522 P.2d at 1195* (emphasis and footnote added). The court in Singer was considering the case in the light of that state's Equal Rights Amendment (identical to article I, § 3 of the Hawaii State Constitution). The Washington court's reasoning is pertinent, in my view, to Appellants' claim in the case at hand and supports the constitutionality of the statute.

n8 Since, in my view, the purpose of HRS § 572-1 is to promote and protect propagation, the concern expressed in Chief Judge Burns' concurring opinion as to whether the statute discriminates against persons who may be genetically impelled to homosexuality does not cause the statute to be invidiously discriminatory.

4.

Furthermore, I cannot agree with the plurality that HRS § 572-1 is presumptively unconstitutional.

The general rule is that every statute is presumed to be constitutional, and the party [***105] challenging the law on constitutional grounds has the heavy burden of overcoming this presumption. *Washington v. Fireman's Fund Ins. Cos., 68 Haw. 192, 199, 708 P.2d 129, 134 (1985),* cert. denied, *476 U.S. 1169, 106 S. Ct. 2890, 90 L. Ed. 2d 977 (1986).*

In Washington this court, in considering a constitutional challenge to a statutory classification, stated:

To prevail, a party challenging the constitutionality of a statutory classification on equal protection ground has the burden of showing, "with convincing clarity that the classification is not rationally related to the" statutory purpose, *State v. Bloss, 62 Haw. 147, 154, 613 P.2d 354, 359 (1980),* or that "the challenged classification does not 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation,'" [*596] *Hasegawa v. Maui Pineapple Co.,*

52 Haw. 327, 330, 475 P.2d 679, 681 (1970), and is therefore "arbitrary and capricious." *State v. Freitas, 61 Haw. 262, 272, 602 P.2d 914, 922 (1979).* [***106] See also, *Schwab v. Ariyoshi, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977).*

This court has ruled that:

[E]qual protection does not mandate that all laws apply with universality to all persons; the State "cannot function without classifying its citizens for various purposes and treating some differently from others." The legislature may not, however, in exercising this right to classify, do so arbitrarily. The classification must be reasonably related to the purpose of the legislation.

We set out in Hasegawa a two-step procedure for determining whether the statute passed constitutional muster:

First, we must ascertain the purpose or objective that the State sought to achieve in enacting [the challenged statute]. Second, we must examine the means chosen to accomplish that purpose, to determine whether the means bears a reasonable relationship to the purpose. *Joshua, 65 Haw. at 629, 656 P.2d at 740* (quoting *Hasegawa, 52 Haw. at 330, 475 P.2d at 681).*

Id. 68 Haw. at 199, 708 P.2d at 134. [***107]

In my view, the statute's classification is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through [*597] heterosexual marriages and bears a reasonable relationship to that purpose. n9 I find nothing unconstitutional in that.

n9 In 1984, the state legislature amended HRS § 572-1 by deleting the requirement that marriage applicants show they are not impotent or that they are not physically incapable of entering into a marriage. Act 119, § 1, 1984 Haw. Sess. Laws 238. The plurality contends that the amendment refutes my assertion that the purpose of HRS § 572-1 is to foster and protect the propagation of the human race. I disagree.

A careful reading of the senate committee report on the amendment indicates that the amendment does not attenuate the fundamental purpose of HRS § 572-1. The intent of the amendment was to remove any impediment that may prevent persons who are "physically handicapped, elderly, or have temporary physical limitations from entering into a valid marriage relationship." Sen. Stand. Comm. Rep. No. 570-84, in 1984 Senate Journal, at 1284. The amendment accommodates only persons with physical limitations on their productive capacities. With respect to those persons, the legislature stated that the view that the primary purpose of marriage is to bear children is "narrow and outdated." That characterization should not be expanded to include the applicants in this case.

[***108]

5.

Appellants complain that because they are not allowed to legalize their relationships, they are denied a multitude of statutory benefits conferred upon spouses in a legal marriage. However, redress for those deprivations is a matter for the legislature, which can express the will of the populace in deciding whether such benefits should be extended to persons in Appellants' circumstances. Those benefits can be conferred without rooting out the very essence of a legal marriage. n10 This court should not manufacture a civil right which is unsupported by any [*598] precedent, and whose legal incidents -- the entitlement to those statutory benefits -- will reach beyond the right to enter into a legal marriage and overturn long standing public policy encompassing other areas of public concern. This decision will have far-reaching and grave repercussions on the finances and policies of the governments and industry of this state and all the other states in the country.

n10 I note that a number of municipalities across the country have adopted domestic partnership ordinances that confer such benefits on the domestic partners as the municipalities have authority to grant. Note: A More Perfect Union: A Legal And Social Analysis Of Domestic Partnership Ordinances, *92 Colum. L. Rev. 1164 (1992).*

[***109]

December 18 , 1995

MEMORANDUM FOR MARVIN KRISLOV

FROM: JOHN STANLEY

RE: Same-sex marriage litigation

I have attached copies of the two court decisions you requested:

1. Allen v. Bone, 186 Bankr. 769 (1995).

2. Baehr v. Lewin, 74 Haw. 645 (1993).

L.Ed.2d 271 (1986). However, the constitutionality of Solow's arrest is irrelevant insofar as the defendant in this case, Captain Graham, is concerned, unless a sufficient connection exists between Captain Graham and the arrest.

The record shows no such connection. Deputy Campbell testified that his supervisor, Sergeant Greve, directed him to take information to the State Attorney's Office to determine whether there was sufficient evidence for prosecution. It is undisputed that after consultation with an Assistant State Attorney, Deputy Campbell completed and signed the affidavit seeking Solow's arrest. Although the testimony of Captain Graham is somewhat ambiguous on this point, it appears from the testimony that the extent of his involvement in the matter was limited to reviewing the facts with Deputy Campbell, telling him to proceed with the investigation and to take his findings to the State Attorney's office, and discussing the incident with in-house counsel at the Collier County Sheriff's Office.

Because Solow failed to offer sufficient evidence to present a jury issue on whether Captain Graham caused Deputy Campbell to obtain the warrant, we affirm the trial court's decision to direct a verdict in Graham's favor on this claim.[6]

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court respecting the removal of the plaintiffs from the wrecker rotation list is REVERSED, the judgment of the district court with respect to David Solow's unreasonable seizure claim is AFFIRMED, and the case is REMANDED for entry of a judgment in favor of the defendants on all claims.

6. Because both defendants are entitled to judgments in their favor as to all the claims involved, their other arguments and the plaintiffs' cross-appeal contending that the district court erred in dismissing the defendants in their individual capacities are moot.

Robin Joy SHAHAR, Plaintiff-Appellant,

v.

Michael J. BOWERS, Individually and in His Official Capacity as Attorney General of the State of Georgia, Defendant-Appellee.

No. 93-9345.

United States Court of Appeals, Eleventh Circuit.

Dec. 20, 1995.

Prospective employee of Georgia Department of Law, whose offer of employment as attorney was withdrawn after Attorney General learned of her plans for homosexual marriage, brought action against Attorney General for violation of her rights of intimate and expressive association, freedom of religion, equal protection, and substantive due process. Following rulings on various pretrial motions, 1992 WL 220781, the United States District Court for the Northern District of Georgia, No. 1:91-cv-2397-RCF, Richard C. Freeman, Senior District Judge, 836 F.Supp. 859, entered summary judgment for Attorney General. Prospective employee appealed. The Court of Appeals, Godbold, Senior Circuit Judge, held that: (1) intimate association between prospective employee and woman whom she planned to marry was protected by First Amendment; (2) strict scrutiny was applicable to intimate association claim; and (3) compelling interest test was applicable to intimate expression claim.

Affirmed in part; vacated and remanded with instructions in part.

Morgan, Senior Circuit Judge, concurred in part, concurred in result, and filed separate opinion.

Kravitch, Circuit Judge, concurred in part, dissented in part, and filed separate opinion.

1. Constitutional Law ⇐84.5(1), 91

Intimate association between woman and second woman whom she planned to marry in Jewish religious ceremony was protected by First Amendment; although relationship did not involve marriage in civil, legal sense, it was inextricably entwined with first woman's exercise of her religious beliefs. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐84.5(12), 91

Strict scrutiny was applicable to claim by prospective employee's intimate association claim arising from withdrawal of offer of employment as attorney by Georgia Attorney General when he learned of prospective employee's plans for homosexual marriage, and acts of Attorney General thus would be deemed to infringe on prospective employee's rights unless narrowly tailored to serve compelling government interest; prospective employee's marriage was intimate and highly personal in sense of affection, commitment, and permanency, and was inextricably entwined with exercise of her religious beliefs. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐91

"Expressive association" is right to associate for purpose of engaging in those activities protected by First Amendment, including exercise of religion. U.S.C.A. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐91

Right of expressive association may be limited by regulations which serve compelling state interest. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐90.1(7.2)

Compelling interest test was applicable to intimate expression claim of prospective employee who planned to engage in homosexual marriage in Jewish religious ceremony, and whose offer of employment as attorney was withdrawn by Georgia Attorney General when he learned of her marriage plans. U.S.C.A. Const.Amend. 1.

Opinion of Kravitch, Circuit Judge

6. Attorney General ⇐2
Constitutional Law ⇐224(3)

Because Georgia Attorney General's withdrawal of prospective employee's offer of attorney job was made because of prospective employee's homosexual marriage rather than because of her sexual orientation, Attorney General did not violate any equal protection rights that prospective employee may have had based on sexual orientation classification (per Kravitch, Circuit Judge). U.S.C.A. Const.Amends. 5, 14.

Debra E. Schwartz, Atlanta, GA, William B. Rubenstein, Ruth E. Harlow, American Civil Liberties Union Foundation, New York City, for appellant.

Michael E. Hobbs, Office of State Attorney General, Atlanta, GA, Dorothy Yates Kirkley, Gregory R. Hanthorn, Diane G. Pulley, Jones, Day, Reavis & Pogue, Atlanta, GA, for appellee.

Robert B. Remar, Georgia Kay Lord, Kirwan, Goger, Chesin & Parks, Atlanta, GA, for amicus Georgia Psychological Association.

Kathleen M. Sullivan, Stanford Law School, Stanford, California, for amicus AAUP, et al.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, Circuit Judge, and GODBOLD and MORGAN, Senior Circuit Judges.

GODBOLD, Senior Circuit Judge:

The appellant Robin Joy Shahar is a homosexual female who was offered employment with the Department of Law of the State of Georgia to begin at a future date. She accepted the offer, but before the employment began she made known her plans to engage in a marriage ceremony with her female companion. The Attorney General of Georgia, who has ultimate responsibility for hiring and employment practices of the Department of Law, learned of her plans and, before the

marriage ceremony took place, terminated the offer of employment.

Shahar sued the Attorney General under 42 U.S.C. § 1983, alleging violation of her rights of intimate association, of her freedom of religion, and of equal protection and substantive due process. She sought declaratory and injunctive relief, including placement as a staff attorney in the Department and compensatory and punitive damages from the defendant in his individual capacity. The district court denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment.

The court unanimously agrees to affirm the conclusion of the district court that Shahar's right of intimate association was burdened. The court holds, however, Judge Kravitch dissenting, that the district court erred in applying a balancing test to determine whether Shahar's rights under the Constitution were violated and that the case must be remanded to the district court for it to consider these issues under a strict scrutiny standard.[1]

The court affirms the summary judgment for the Attorney General on Shahar's free expression and equal protection claims for reasons set out by Judges Kravitch and Morgan in their separate opinions. Judge Godbold disagrees with these affirmances.

Shahar's claim of violation of substantive due process is not substantially presented on appeal. All judges agree that summary judgment for the defendant on that claim must be affirmed.

Shahar, then known as Robin Brown, worked as a law clerk in the Department of Law during the summer of 1990. During her clerkship she told other clerks that she was a lesbian. She talked with Mary Beth Westmoreland, an attorney with the Department, explained the relationship with her partner, Francine Greenfield, and discussed whether it would be appropriate to bring Greenfield to a picnic to be given by the departmental division in which Shahar was working. Westmoreland discouraged the proposal, and Shahar did not bring Greenfield to the picnic.

In September 1990 defendant offered Shahar a permanent position as a Department attorney to commence in the fall of 1991, and she accepted. She had been a Phi Beta Kappa as an undergraduate. She graduated from Emory Law School in the spring of 1991 with an outstanding academic record (sixth in her class academically), as an editor of the law review, and the recipient of a distinguished scholarship.

In the fall of 1990, following her acceptance, Shahar completed a standard personnel form of the Department. In the "Family Status" section she showed her "Marital Status" as "Engaged." In response to "Spouse" she added the word "Future" and inserted the name of Francine M. Greenfield. She identified her "Future Spouse's Occupation" as an employee of a department of the State of Georgia, her purpose being to reveal that Greenfield was employed by the State. The Department received the form and filed it without fully reviewing it.

In June of 1991, by telephone, Shahar discussed with Deputy Attorney General Bob Coleman her upcoming employment. He asked whether she could begin work in mid-September, and she responded that she would prefer to begin work later in the month in light of her upcoming wedding. Shahar did not tell Coleman that she planned marriage to another woman but did state that she would be changing her last name from Brown to Shahar. Coleman mentioned Shahar's upcoming wedding to Senior Assistant Attorney General Jeffrey Milsteen, who subsequently learned from Susan Rutherford, a Department attorney, that plaintiff's planned wedding would be to another woman. Rutherford and another Department employee had seen Shahar in a restaurant in the spring of 1991, and Shahar told them that she and her female dinner companion were preparing for their upcoming wedding.

Attorney General Bowers learned that the planned wedding was to another woman. He discussed the matter with his staff. Information conveyed to him included Shahar's personnel form, Coleman's description of his telephone conversation with Shahar, information concerning the restaurant encounter between Rutherford and Shahar, information of unspecified origin that Shahar planned to send or already had sent invitations to the ceremony and that some staff of the Department of Law were on the invitation list, and other information that, as the Attorney General described it, the planned ceremony would be "a big or church wedding, I don't remember which." The Attorney General talked with a female Jewish member of his staff, who told him the wedding was to be performed by a rabbi from New York who performed homosexual marriages but that "she was not aware of homosexual marriages or gay and lesbian marriages being recognized in Judaism."

The Attorney General wrote to Shahar on July 9, withdrawing the offer of employment. The letter said in part:

> This action has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As the chief legal officer of this state inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper function of this office.

Before the wedding Brown and Greenfield changed their names to Shahar, which refers to being in a search for God.

On July 28 a rabbi performed a Jewish marriage ceremony for the couple, conducted in a state park in South Carolina. This suit was filed in October 1991.

I. The District Court's Findings

With respect to interference with intimate association, the court defined the relevant association as Shahar's relationship with her lesbian partner whom she intended to marry. It declined to decide whether this associational relationship fell within the definition of traditional family relationships described in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20, 104 S.Ct. 3244, 3250–51, 82 L.Ed.2d 462 (1984). It decided instead that it was within the "broad range of [constitutionally protected] human relationships" that *Roberts* described as falling between familial relationships and associations such as large business enterprises. *Id.* at 620, 104 S.Ct. at 3250.

The court then found, based on undisputed facts, and applying the balancing test of *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), that the defendant's articulated and unrebutted concerns regarding Shahar's employment outweighed her interests in the intimate association with her female partner. The court did not address Shahar's expressive association claim because it felt that it overlapped her free exercise claim and required no greater constitutional protection than her intimate association claim.

With respect to free exercise, the court assumed without deciding that defendant indirectly burdened Shahar's right to freely exercise her religion, but again it applied *Pickering* because it said it found no other controlling guideline, and it held that any burden suffered by Shahar was justified in light of the unique governmental concerns involved in efficient operation of the Department.

As to equal protection, Shahar contended that by withdrawing the offer of employment the defendant acted with intent to discriminate against her on the basis of her sexual orientation. The court held that defendant's classification, if any, was not based upon mere sexual orientation. It also found that, even if Shahar could establish that defendant acted in part based upon a general classification of plaintiff as a homosexual, she had not presented sufficient facts to raise a genuine issue of fact whether defendant acted with an impermissible intent to discriminate.

As to substantive due process, the court granted summary judgment because plaintiff conceded that she had no property interest in the promised employment and made no showing of deprivation of any liberty interest.

II. The Contours of Intimate Association

[1] Shahar's position is that the district court correctly found that her intimate asso-

1. Since the district court granted summary judgment for Bowers on all claims it did not address his assertion of qualified immunity. If, on remand, Shahar reasserts claims for monetary damages, then that issue would have to be addressed.

ish couple except for deletion of the terms "bride" and "groom." It took place beneath a traditional huppah, or canopy. The couple signed a traditional Kutubah, or written marriage contract. They exchanged rings in traditional fashion. The traditional glass was broken. The traditional seven blessings were given, done in Hebrew and in English. Rabbi Kleinbaum was dressed in traditional garb. She described the event as a "Jewish religious ceremony," as a "Jewish marriage," and as a "Jewish wedding."

The Attorney General states his position this way:

> The Attorney General did not withdraw Shahar's offer of employment because of her association, religious or otherwise, with other homosexuals or her female partner, but rather because she invoked the civil and legal significance of being "married" to another woman. Shahar is still free to associate with her female partner, as well as other homosexuals, for religious and other purposes.

Brief, p. 35. But he did not submit substantial evidence tending to show that Shahar "invoked the civil and legal significance of being 'married' to another woman." Shahar and Greenfield have been companions for several years. They jointly own the house in which they live, but their joint ownership began several years before this case arose and, in any event, joint ownership is not limited to persons married pursuant to Georgia civil law.[3] The couple benefit from an insurance rate (presumably on household or automobile insurance) lower than that available to single women. But, under the undisputed evidence, Shahar talked to the insurance agent, explained that she was going to undergo a religious ceremony with her female partner, described and explained the ceremony, and asked if the company would consider giving them the rate available to married women, and the company agreed to do so.

The intimate relationship between Shahar and her partner whom she planned to marry did not involve marriage in a civil, legal sense but it was inextricably entwined with Shahar's exercise of her religious beliefs. The court holds that the district court did not err in defining that intimate relationship as constitutionally protected.[4]

III. Scope of Review of Intimate Association

[2] The district court used the *Pickering* balancing test. The court holds, Judge Kravitch dissenting, that strict scrutiny must be utilized.

The difficulty of identifying a correct standard of review is demonstrated by the lengthy analysis in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir.1994) (noting three possible standards—*Pickering, Elrod–Branti*, and strict scrutiny). *Pickering* arose in the context of free speech, and the line of cases following it have applied most often to those involving freedom of speech or expressive association, and they give somewhat more deference to the employer. The *Elrod*[5] and *Branti*[6] line of cases are variants of strict scrutiny that focus on the effects of political beliefs on the job performance of public employees and have not been applied outside of the political patronage context. *See McCabe*, 12 F.3d at 1567.

The court believes that the general standard of strict scrutiny is applicable to Shahar's intimate association claim and that the acts of the Attorney General must be deemed to infringe on Shahar's rights unless shown to be narrowly tailored to serve a compelling governmental interest. Shahar was not engaged in political commentary. Marriage in the conventional sense is an intimate association significant burdens on which are subject to strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Though the religious-based marriage in which Shahar participated was not marriage in a civil, legal sense it was intimate and highly personal in the sense of affection, commitment, and permanency and, as we have spelled out, it was inextricably entwined with Shahar's exercise of her religious beliefs. Strong deference must be given to her interests and less to the employer's interest than in a *Pickering*-type case.

3. O.C.G.A. §§ 44–6–120 & 44–6–190.

4. Neither the Supreme Court nor any circuit court has held that an association based solely upon the sexual orientation of a same-sex couple is an intimate association having constitutional protection. The district court has not so held in this case and neither do we.

5. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

6. *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

IV. Expressive Association

[3–5] Shahar also asserts that Bowers violated her right to expressive association. Opening Brief, 36 n. 7; Reply Brief, 12 n. 6. Expressive association is the "right to associate for the purpose of engaging in those activities protected by the First Amendment ... [, including] the exercise of religion." *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249. The right of expressive association may be limited by regulations which serve a compelling state interest. *Id.* at 623, 104 S.Ct. at 3252 ("Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."). *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987) ("Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.").[7] The district court did not address Shahar's expressive association claim because of its overlap with her free exercise claim and the court's conclusion that her expressive association claim required no greater constitutional protection than her intimate association claim. The court, Judge Kravitch dissenting, remands this claim for consideration by the district court under the compelling interest test.

7. This court instructed a district court to apply the *Pickering* balancing test in a similar expressive association claim. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1559 & n. 26 (11th Cir.1987). But the Supreme Court applied the compelling interest test in *Rotary*, which was decided subsequent to *Hatcher*.

V. Freedom of Religion

The district court applied the balancing test of *Pickering* to Shahar's free exercise claim after considering the restrictions placed by *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), on the traditional compelling interest test articulated in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *Smith* had sharply criticized *Sherbert* and essentially limited it to the unemployment benefits context. 494 U.S. at 883–85, 110 S.Ct. at 1602–04.

For reasons set out in Part II, the writer would hold that Shahar asserted a free exercise claim and would remand this claim to the district court for it to reconsider under the compelling interest test. Judges Kravitch and Morgan do not agree with this view.

VI. Equal Protection

Federal courts have concluded that homosexuals, as a class, do not receive heightened scrutiny when their equal protection claims are analyzed, and accordingly, the courts have applied the rational basis test to such claims. *See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266 n. 2 (1995) (amendment to city charter denying special status and legal protection based on sexual orientation); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir.1992) (applicant for public high school teacher and coach position), *cert. denied*, — U.S. —, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.1989) (U.S. Army Reserves sergeant), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C.Cir.1987) (applicant for FBI special agent). *But see Watkins v. U.S. Army*, 875 F.2d 699, 728 (9th Cir.1989) (en banc) (Norris, J., concurring in judgment and declaring homosexuals to be a suspect class), *cert. denied*, 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990). The writer would hold

that the court need not consider whether homosexuals are, by that status alone, a class deserving a heightened scrutiny when alleging violations of the equal protection clause because, without the court's making that determination, the facts of this case require the application of strict scrutiny to Shahar's equal protection claim.

Shahar's classification or characterization is not that of homosexuality alone. Rather she is a homosexual engaging in the exercise of her religious faith, including her religious ceremony of marriage and her right to accept, describe and hold out the event and the status created by it by using the term "marriage." "[W]here a constitutional 'fundamental right' is assaulted by operation of [a government regulation], ... the enactment 'will be sustained only if [it is] suitably tailored to serve a compelling state interest.'" *Equality Found.*, 54 F.3d at 266 (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Court disagreed with respondents' contention that education was a fundamental right and held that rational basis review applied); *Price v. Tanner*, 855 F.2d 820, 823 n. 7 (11th Cir.1988) (because the appellant did not allege the existence of a suspect class or burdened fundamental right, strict scrutiny would not apply), *cert. denied*, 489 U.S. 1081, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989); *Tarter v. James*, 667 F.2d 964, 969 (11th Cir.1982) (no fundamental right was involved, so rational basis review applied). *See also* Laurence H. Tribe, *American Constitutional Law* §§ 16–7—16–11, § 16–12 at 1464 (2d ed. 1988) ("[E]qual protection analysis demands strict scrutiny ... of classifications that penalize rights already established as fundamental for reasons unrelated to equality...."); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.3 (4th ed. 1991).

The Supreme Court has used equal protection analysis, and a strict scrutiny standard, to consider state legislation that allegedly burdened individuals' right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (statute forbidding marriage by any person with minor children not in his/her custody and which the person is under obligation by court order to support); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (statute forbidding miscegenation); right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (habitual criminals subjected to sterilization); right to travel, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974) (residency requirement for indigents in order to receive non-emergency medical care); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (residency requirements for voting); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (residency requirements for welfare recipients); and right to vote; *Dunn*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (residency requirements for voting); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (those without children in the school system or who did not own or lease taxable property were ineligible to vote in school district elections). *Cf. Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (appearing to apply a strict scrutiny standard but deciding that state interests override the individual's interest where state law required residency for at least one year prior to petitioning for divorce).

The writer, Judges Kravitch and Morgan disagreeing, would remand the equal protection claim to the district court for analysis under the strict scrutiny standard.

VII. Mandate of the Court

The decision of the district court that Shahar's intimate association rights were violated is AFFIRMED. The summary judgment for defendant on this claim is VACATED and it is REMANDED to the district court for it to determine under a strict scrutiny standard whether this violation infringed Shahar's constitutional rights. The claim of violation of expressive association may be addressed by the district court on remand.

Summary judgment for the defendant on the free exercise, equal protection, and substantive due process claims is AFFIRMED.

MORGAN, Senior Circuit Judge, concurring in part and concurring in result:

I concur in parts II, III, and IV of Judge Godbold's opinion which hold that Shahar's rights of intimate and expressive association have been burdened and that strict scrutiny is the proper test to apply. For this reason, it is necessary to remand the case to the district court. Nevertheless, I respectfully disagree with Judge Godbold that the facts underlying Shahar's association claims necessarily translate into a Free Exercise claim that requires strict scrutiny. Thus, I do not join in Part V of his opinion.

Furthermore, I disagree with Part VI of Judge Godbold's opinion as it pertains to Shahar's Equal Protection claim. Generally, the Equal Protection Clause of the Constitution requires that a state classification be rationally related to a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992); *Panama City Medical Diagnostic Ltd.*, 13 F.3d 1541, 1545 (11th Cir.), *reh. denied* 21 F.3d 1127 (11th Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 93, 130 L.Ed.2d 44 (1994). A rational basis will not suffice, however, in cases involving either a suspect class or a fundamental right. *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 457–58, 108 S.Ct. 2481, 2487–88, 101 L.Ed.2d 399 (1988); *Panama City*, 13 F.3d at 1545. In such a case, the strict scrutiny test must be applied. Many courts include religion as a classification or fundamental right that deserves strict scrutiny. *See Droz v. Commissioner of I.R.S.*, 48 F.3d 1120, 1125 (9th Cir.1995) (discussing equal protection under the Fifth Amendment); *Steffan v. Perry*, 41 F.3d 677, 689 n. 9 (D.C.Cir.1994); *Olsen v. Commissioner*, 709 F.2d 278, 283 (4th Cir.1983) (discussing equal protection under the Fifth Amendment); *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 149 (5th Cir.1981); *see also Johnson v. Robison*, 415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 1169 n. 14, 39 L.Ed.2d 389 (1974) (noting that the free exercise of religion is a fundamental right under the Constitution). Judge Godbold's opinion is based upon the argument that Shahar has an Equal Protection claim due to her fundamental right to exercise her religious beliefs. I believe this to be a mistake. Shahar has not brought before us an Equal Protection claim based on a fundamental religious right. Instead, as Judge Kravitch points out in her opinion, Shahar is arguing her homosexuality as a suspect class.[1] Thus, since Shahar has failed to raise religion as an issue with respect to her Equal Protection claim, I join with Judge Kravitch in affirming that portion of the district court's order.[2]

Turning to Shahar's contention that her homosexuality entitles her to the designation of being in a suspect class, I note that such an argument has been universally rejected by the courts that have considered it. *See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir.1995); *Ben–Shalom v. Marsh*, 881 F.2d 454 (7th Cir.1989), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir.1984); *see also High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.) (discussing issue in the context of the Fifth Amendment), *reh. denied*, 909 F.2d 375 (9th Cir.1990). As pointed out by Shahar, it is true that this circuit has not ruled on the issue. Nevertheless, I agree with Judge Kravitch that the facts of

1. The portion of Shahar's appellate brief discussing Equal Protection makes numerous references to a homosexual classification claim, but it is devoid of any reference to a religious fundamental rights claim. *See, e.g.*, Appellant's Brief (filed May 13, 1994) at 42 ("Shahar's equal protection claim rests on her contention that, as a homosexual, she was judged by Bowers ... differently than a heterosexual would have been judged."), at 44 ("Shahar's claim, however, is precisely that her conduct, as a homosexual, was evaluated differently."), at 45–46 ("Here, Shahar's direct evidence of being judged differently as a homosexual ... can fully establish the viability of her sexual orientation discrimination claim ..."), at 47 ("All of the background to Shahar's firing underscores that her acknowledged relationship with another woman triggered differential, adverse judgments about homosexuals versus heterosexuals ..."), and at 48 ("Shahar urges ... that, under the governing criteria, discrimination against gay people warrants heightened equal protection scrutiny.").

2. I express no opinion as to the merits of Shahar's claim had it been presented as a religious fundamental rights question.

this case do not require us now to make a determination. The evidence supports the district court's conclusion on summary judgment that Bowers did not revoke Shahar's job offer because of her sexual orientation. Instead, the dispute arose because Bowers believed that Shahar invoked the legal and civil significance of being married to another female, which is inconsistent with Georgia law.[3] Therefore, I do not believe the evidence supports Shahar's Equal Protection claim.

For the reasons set forth above, I concur in Judge Godbold's opinion only to the extent that the burdens placed upon Shahar's intimate and expressive association claims are subject to strict scrutiny. Thus, I concur in the result that this case should be remanded to the district court for further consideration.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

In my view, this case is not primarily about religion or expression or equal protection. Rather, the constitutional deprivation suffered by Shahar[1] is the burdening of her First Amendment right of intimate association. In the public employment context, an employee's intimate association rights must be balanced against the government's legitimate concerns with the efficient functioning of its agencies. I therefore disagree with the majority's holding that strict scrutiny ought to be applied in this case. Nonetheless, utilizing a balancing test, I conclude that Shahar is entitled to constitutional protection.

I. *Intimate Association*

A. *Shahar's commitment ceremony and relationship with Greenfield is an intimate association entitled to First Amendment protection.*

Intimate associations involve "choices to enter into and maintain certain intimate human relationships." *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984). Such choices "must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* In *Roberts*, the Supreme Court enumerated several characteristics typical of relationships entitled to constitutional protection as intimate associations: "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620, 104 S.Ct. at 3250. Family relationships, which "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life," "exemplify"—but do not exhaust—this category of protected associations. *Id.; see also Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545, 107 S.Ct. 1940, 1946, 95 L.Ed.2d 474 (1987) ("[W]e have not held that constitutional protection is restricted to relationships among family members."); Kenneth L. Karst, "The Freedom of Intimate Association," 89 Yale L.J. 624, 629–37 (1980) (defining intimate association as "a close and familiar personal relationship with another that is in some significant way *comparable* to a marriage or family relationship") (emphasis added). A relationship that fits these descriptions is no less entitled to constitutional protection just because it is between individuals of the same sex.

This court has taken an expansive view of the right of intimate association under the First Amendment, protecting even dating relationships. *See Hatcher v. Bd. of Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987) ("[E]ven a public employee's association choices as to whom to date enjoy constitutional protection."); *Wilson v. Taylor*, 733 F.2d 1539, 1544 (11th Cir.1984) ("We conclude that dating is a type of association which must be protected by the first amendment's freedom of association.").

I agree with the district court and the majority that the relationship between Shahar and her partner qualifies as a constitutionally protected intimate association. The ceremony was to solemnize and celebrate a lifelong commitment between the two women, who share not only an emotional bond but, as the majority exhaustively describes, a religious faith.[2] Even if Shahar and Greenfield were not religious, I would still find that their relationship involves the type of personal bond that characterizes a First Amendment intimate association.[3] We protect such associations because "the 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.'" *Bowers v. Hardwick*, 478 U.S. 186, 205, 106 S.Ct. 2841, 2851, 92 L.Ed.2d 140 (1986) (Blackmun, J., dissenting) (quoting *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3250). Where intimacy and personal identity are so closely intertwined as in the relationship between Shahar and Greenfield, the core values of the intimate association right are at stake.

B. *Shahar's intimate association rights were burdened by Bowers' withdrawal of her job offer.*

A public employee's freedom of association is burdened by adverse employment action if the protected association was a "substantial" or "motivating" factor in the employer's decision. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Hatcher v. Board of Pub. Educ.*, 809 F.2d 1546, 1558 (11th Cir. 1987).[4] Bowers argues that he withdrew Shahar's offer of employment only because she publicly "held herself out" as to be legally married, not because of the planned commitment ceremony or relationship per se, and therefore that Shahar's right to associate with her partner was not threatened. I agree with the district court, however, that Shahar's "conduct ('holding herself out' as about to marry another woman) is not sufficiently separate from her intimate association (marrying another woman) to allow a finding that this association was not burdened." *Shahar v. Bowers*, 836 F.Supp. 859, 863 (N.D.Ga.1993).

The evidence Bowers presents of Shahar's "holding herself out" as legally married is less than compelling. As the majority observes, Shahar has never asserted—and in fact has repeatedly disclaimed—any civil or legal status as married. What Shahar did do was plan and participate in a private, religious, out-of-state, commitment ceremony. She did not place an announcement in the newspaper or cast the ceremony as a political or religious rally. Shahar did characterize her marital status as "engaged" and identify Greenfield as her "future spouse" on a Department form, the purpose of which was "to elicit information which might be relevant to whether there would be some sort of conflict in [the Department's] representation of" another part of state government.[5] In so do-

3. Shahar does not challenge the state of the law as it exists in Georgia with respect to same sex marriages.

1. The plaintiff-appellant and her partner legally changed their surnames from "Brown" and "Greenfield," respectively, to "Shahar," which they understood to mean in Biblical Hebrew "[t]he act of seeking God." Shahar Dep. at 23. For the sake of clarity, I will refer to the plaintiff-appellant as "Shahar" and to her partner as "Greenfield."

2. Shahar has described Greenfield as her "life partner," elaborating, "Fran is my best friend and she is my main confidante, and there is just a certain closeness with her that I don't share with others." Shahar Dep. at 5–6.

3. To avoid confusion, my view is that relationships possessing the characteristics cataloged above—"smallness," "selectivity," "seclusion," "deep attachment[ ] and commitment[ ]," etc.—warrant constitutional protection *irrespective* of (not because of) the sexual orientation of the individuals involved.

4. Under *Mt. Healthy* causation analysis, even if the employee proves that the conduct at issue is constitutionally protected and was a "substantial factor" in the government's decision to take adverse employment action; the government employer will still prevail if it can show by a preponderance of the evidence that it would have reached the same decision even in the absence of the employee's protected conduct. *Mt. Healthy*, 429 U.S. at 285–87, 97 S.Ct. at 575–76. Nothing in the record of this case, however, indicates that Bowers would have withdrawn Shahar's employment offer if she had not planned to participate in the commitment ceremony.

5. Bowers Dep. at 33–34.

ng, Shahar provided the relevant information (Greenfield was, in fact, employed by the tate) as best she could within the constraints of the standardized form, which in any case was filed unread and would never have been visible to the public. Shahar also chatted about "wedding" preparations with two Department co-workers after encountering them by chance in a restaurant while she and Greenfield were planning the ceremony. Finally, for the purpose of arranging her starting date, she notified a Department administrator that she was "getting married" and changing her last name to "Shahar," and she discussed the planned timing of her "wedding."[6] All of these mentions by Shahar of her planned ceremony were reactive, responding to requests for information.[7]

Given the limited extent of Shahar's pretermination publicizing of her commitment ceremony in terms that could be misunderstood as implying a legal relationship, I conclude, as did the district court, that Shahar "pursued her desired association only at the price of her desired employment." *Shahar*, 836 F.Supp. at 863.

C. *Intimate association claims in the public employment context are subject to a balancing test.*

The majority determines that because Shahar was involved in an intimate association akin to marriage and because the relationship was intertwined with religion, strict scrutiny should be applied. While I agree that heightened scrutiny is appropriate in cases where a public employee's First Amendment association rights have been burdened, it is also necessary to take into account the legitimate interests of government employers. These competing concerns lead me to a "balancing" analysis similar to both the test described in *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and strict scrutiny as it has been applied in public employment cases.

This case must be understood in light of the public employment context in which it arises. "[T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, — U.S. —, —, 114 S.Ct. 1878, 1886, 128 L.Ed.2d 686 (1994) (plurality opinion). The supplemental power afforded the government over its employees is justified by "the practical realities of government employment," *id.* at —, 114 S.Ct. at 1886, and the fact that "the government is employing someone for the very purpose of effectively achieving its goals," *id.* at —, 114 S.Ct. at 1888. "The key to First Amendment analysis of government employment decisions . . . is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Id.*

Neither the Supreme Court nor the Eleventh Circuit has determined the precise standard to be applied to an employee's intimate association claim against a government employer. As the majority points out, the court in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir.1994), identified and discussed the three most likely standards of review for this type

6. Shahar Dep. at 77.

7. Shahar's occasional use of the words "marriage" and "wedding" to describe the ceremony she and Greenfield were preparing to undertake hardly amounts to flaunting Georgia law. Neither "marriage" nor "wedding" is a proprietary legal term. Rabbi Friedlander testified that "marriage" is the appropriate English translation of the Hebrew term for the Jewish wedding rituals followed by Shahar and Greenfield. Friedlander Dep. at 48–50. And one of the English meanings of "marriage" is simply "an intimate or close union." Webster's Third New Int'l Dictionary (1961).

Shahar might have been better served had she been consistent in referring to Greenfield as her "partner," and the event at issue as a "commitment ceremony." On the other hand, in response to a deposition question about her use of the word "engaged" to describe her relationship with Shahar, Greenfield replied:

> We are limited by language. It is sort of derived for heterosexuals. We use the language because we don't have a better one to explain what we are talking about, but it describes that there is a sense of a commitment relationship, there is a union to take place, this person is part of my family.

Greenfield Dep. at 28.

of case: strict scrutiny,[8] *Pickering*,[9] and *Elrod–Branti*.[10] The issue of which standard to apply in intimate association cases remains unsettled after *McCabe*, however, for in that case the court determined that the employee's association rights were not violated under any of the three standards considered. *McCabe*, 12 F.3d at 1569–74. In reaching this conclusion, the court noted that "[a]ll three of these schemes provide the government employer some opportunity to demonstrate that governmental interests justified the challenged employment action." *Id.* at 1569 n. 14.

A survey of intimate association cases (and analogous privacy cases) in the context of public employment reveals that courts, irrespective of the doctrinal test being applied, have consistently balanced the interest of the government employer in the efficient functioning of its office against the employee's interest in pursuing his or her constitutionally protected freedom.[11]

I conclude that in the context of a public employee's intimate association claim based on adverse employment action, the heightened scrutiny applied by some courts is no different in practice from the *Pickering* bal-

8. Under strict scrutiny, the government must show that its action is "narrowly tailored to serve a compelling government interest." *McCabe*, 12 F.3d at 1566.

9. *See Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The *Pickering* analysis was developed in the context of an adverse employment action on the basis of a public employee's speech. Under *Pickering*, courts balance "the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *McCabe*, 12 F.3d at 1564 (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734).

10. *See Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Under the *Elrod–Branti* analysis, which was developed in the context of an adverse employment action based upon a public employee's political affiliation, courts "look to whether party affiliation is important to effective performance of the job at issue." *McCabe*, 12 F.3d at 1565.

Because the *Elrod–Branti* analysis has been limited to the context of political patronage, I will exclude it from further consideration in the intimate association context.

11. *See Whisenhunt v. Spradlin*, 464 U.S. 965, 970–72, 104 S.Ct. 404, 408–09, 78 L.Ed.2d 345 (1983) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting from denial of cert.) (calling for heightened scrutiny for employees' due process privacy claims, but recognizing that "[p]ublic employers . . . deserve considerable latitude in enforcing codes of conduct"); *Kelley v. Johnson*, 425 U.S. 238, 244–49, 96 S.Ct. 1440, 1444–46, 47 L.Ed.2d 708 (1976) (balancing police officer's liberty interest in personal appearance against police department's need to regulate the hair length of its officers, after suggesting that state employees may be subject to more restrictive regulations where their less fundamental rights are at stake); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984) (applying *Pickering* balancing test to school board employee's constitutional challenge to policy prohibiting school board employees from sending their children to private schools); *Wilson v. Taylor*, 733 F.2d 1539, 1542–44 (11th Cir.1984) (assuming that *Pickering* is the appropriate standard for police officer's intimate association claim); *Dike v. School Bd.*, 650 F.2d 783, 787 (5th Cir. Unit B 1981) (nominally applying strict scrutiny to school board's burden on employee's liberty interest in breast-feeding her child, but remanding for consideration of whether school board's interests in avoiding disruption of educational process, ensuring that teachers perform their duties without distraction, and avoiding potential liability for accidents were strong enough to justify the burden); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir.1990) (applying *Pickering* balancing to public school employee's First Amendment privacy claim arising out of termination due to decision to send her daughter to private school); *Thorne v. City of El Segundo*, 726 F.2d 459, 468–72 (9th Cir.1983) (applying sliding-scale scrutiny, so that "[t]he more fundamental the rights on which the state's activities encroach, the more weighty must be the state's interest in pursuing that course of conduct," to employee's privacy and intimate association claims); *Kukla v. Village of Antioch*, 647 F.Supp. 799, 803–12, 806 (N.D.Ill.1986) (analyzing employee's intimate association claim by "weighing the amount of constitutional protection given to the conduct in question against the extent to which restriction of it is necessary for the government agency to function"); *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D.Mich.1983) (balancing police officer's intimate association and privacy rights against police department's interest in officer's job performance), *aff'd without opinion*, 746 F.2d 1475 (6th Cir.1984), *cert. denied*, 473 U.S. 909, 105 S.Ct. 3535, 87 L.Ed.2d 659 (1985); *Childers v. Dallas Police Dept.*, 513 F.Supp. 134, 139–42 (N.D.Tex.1981) (applying *Pickering* balancing test to city employee's First Amendment association claim), *aff'd without opinion*, 669 F.2d 732 (5th Cir.1982).

ancing test applied by others. Both necessitate balancing the employee's constitutional association rights against the government's interest in the efficient functioning of its agency. Although *Pickering* and its direct descendants are free speech cases, their motivating principle—optimizing protection of government employees' fundamental constitutional rights and the effective provision of public services by government agencies—applies equally to intimate association cases under the First Amendment. Like core First Amendment speech, which the Supreme Court has protected in the *Pickering* line of cases as a "fundamental right," of which citizens must not be deprived just "by virtue of working for the government," *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), the right of intimate association is a fundamental aspect of personal liberty, *Roberts*, 468 U.S. at 617–21, 104 S.Ct. at 3249–51, 82 L.Ed.2d 462. But it is also true that an employee may disrupt the efficient workings of a government office with First Amendment *conduct* as well as speech. Balancing is equally appropriate in both contexts.[12]

D. *Shahar's intimate association rights outweigh Bowers' legitimate interests in this case.*

The district court applied the *Pickering* balancing test to Shahar's intimate association claims. The court correctly noted that Bowers'

> asserted interests embody two over-arching concerns: (1) public credibility, specifically the need to avoid the appearance of endorsing conflicting interpretations of Georgia law, and (2) internal efficiency, specifically the need to employ attorneys who act with discretion, good judgment, and in a manner which does not conflict with the work of other Department attorneys.

Shahar, 836 F.Supp. at 864. Proceeding to find sufficient evidentiary support for Bowers' articulated concerns, the district court concluded that "the unique circumstances of this case show that [Bowers'] interests in the efficient operation of Department outweigh [Shahar's] interest in her intimate association with her female partner." *Id.* at 865. Absent from the district court's "balancing" discussion, however, is an explicit juxtaposition of Shahar's intimate association rights or any discussion of their countervailing weight.

The relationship celebrated through Shahar's and Greenfield's commitment ceremony is close to the core of the constitutional right to intimate association, for it exemplifies the characteristics determined by the Supreme Court to warrant special protection. In *Roberts*, the Court explained that between the poles of "family" relationships and large business enterprises "lies a broad range of human relationships that may make greater and lesser claims to constitutional protection from particular incursions by the State." *Id.* at 618–22, 104 S.Ct. at 3250–51. Because Shahar's commitment ceremony and relationship with Greenfield fall close to the "family" end of this continuum, her intimate association rights weigh heavily on the balance.

On the other hand, Bowers is the chief legal officer of the state of Georgia, with responsibility for "seeing that State agencies uphold the law and [for] upholding the law in

12. One aspect of how *Pickering* free speech analysis maps onto intimate association cases might be misleading. In *Connick*, the Supreme Court made clear that a government employee can be protected under *Pickering* only if the speech in question relates to "matters of public concern." 461 U.S. at 147, 103 S.Ct. at 1690. Obviously, it would be paradoxical to require a government employee's intimate association to relate to a matter of public concern as a threshold requirement for constitutional protection. The point of the *Connick* requirement, however, is simply to operationalize *Pickering*'s purpose of upholding only the more fundamental rights of public employees and not turning federal courts into general review boards for personnel decisions. *Id.* Speech on matters of public concern is given categorical protection under *Pickering* and *Connick* because this type of speech "occupies 'the highest rung of the hierarchy of First Amendment values.'" *Id.* at 145, 103 S.Ct. at 1689 (quoting *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980)).

Therefore, inasmuch as *Connick* may be instructive in the intimate association context, it reaffirms the appropriateness of the sliding-scale scrutiny inherent in a balancing test that weighs intimate associations closer to the core of the First Amendment right more heavily than those closer to the periphery.

general."[13] Although Georgia does not have a statute which prohibits same-sex "marriages," and Shahar violated no law by planning and participating in the commitment ceremony with her partner, the state does not officially recognize such a union and would not authorize the issuance of a marriage license to a same-sex couple.[14]

Bowers does not allege that Shahar's planned ceremony caused any actual disruption of the functioning of the Georgia Department of Law. Although we must consider a government employer's "reasonable predictions of disruption," *Waters*, — U.S. at —, 114 S.Ct. at 1887, the employer's assessment of harm should be discounted by the probability of its realization in order to weigh it fairly against an actual burden on an employee's constitutional rights. Certainly, the mere "subjective apprehension that [the employee's conduct] might have an adverse impact upon" the government agency will not outweigh such a burden. *Williams v. Roberts*, 904 F.2d 634, 638 (11th Cir.1990).

Bowers first determined that Shahar's "holding herself out as 'married' to another woman ... indicated a lack of discretion regarding the Department's public position on the proper application for the [Georgia] sodomy statute and Georgia's marriage laws."[15] Shahar's pre-termination conduct, however, seems unrelated to the Department's legal positions. Second, Bowers characterized Shahar's representations about her commitment ceremony as "political conduct demonstrating that she did not believe in and was not going to uphold the laws regarding marriage and sodomy."[16] But there is no evidence in the record to support such an inference; to the contrary, Shahar has never asserted any legal benefit from her marriage and her commitment ceremony was far from a political demonstration or an act of civil disobedience. In any case, the Department has a rule against certain political activities which Shahar had understood to preclude advocacy on behalf of, for instance, gay rights.[17] Third, Bowers makes the general assertion that Shahar's presence in the Department would have a "disruptive" effect on her co-workers.[18] Again, there is no evidence in support of this prediction in the record, and some evidence against: Shahar's summer clerkship with the Department appears to have been a success.

Bowers further contends that he was motivated to withdraw Shahar's job offer by the concern that the Department would be perceived by the public as disregarding Georgia law as it pertains to homosexual marriages (which are not recognized) and sodomy (which is illegal).[19] Again, Shahar's commitment ceremony and relationship were not, before the inception of this case, thrust into the public domain. Even if members of the public were to become aware of and misunderstand the asserted status of the relationship between Shahar and her partner, it is questionable whether they would infer that the Department, by employing Shahar, was acquiescing in the legally legitimate status of the union. Shahar neither violated Georgia's laws pertaining to marriage nor attempted to avail herself of any legal rights or privileges reserved for legally married people. And there is no evidence that Shahar violated Georgia's sodomy law.[20] Catering to private

13. Bowers Dep. at 42.

14. Nor does Georgia recognize same-sex common-law marriages. *See* O.C.G.A. § 19–3–1; *Georgia Osteopathic Hosp., Inc. v. O'Neal*, 198 Ga.App. 770, 403 S.E.2d 235, 243 (1991) ("In order for a common-law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife, and must consummate the agreement.").

15. Br. of Appellee at 12–13.

16. Br. of Appellee at 13; Bowers Dep. at 62–63.

17. Br. of Appellee at 5; Shahar Dep. at 60–61.

18. Br. of Appellee at 13; Bowers Dep. at 90–91.

19. The Georgia consensual sodomy statute, O.C.G.A. § 16–6–2, which makes oral and anal sex illegal, applies equally to homosexuals and heterosexuals.

20. Bowers admits that he has no knowledge of Shahar's actual sexual behavior. Bowers Dep. at 69. Instead, in considering whether to withdraw Shahar's job offer, he claims to have relied on "the public perception that 'the natural consequence of a marriage is some sort of sexual conduct' ... and if it's homosexual, it would have to be sodomy." Brief of Appellee at 10–11; Bowers Dep. at 80–81. The bare description of a

prejudice is not a legitimate government interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed.2d 313 (1985) ("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government], are not permissible bases" for decisionmaking); *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Although the unique status of Bowers' office makes this a close case, I conclude that Shahar's constitutional interest in pursuing her intimate association outweighs any threat to the efficient operation of the Georgia Department of Law. As the ultimate balancing under *Pickering* is a question of law for this court to decide *de novo*, *Kurtz v. Vickrey*, 855 F.2d 723, 732 (11th Cir.1988), I would reverse summary judgment in favor of Bowers and grant summary judgment in favor of Shahar on her intimate association claim.

II. *Expressive Association*

"Expressive" association claims involve the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249. The right of expressive association protects communal pursuit of the rights expressly protected by the First Amendment. *Id.* at 618, 622, 104 S.Ct. at 3249, 3252; *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir.1994). In this case, Shahar's commitment ceremony constituted an association for the purpose of, at least in part, engaging in the exercise of religion, a protected First Amendment activity.[21] I agree with the majority that Bowers' withdrawal of Shahar's job offer burdened her right of expressive association.

This court has stated that the *Pickering* balancing test is the correct standard of review when a public employer burdens an employee's First Amendment right of expressive association. *Hatcher v. Board of Public Educ. & Orphanage*, 809 F.2d 1546, 1559 & n. 26 (11th Cir.1987). The majority now determines that *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), overruled *Hatcher* on this point because the Supreme Court in *Rotary* applied a compelling interest test to the plaintiff's expressive association claim. *Rotary*, however, was not an employment case, and, as explained above, in the employment context the state has "far broader powers than does the government as sovereign." *Waters*, — U.S. at —, 114 S.Ct. at 1886. Because I believe that this court continues to be bound by *Hatcher*, *Pickering*, not strict scrutiny, should be applied in reviewing Shahar's expressive association claim.[22]

"The intrinsic and instrumental features" of expressive and intimate association "may, of course, coincide." *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249. In this case, as the district court found, Shahar's expressive association claim overlaps not just her intimate association claim but also her free exercise claim. I agree with the district court that Shahar's expressive association claim "offers no greater claim to constitutional protection than [her] intimate association claim," *Shahar*, 836 F.Supp. at 862, given that *Pickering* should be applied to both, and therefore I would not address it any further.

person as "homosexual," however, is hardly sufficient to support an inference that he or she has engaged in the specific conduct violative of Georgia's sodomy law. *Cf. Able v. United States*, 880 F.Supp. 968, 976 (E.D.N.Y.1995) ("This court concludes that under the First Amendment a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings.").

21. On the facts of this case, I do not believe that Shahar has stated a viable expressive association claim based on social or political aspects of her commitment ceremony and relationship with her partner. In any case, an association claim based on public expression would be in tension with Shahar's more compelling intimate association claim.

22. *Connick*'s public concern requirement does not stand in the way of Shahar's expressive association claim in this circuit. *See Hatcher*, 809 F.2d at 1558 ("We conclude, however, that *Connick* is inapplicable to freedom of [expressive] association claims."). Other circuits have applied the *Connick* requirement to expressive association claims. *See Griffin v. Thomas*, 929 F.2d 1210, 1212–14 (7th Cir.1991); *Boals v. Gray*, 775 F.2d 686, 691–93 (6th Cir.1985); *see also Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 791 (9th Cir.1986) (noting that because defendant had not raised the question, the court had no need to decide whether the plaintiff's "right of association with the union touches on a matter of public concern so as to give rise to a cause of action in federal court for a violation of First Amendment rights").

III. *Free Exercise of Religion*

I would not remand for reconsideration on the free exercise claim. Rather, because in my view this case is not about the free exercise of religion, and because the violation of Shahar's intimate association rights is dispositive, I would not reach this issue.

IV. *Equal Protection*

[6] Shahar's equal protection claim is based on the contention that Bowers withdrew her job offer, at least in part, because she is a homosexual. Shahar argues that classifications based on sexual orientation should be subject to strict scrutiny under the Equal Protection Clause.[23]

The facts of this case, however, do not support Shahar's contention that Bowers withdrew her offer because of her sexual orientation.[24] Bowers asserted that he withdrew Shahar's job offer only because of conduct surrounding her commitment ceremony and relationship with her partner, not because of her status as a homosexual. The record establishes that the Department has neither a policy nor a proven practice of excluding homosexuals from employment, and that Bowers generally does not inquire into the sexual practices or preferences of applicants and employees. Furthermore, a number of Department employees, including at least two in management positions (but not, apparently, Bowers himself), were aware that Shahar was a lesbian when the offer of employment was extended. Although Shahar offers some indirect evidence of divergent attitudes in the Department towards homosexuals and heterosexuals, she has not shown that she was treated differently, for equal protection purposes, on the basis of sexual orientation.[25] Her equal protection claim thus fails.

Accordingly, I CONCUR in part and DISSENT in part.

23. Judge Godbold would hold that strict scrutiny applies to Shahar's equal protection claim because Shahar's fundamental right of free exercise of religion has been burdened. This equal protection analysis is both flawed and superfluous. Shahar does not argue, and the record does not indicate, that she was treated differently because of her religion. *See, e.g., Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.1993) ("To establish an equal protection clause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate.") (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 238–48, 96 S.Ct. 2040, 2047–52, 48 L.Ed.2d 597 (1976)). Nor did Bowers *classify* employees in the manner contemplated by equal protection principles. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992) (stating the general equal protection principle that rational basis review applies "unless a *classification* warrants some form of heightened review because it jeopardizes exercise of a fundamental right or *categorizes* on the basis of an inherently suspect characteristic") (emphasis added). Moreover, even if Shahar could make out an equal protection claim based on her fundamental right of free exercise, this claim would be subsumed by her direct free exercise claim; no greater constitutional protection would result.

24. Shahar further argues that disputed issues of material fact should have precluded summary judgment. After reviewing the record, however, I agree with the district court that the pertinent facts are undisputed.

25. Thus, we need not reach the issue of whether homosexuals constitute a suspect class entitled to strict scrutiny for equal protection claims.

LEVEL 1 - 1 OF 2 CASES

NINIA **BAEHR**, GENORA DANCEL, TAMMY RODRIGUES, ANTOINETTE PREGIL, PAT LAGON, JOSEPH MELILIO, Plaintiffs-Appellants, v. JOHN C. **LEWIN**, in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellee

No. 15689

Supreme Court of Hawaii

74 Haw. 645; 1993 Haw. LEXIS 30

May 27, 1993

May 27, 1993, Filed

PRIOR HISTORY: [**1]
Motion for Reconsideration or Clarification; Civ. No. 91-1394.

COUNSEL: Robert A. Marks, Attorney General, and Sonia Faust, Deputy Attorney General, for appellee John C. **Lewin.**

JUDGES: Moon, C.J., Levinson, J., Nakayama, J., * Intermediate Court of Appeals Chief Judge Burns, in place of Lum, Former C.J., Recused, ** Intermediate Court of Appeals Judge Heen, in place of Klein, J., Recused. Concurring Opinion by Chief Judge Burns.

* In place of Substitute Justice Hayashi, whose term of Substitution expired on October 30, 1992. See Yoshizaki v. Hilo Hosp., 50 Haw. 40, 429 P.2d 829 (1967).

** Chief Justice Lum retired March 31, 1993. See Rohlfing v. Moses Akiona, Ltd., 45 Haw. 440, 369 P.2d 114 (1962).

OPINION: [*645] Defendant-Appellee's motion for reconsideration, or, in the alternative, for clarification, and suggestion of the appropriateness of rebriefing and reargument having been filed in the above-captioned matter on May 17, 1993, the motion is hereby granted in part, and the mandate on remand is hereby clarified as follows:

[*646] Because, for the reasons stated in the plurality opinion filed in the above-captioned matter on May 5, 1993, the circuit court erroneously [**2] granted **Lewin's** motion for judgment on the pleadings and dismissed the plaintiffs' complaint, the circuit court's order and judgment are vacated and the matter is remanded for further proceedings consistent with the plurality opinion. On remand, in accordance with the "strict scrutiny" standard, the burden will rest on **Lewin** to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights. See *Nagle v. Board of Educ., 63 Haw. 389, 392, 629 P.2d 109, 111 (1981); Holdman v. Olim, 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978).*

Defendant-Appellee's motion is denied in all other respects.

Intermediate Court of Appeals Judge Heen, having filed a dissenting opinion in this matter, does not concur.

CONCURBY: BURNS

CONCUR: CONCURRING OPINION BY CHIEF JUDGE BURNS

There are three opinions in this case: (1) Levinson-Moon; (2) Burns; and (3) Heen-Hayashi. Appellee **Lewin** disagrees with the Levinson-Moon and Burns opinions and seeks reconsideration of both. With respect [**3] to the Levinson-Moon opinion, I concur with the decision by [*647] Justice Levinson and Chief Justice Moon to grant the motion in part. With respect to the Burns opinion, I deny the request.

Alternatively, appellee **Lewin** seeks clarification of this court's mandate. The only agreement by a majority of this court is that this case involves genuine issues of material fact. In my view, that is this court's mandate. Thus far, there is no majority agreement as to what these issues are or which side has the burden to prove them.

Presented with this chance to write more than I have already written in the Burns opinion about these issues and burdens, I choose to wait for the next appeal. At that time, hopefully, there will be: a complete record of a trial in which the parties have presented their evidence and arguments and the trial court has made its decisions of fact and law; and opening, answering and reply briefs fully discussing the issues and the applicable law.

1ST CASE of Level 1 printed in FULL format.

IN RE ZACHARIAH HAYES **ALLEN** and GLEN ROYCE FAVRE, Debtors. JAMES H. **BONE,** Standing Chapter 13 Trustee, Movant, v. ZACHARIAH HAYES **ALLEN** and GLENN ROYCE FAVRE, Respondents.

CASE NUMBER A95-63953-ADK, IN PROCEEDINGS UNDER CHAPTER 13 OF THE BANKRUPTCY CODE

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

186 Bankr. 769; 1995 Bankr. LEXIS 1446; Bankr. L. Rep. (CCH) P76,697; 27 Bankr. Ct. Dec. (CRR) 1190

October 3, 1995, Decided

October 3, 1995, ENTERED, filed

COUNSEL: [*1] For MOVANT: James H. Bone, Esquire, Chapter 13 Trustee, Atlanta, GA.

For Respondents: A. Keith Sanders, Esq, Mary Ida Townson, Esq., Clark & Washington, P.C., Atlanta, GA.

JUDGES: A. D. KAHN, UNITED STATES BANKRUPTCY JUDGE

OPINIONBY: A. D. KAHN

OPINION: MEMORANDUM OF OPINION

This contested matter calls upon the Court to interpret the word "spouse" as used in § 302 of the Bankruptcy Code *(11 U.S.C. § 302)*, which governs the filing of a joint petition in bankruptcy. Specifically, the issue before the Court is: Can a same sex couple qualify as a debtor and spouse within the meaning of § 302? The Court finds this matter to be a core proceeding pursuant to *28 U.S.C. § 157*(b)(2).

I. Procedural Background

The Debtors filed their joint petition for relief under Chapter 13 of the Bankruptcy Code on March 22, 1995. The Chapter 13 Trustee (the "Trustee") filed an objection to confirmation, contending that the Debtors did not qualify as a debtor and spouse within the meaning of § 302. A hearing was held on June 7, 1995, n1 after which the Court took the matter under advisement and gave the Parties the opportunity to file briefs. The Court has considered the briefs and the responses thereto and [*2] now makes the following findings of fact and conclusions of law.

n1 At the hearing, the possibility was discussed that the Debtors could have filed separate bankruptcy petitions and moved for joint administration. However, upon review of Fed. R. Bankr. P. 1015, joint administration does not appear to be available to individual debtors who are not husband and wife or general partners. Fed. R. Bankr. P. 1015(b). But see *In re Coles, 14 Bankr. 5 (Bankr. E.D. Pa. 1981)*(heterosexual, cohabitating couple not eligible to file joint case under § 302, but cases may be jointly administered).

II. Findings of Fact

The Debtors are two men who have a long-term, homosexual relationship. Their relationship is such that it has many of the same characteristics of a typical marriage between a man and a woman. On February 12, 1993, in Las Vegas, Nevada the Debtors participated in a religious ceremony conducted by a Baptist minister in which they exchanged vows. Since that time, the Debtors have cohabitated and have shared [*3] their lives together, including incurring debts together. Approximately 92% of their debts are joint debts. Stipulation of Facts, P 3. The Debtors consider themselves to be married despite the fact that they do not have a marriage license. The Debtors acknowledge that their relationship is not legally recognized as a marriage under the laws of either Nevada or Georgia. n2

n2 The Debtors argue that a same sex marriage is not illegal in Georgia, contending that the only prohibition against such a union is that they cannot obtain a marriage license. "Debtors' Response to Brief Filed by Trustee in Support of Objection to Confirmation and Debtors' Brief Requesting Confirmation of Chapter 13 Plan" at 14 - 15. As both the Trustee and the Debtors agree that the Debtors do not have a legally recognized marriage by the State of Georgia, the Court finds it unnecessary to determine whether the Debtors' relationship is illegal in Georgia. The Court would note, however, that the Georgia law on sodomy has been upheld by the United States Supreme Court. *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).*

[*4]

III. Conclusions of Law

Section 302(a) of the Bankruptcy Code provides that

A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse.

11 U.S.C. § 302(a)(emphasis added). Section 302 permits the joint administration of the estates of a debtor and the debtor's spouse. It creates no substantive rights. *Reider v. Federal Deposit Ins. Corp. (In re Reider), 31 F.3d 1102, 1109 (11th Cir. 1994).*

Joint administration is thus a procedural tool permitting use of a single docket for administrative matters, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other ministerial matters that may aid in expediting the cases.

Id.

The Bankruptcy Code does not define the term "spouse." The legislative history for § 302 states that "[a] joint case is a voluntary bankruptcy case concerning a wife and a husband." H.R. Rep. No. 595, 95th Cong., 1st Sess., 321 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6277; [*5] S. Rep. No. 989, 95th Cong., 2nd Sess. 32 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5818. The Trustee appears to contend that this language in the legislative history makes it clear that Congress intended to limit those eligible to file a joint bankruptcy petition under § 302 to husbands and wives. Brief in Support of Trustee's Objection to Confirmation at 2.

The Court does not find the above legislative history as persuasive as the Trustee. In fact, the Court finds nothing in the history of this section to indicate that Congress ever contemplated or anticipated that a same sex couple would attempt to file a joint petition. For the same reasons the Court rejects the Debtors' argument below that Congress intended to keep the term "spouse" open to an expansive definition, the Court rejects the argument that this language demonstrates that same sex couples are to be excluded. Thus, on this particular aspect of the issue sub judice, the Court gives little weight to this legislative history. As will be discussed below, however, it does indicate that Congress intended that, to be eligible to file a joint petition, the parties must be legally married.

A.

Where a word is not [*6] specifically defined in a statute, it is presumed that Congress intended the word's common and approved usage to control. 2A Norman J. Singer, Sutherland Statutory Construction § 46.01, at 83 (5th ed. 1991). The Random House College Dictionary 1272 (1980) defines "spouse" as "either member of a married pair in relation to the other; one's husband or wife." Black's Law Dictionary 1402 (6th ed., 1990) defines "spouse" as "one's husband or wife." Therefore, it appears that the term "spouse" is defined in terms of husband or wife, which presupposes a marriage.

Although there are no reported cases on the specific question of whether a same sex couple can file a joint bankruptcy petition, courts have considered other attempts to file a joint petition. For example, a court has rejected the attempt to file a joint petition by a mother and daughter. *In re Lam, 98 Bankr. 965 (Bankr. W.D. Miss. 1988).* See also *In re Simon, 179 Bankr. 1, 6 (Bankr. D. Mass. 1995)*(individual and trust); *In re Jackson, 28 Bankr. 559* (Bankr. ED. Pa. 1 983)(mother/father/son).

The case most analogous to the case sub judice is *In re Malone, 50 Bankr. 2 (Bankr. E.D. Mich. 1985).* In Malone, [*7] the court had to determine whether a man and woman who cohabitated but were not legally married were eligible to file a joint petition. This couple shared living expenses, owned property together, and raised their natural children together. The court found that the statutory requirements of § 302 had not been met because the debtors were not married. *Id., at 3.*

The Debtors contend that the lack of a definition of "spouse" in the Bankruptcy Code is significant. They point to the case of *Wiswall v. Tanner (In re Tanner), 145 Bankr. 672 (Bankr. W.D. Wash. 1992).* In Tanner,

a trustee was attempting to recover an alleged preference from the debtor's former lesbian lover. The court had to determine whether the former lesbian lover was an insider as defined by § 101(31)(A). The court found that Congress had intended the definition of "insider" to be expansive and "'flexibly applied on a case by case basis.'" *145 Bankr. at 677* (quoting *In re Missionary Baptist Foundation of America, Inc., 712 F.2d 206, 210 (5th Cir. 1983)).* The court then concluded, under the facts of the case, the former lesbian lover qualified as an insider.

The Debtors argue that, just as the Tanner [*8] court used a case by case approach to define "insider," this Court should use the same approach to define "spouse."

In this case, the term spouse does not have the rigid definition that the term insider has and therefore it must have been the intent of Congress to leave the term spouse open so that it could be expanded to diminish society's prejudices and therefore implement the underlying purpose of the bankruptcy code and allow these Debtors an opportunity to reorganize their debts.

"Debtors' Response to Brief Filed by Trustee in Support of Objection to Confirmation and Debtors' Brief Requesting Confirmation of Chapter 13 Plan" ("Debtors' Brief") at 19 - 20. The flaw in the Debtors' contention that Congress intended the word "spouse" to be interpreted expansively like the term "insider" is that the manner in which Congress has used the terms "insider" and "spouse" in the Bankruptcy Code differs. The term "insider" is a term of art and as such required Congress to include a definition. Congress did indeed intend to make its definition flexible and expansive by prefacing the definition with the words: "'insider' includes." § 101(31)(emphasis added). By contrast, [*9] Congress apparently saw no need to supply the definition of "spouse" - not intending to allow an expansive, case by case approach to its definition, but rather to limit it to its common usage.

The Debtors propose the following definition of the term "spouse."

two persons who cohabitate, have a positive mutual agreement that is permanent and exclusive of all other relationships, share their income, expenses and debts, and have a relationship that they deem to be a spousal relationship.

Debtors' Brief at 10. In other words, the Debtors are suggesting a subjective test for the qualification of being a spouse. Presumably, a court would make a case by case inquiry to determine whether a couple qualified as a debtor and spouse for the purposes of § 302. Much would hinge on the parties' intent. If, in their minds the parties are married, then they would qualify as spouses.

This would, in fact, create a federal standard for marriage, and, indeed, the Debtors contend that state law is irrelevant for defining the meaning of "spouse" in § 302. n3 Debtors' Brief at 12 - 14. The Debtors look to the case of *Kahn v. Immigration and Naturalization Service, 36 F.3d 1412 [*10] (9th Cir. 1994)* for support. In Kahn, the Court reviewed a decision by the Board of Immigration Appeals which adopted state law in determining whether an alien convicted of a serious drug offense had sufficient family ties in the United States to be entitled to a waiver of deportation. In holding that state law should not control, the court stated that the Immigration and Nationality Act "'was designed to implement a uniform federal policy,' and the meaning of concepts important to its application are 'not to be determined according to the law of the forum, but rather require[] a uniform federal definition.'" *36 F.3d at 1414* (quoting *Rosario v. INS, 962 F.2d 220, 223 (2nd Cir. 1992).*

> n3 Debtors go so far as to state that "the laws of the State of Georgia have nothing to do with how any term used on [sic] the Bankruptcy Code should be defined." Debtors' Brief at 13 (emphasis in original). This is an inaccurate statement. For example, the question of what is property of the bankruptcy estate is controlled to a large extent by state law. See *Butner v. U.S., 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).* Therefore, it is neither unusual nor inappropriate to look to state law for certain purposes, including the determination of whether or not two people are married.

[*11]

Kahn is distinguishable from the case sub judice in that there is no indication that Congress intended to establish a federal definition of marriage. Laws on marriage have traditionally been left to the states to control. The Court can find nothing in § 302 which demonstrates Congress' intent to alter this tradition. For the reasons previously stated, the Court rejects the Debtors' proposed definition of "spouse" opting rather for the common definitions quoted above.

Requiring that a debtor and spouse be legally married in order to qualify to file a joint bankruptcy petition is more than a mere technicality. Marriage is a legal relationship. Significant rights and obligations arise upon marriage. Certain property rights, eviden-

tiary privileges, and tort and contract rights may be altered. Therefore, limiting the ability to file a joint petition to legally married couples has a very rational basis.

The Court is not unaware that there may come a time when a state does legally recognize a marriage between a same sex couple. For example, the Supreme Court of Hawaii has remanded a case to the lower courts for the state to demonstrate, under a strict scrutiny standard, that [*12] a statute restricting the marriage of same sex couples "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." *Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, 68 (Haw. 1993)*(citations omitted). n4 In the Court's opinion, if a state recognizes a legal marriage between a same sex couple, they would qualify for relief under § 302 of the Bankruptcy Court. In other words, what is controlling is the fact that the parties are legally married. It is not limited to legally married husbands and wives. The Court has already determined that Congress did not anticipate the marriage, legal or otherwise, of a same sex couple. If it comes to pass that a state does recognize such marriages, and if Congress wants to limit relief under § 302 to married, heterosexual couples, thereby creating a federal standard for the meaning of "spouse" in the Bankruptcy Code, it may amend § 302 accordingly.

n4 By contrast to the Baehr case, another court has recently affirmed the denial of a complaint for an injunction to require that a clerk issue a marriage license to two homosexual men. *Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).*

[*13]

B.

The Debtors argue that, if the Court finds that the Debtors are ineligible to file a joint petition under § 302 of the Bankruptcy Code, their rights under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution will be violated. Debtors' Brief at 20. n5 The Debtors contend that the Court will be denying them the right to file a joint petition based solely on their homosexual relationship and the resulting lack of ability to obtain a marriage license. This is not the basis of the holding of the Court today.

n5 The Court notes that there is no constitutional right to obtain a discharge in bankruptcy. *United States v. Kras, 409 U.S. 434, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973).* Therefore, the Debtors' constitutional arguments properly focus on equal protection and due process.

The Court holds that, in order to qualify to file a joint petition under § 302 of the Bankruptcy Code, the two parties must be legally married. This applies to both heterosexual [*14] and homosexual couples. Therefore, there is no violation of the Debtors' constitutional rights. In order for the Court to find a constitutional violation, the Court would have to hold that the denial of a marriage license to the Debtors by the State of Georgia is unconstitutional. This, in essence, is what the Debtors are asking the Court to do. First, it should be noted that there is no evidence before the Court that the Debtors have ever applied for a marriage license. However, it is assumed, for the purposes of the issue before the Court, that Georgia would decline to issue a marriage license to the Debtors. n6

n6 The Court further notes that the Debtors exchanged vows in Nevada, and it appears that they never applied for a Nevada marriage license either. However, because the Debtors are now residents of the State of Georgia, the Court focuses on Georgia's marriage laws.

This leads to the question of whether such a denial by Georgia would be constitutional. Pursuant to *28 U.S.C. § 1334*(c)(1), the Court [*15] abstains from considering this issue. The Court will not allow the Debtors to challenge Georgia's laws on marriage through the "back door" by litigating their validity before the bankruptcy court. If the Debtors are truly interested in pursuing their right to enter into a legally recognized marriage, they should bring an action before the appropriate state forum. This Court will not accept the Debtors' invitation to declare a state's marriage laws invalid. The Court is convinced that Congress had no intention of bankruptcy courts' entertaining this type of litigation.

IV. Conclusion

In summary, the Court finds that, in order for two debtors to qualify as a debtor and spouse within the meaning of § 302 of the Bankruptcy Code, they must be legally married. Therefore, the Debtors are not eligible to file a joint bankruptcy petition. The Court will allow the Debtors twenty (20) days to amend the instant bankruptcy petition to delete one of the Debtors and to amend the proposed Chapter 13 plan accordingly. The other Debtor may file his own bankruptcy

petition. In the event the Debtors choose not to amend their bankruptcy petition, the case will be dismissed.

An appropriate Order is [*16] entered contemporaneously herewith.

At Atlanta, Georgia, this 3rd day of October, 1995.

A.D. KAHN

UNITED STATES BANKRUPTY JUDGE

ORDER

In accordance with the reasoning in the accompanying Memorandum of Opinion,

IT IS THE ORDER OF THE COURT that the Chapter 13 Trustee's Objection to Confirmation be, and the same hereby is, SUSTAINED.

IT IS THE FURTHER ORDER OF THE COURT that the Debtors are hereby directed to amend their bankruptcy petition and proposed plan in accordance with the Court's accompanying Memorandum of Opinion within twenty (20) days of the entry of this Order or the Court will dismiss the case without further notice or hearing.

The Clerk is hereby directed to serve a copy of this Order and the accompanying Memorandum of Opinion on the Debtors, the Debtors' attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia, this 3rd day of October, 1995.

A.D. KAHN

UNITED STATES BANKRUPTCY JUDGE