

Mr. Hochberg stated the problem with saying income tax benefits are a major benefit is that, as Randy Roth said, sometimes it is a burden. I could vote to approve this table if it was not attached to the report, because I don't doubt that its true. It's only questionable if its a major benefit.

A call for the question was made.

The motion to accept Substantial Benefit No. 9, income tax table benefits passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Ms. Sheldon voting nay. Mr. Hochberg abstained.

Dr. Stauffer moved to accept Substantial Benefit No. 10, additional income tax benefits. Mr. Britt seconded the motion. Which specifically states:

Substantial Benefit No. 10: Additional Income-Tax Benefits

The Commission finds that certified spouses (who are not claimed as dependents on other tax returns) are automatically given an exemption, while uncertified spouses must meet a much more rigorous test of economic dependency which many could not meet.

The Commission further finds that if an uncertified spouse's employer offers domestic partner benefits (such as health care or other benefits), the amount paid to the worker for their spouse's benefits are considered part of the worker's income unless the spouse is claimed as a dependent. The amount paid out by employers for certified spouse's benefits are, however, not treated as taxable income.

The Commission further finds that if a marriage dissolves, there are tax advantages if the couple was certified. Alimony payments for (once) certified couples are deductible, and (legal) divorce-related property settlements (such as transfers from one legal spouse to the other) are exempt from capital gains tax (until the certified spouse receiving the property sells it). When uncertified marriages dissolve, these tax benefits cannot be claimed.

The Commission finds that tax benefits like these are a substantial benefit.

Dr. Stauffer spoke in favor of the motion, stating that the presumption that if you are married you are automatically presumed economically dependent presents an opportunity to *influence* a couple's tax situation. He *noted* that if someone receives health benefits for their domestic partner, the cost of those benefits are taxable income, *while certifiably married couples are not attributed this income when health benefits are extended to a spouse*. If the marriage is dissolved in divorce, *certain alimony* payments may be tax free. Dr. Stauffer agreed to add citations to the three paragraphs *of the motion*.

Ms. Sheldon moved to table motion until the Commission can determine further information. Mr. Hochberg seconded the motion.

The motion to table discussion of Substantial Benefit No. 10 did not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

Ms. Sheldon asked that when the Commission is comparing uncertified relationships with certified relationships are we talking about opposite-sex couples too? Dr. Stauffer confirmed that he's talking about those who would like to be married but can't because they can't have a certificate. Mr. Hochberg asked about those who were heterosexuals. Dr. Stauffer replied that the Commission can address that when we get to that point. Mr. Hochberg asked Dr. Stauffer "What is your intent? Where are you going?" The Chair asked Mr. Hochberg *whether he had received Dr. Stauffer's motions back on October 6th* and Mr. Hochberg confirmed he did.

Mr. Britt called for the question.

The motion to accept Substantial Benefit No. 10, additional income tax benefits passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 11, estate and gift taxes. Ms. Gomes seconded. The motion specifically reads:

Substantial Benefit No. 11: Estate/Gift-Tax Benefits

The Commission makes the following findings, for the information contained in this section:

A legally married person receiving an estate (or total gifts) beyond \$600,000 from his/her spouse does not owe transfer taxes due to the unlimited "marital deduction."⁷² Other heirs, including an uncertified spouse, would have to pay transfer taxes on the value of the estate or gifts beyond the \$600,000 ceiling.⁷³ The generally positive effect of this law for certified surviving spouses is to allow them to defer payment of the transfer tax until their own death. Also, annual gifts beyond \$10,000 to unrelated individuals are taxed; transfers to spouses are not taxed.⁷⁴

In the cases of couples without sizeable estates, the "marriage bonus" here is irrelevant. But to those couples who are affected, this bonus is substantial, amounting in the hundreds of thousands of dollars (or millions of dollars), depending on the size of their assets.

The truly wealthy have other methods of reducing their estate or gift taxes, and so a pure comparison between a certified couple and an uncertified one is difficult. For example, let us say a certified spouse dies with a billion-dollar estate. Because

72. Give citation.

73. Give citation.

74. Give citation.

the marriage was certified, there would be no estate tax for the surviving legal spouse. But if the marriage had not been certified, then the surviving spouse would see an estate tax of between 450 and 500 million dollars. That, to say the least, is a substantial benefit.

But for someone having that amount of wealth, we would expect he or she to hire competent legal and accounting experts to devise various legal instruments to reduce some or all of this potential tax liability. The value of a marriage certificate for a billionaire is therefore not automatically worth \$450-500 million. Instead, the value would be the price of paying the experts, plus the price of any remaining estate tax that the experts could not get out of paying.

In this regard, this matter of estate/gift taxes are similar to the marriage-certificate benefits from No. 8 above (savings in creating the relationship). This is to say, by hiring experts, the person of wealth could "replicate" the effects of a marriage certificate.

In this case, however, the cost of the "replication" could easily run millions of dollars. Even so, the couple would see a substantial reduction in the \$450-500 million that would have to otherwise be paid.

In any event, the matter of the "marriage bonus" for purposes of Federal and State estate and gift taxes is substantial. Precise estimates would depend on the variables of the individuals' estates.

Dr. Stauffer spoke in favor of the motion explaining there is a *normally only* \$600,000 exclusion from estate taxes, and *an annual exclusion of just* of \$10,000 *in gifts*. But it is unlimited to married couples.

Mr. Hochberg asked for the citations to this material. Dr. Stauffer said he would supply them.

Mr. Hochberg moved to table the motion until the Commission has the exact citation. Ms. Sheldon seconded the motion.

The motion to table discussion of Substantial Benefit No. 11 does not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

Mr. Hochberg reiterated his concerns that were articulated in earlier discussion of other substantial benefits.

Mr. Britt called for the question.

The motion to accept Substantial Benefit No. 11, estate and gift tax benefits, passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 12, capital-gain tax benefit for a couple's home. Ms. Gomes seconded the motion. Specifically it states:

Substantial Benefit No. 12: Capital-Gain Tax Benefit For A Couple's Home.

The Commission makes the following findings, for this section:

Couples, particularly homeowners in Hawaii, commonly find their homes (and other assets) to have appreciated enormously over the time they have owned them. Upon the time of death of one spouse, the general half-ownership of the house (and other assets) is transferred to the surviving spouse. Normally at this time a capital-gains tax (of 45-50% between the Federal and State tax systems)⁷⁵ would become due on the increase-in-value ("capital gain") that belonged to the deceased spouse.⁷⁶

Legal spouses may, however, choose to defer the capital gain tax on the dead spouse's appreciated assets. This free deferral can continue throughout the remaining life of the surviving spouse.⁷⁷ Thus the value of this "marriage benefit" is two-fold. First, the value of deferring the bill is substantial. Second, the cost of the bill several years from now will not have been adjusted for inflation and so its absolute value will have fallen. The amount of this fall (the discount based on inflation) represents a second substantial benefit.

It is difficult to put precise figures on this benefit as its value depends on the worth of the couple's house (and other assets) and the number of years the surviving spouse remains alive. However, it can be pointed out that all homes in Hawaii have appreciated substantially over time; in the three-year 1988-1990 period they each appreciated an average of about \$200,000.⁷⁸

Taking just this example, if a couple owns a house that went through this appreciation period, then each of their capital-gain was about \$100,000.⁷⁹ Upon death, the inheriting spouse, if they did not have the government marriage certificate, could have to pay capital-gains taxes on the deceased spouse's appreciation, a tax which in this case could be 45-50 thousand dollars.

In these cases, the surviving spouse is often older and does not have the income or liquid assets to make such a payment. Borrowing on the house may also be difficult as an income stream to service the loan may not be available. The result could sometimes be losing the house to pay the tax.

The "marriage benefit" in this case simply allows the surviving spouse to defer paying this tax throughout the balance of their lifetime. As such, the tax-flow to the government is not stopped but simply delayed. Still, the benefit to the surviving

75. Give tax-table citations or tax law citations.

76. Technically, all this falls under the matter of estate taxes, covered above. But that section looked at couples holding sizeable estates, whereas this section looks at the much more common occurrence of a couple in Hawaii that do not have an unusual estate except for the appreciated value of their home.

77. Give citation.

78. Give citation.

79. This figure could be substantially more for some couples.

The appreciation amount for a couple that had held their home for a longer period would also have to be adjusted for capital gains or losses over those other years. After all, Hawaii's real estate market has fluctuated over the years and has even lost some value recently for some homes.

spouse is substantial: not having to pay the tax at once, and therefore possibly not having to lose the house. The precise economic benefit, outside of the human side of not losing the house, would be the value of the tax deferral, which would depend on the circumstances of each couple.

Dr. Stauffer commented that this benefit is related to death benefits and is a subspecies of it. *A couple's home is often their largest asset. If I die he said, my spouse would be subject to a capital gain on inheriting my portion of the house, were it not for this marriage exclusion.*

Ms. Sheldon spoke against the motion. When you are married you own the property as tenants in the entirety. And most real estate has decreased in value during the last three years. Dr. Stauffer pointed out that he has considered a fluctuating market, see *footnote 76 of these minutes*. Ms. Sheldon disagreed that it is a benefit because the same situation exists for both married and nonmarried couples.

Mr. Hochberg stated that he is a real estate attorney, and that is a not a benefit of marriage, it is a benefit of the type of ownership. Mr. Hochberg continued to say that when a person owns a home and they are married, only because they are married they have the benefit is incorrect.

Morgan Britt called for the question.

The motion to accept Substantial Benefit No. 12, capital gains on the transfer of home benefit passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to accept Substantial Benefit No. 13, "tenants by the entirety" benefit. Mr. Britt seconded. Specifically the motion states:

Substantial Benefit No. 13: "Tenancy by the Entirety" Benefits

The Commission finds that a very few number of States have a form of ownership of real estate known as "tenancy by the entirety." This bestows unique legal protections and benefits on a certified couple. The protections and benefits, in turn, cannot be completely replicated by the use of other legal instruments, no matter what price is paid to attorneys in drawing up such instruments.

The Commission finds that the benefit comes in the form of protection of the couple's ownership of their house in times of legal attachment. The value is difficult to make with precision, but the Commission finds that it is of significant value.

Dr. Stauffer explained that "tenancy by the entirety" is a benefit that only married people can have. The Chair added that creditors cannot attach to this property. Ms. Sheldon commented that only a few states still have this type of ownership still on the books.

Mr. Hochberg asked if Hawaii had tenancy by the entirety. Dr. Stauffer replied yes.

The motion passed unanimously.

Dr. Stauffer moved to accept Substantial Benefit No. 14, federal benefits. Ms. Gomes seconded the motion. Specifically it reads:

Substantial Benefit No. 14: Federal Benefits

The Commission makes the following findings for this section:

The State of Hawaii cannot directly control Federal certified-marriage benefits. However, because Federal benefits currently are granted to certified spouses, and certified spouses are defined as those who are linked together with a valid marriage contract issued from any of the States, then Hawaii can indirectly award these Federal benefits by issuing the certificate. Likewise, Hawaii can deny these benefits by refusing to issue a certificate.

In above categories we have already discussed Federal tax benefits (the basic tax tables, the matter of estate taxes, etc.) including some intangible benefits (such as the special status granted a certified spouse for immigration purposes). There are also special spousal rights under the Retirement Equity Act of 1984 -- this is a "choice" type benefit as the special rights can cut both ways, and the main option of being able to get a certificate is that the couple has the choice of taking out the certificate or not and therefore being covered or not under the REA.⁸⁰

Another Federal benefit involves Social Security. Certified married couples receive significant advantages in the nation's Social Security programs, particularly in the size of the monthly benefit amount that is paid under the Old-Age and Survivors Insurance Program (OASI), but also under the Disability Insurance Program.⁸¹

The benefits from getting a marriage certified in the OASI Program have several sources. First, when a fully-insured worker retires, his or her legal spouse receives a bonus benefit equal to 50% of the retired worker's benefit (unless the legal spouse is entitled to a larger benefit based on his or her own work history).

In 1993, the average monthly benefit for the covered spouses was \$347, or \$4,164 more than the couple would have received if their marriage was not certified.

Second, when the retired worker dies, the surviving certified spouse (from age 60 and up) then receives the retired worker's full benefit. In 1993, the average certified surviving spouse in this program received \$630 per month, or \$7,560 annually, whereas the uncertified surviving spouse would receive nothing.

80. Give citation for the law. This benefit was discussed by Roth, Randall W. "Testimony to Commission on Sexual Orientation and the Law." Mss. September 27, 1995. [give page number citation.] Also Roth, Randall W. Verbal testimony before The Commission on Sexual Orientation and the Law. September 27, 1995.

81. All figures cited in the following text are taken from the 1994 "Green Book" compiled by the Committee on Ways and Means, U.S. House of Representatives."

Third, when an insured certified spouse dies, the surviving certified spouse dies, the survivor is entitled to a one-time death benefit of \$255.

Finally, when a currently insured (non-retired) worker dies, the surviving certified spouse is eligible for a monthly benefit if the couple had children who are under age 16 (or disabled), and the legal children of the deceased also receive benefits. In 1993, the average survivor in this category received \$448 per month or \$5,376 annually, and the children in this category received an average of \$173 per month or \$2,076 annually. In these cases, an uncertified surviving spouse and that spouse's children would receive nothing.

The Disability Insurance system also favors certified couples. If a disabled worker has a legal spouse who is either aged 62 or older (or is caring for a young or disabled child of the worker), then the legal spouse is eligible for a benefit that averaged \$156 per month or \$1,872 annually in 1993. For an uncertified couple, the spouse would receive nothing.

More-detailed studies of the Social Security system show that over time, the numerous benefits awarded by the system to certified couples generate significant benefits. Certified couples, even when both legal spouses work, have rates of return on their Social Security taxes that are two-to-three times higher than the rate of return earned by non-certified married couples with the same income and taxes paid.

In sum, the OASI tax advantages for certified couples generate significant economic benefits that are worth thousands of dollars annually during retirement. In addition, the payments provided to some legal spouses under the Disability Insurance system provides substantial added financial security benefits when a legal spouse becomes disabled.

Dr. Stauffer explained that the States's ability to define the status of marriage, confers these Federal benefits.

Ms. Sheldon moved to strike this benefit based on the fact the Commission discussed earlier it would not consider federal benefits. Even if the Commission does consider them, it implies that the federal government will recognize it. Mr. Hochberg seconded the motion.

Dr. Stauffer spoke against the motion stating that the state of Hawaii, by directly granting marriage certificates, is indirectly conferring these benefits. Dr. Stauffer also commented that his further research indicated, regarding *Federal* immigration law, the *national INS* office is *not allowing the Colorado case to influence their decision-making to automatically deny immigration benefits to same-gender married couples.* (See previous discussion of Commission under *Intangible Benefits* on pages 26-27.)

The motion to strike the federal benefits did not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Mr Hochberg moved to table the discussion because we don't have the information we need. There have been no testimony to date. Ms. Sheldon seconded the motion to table.

Dr. Stauffer reminded Mr. Hochberg that both *Mr. Roth*, and Sumner La Croix addressed *these* issues. Mr. Hochberg stated the Dr. La Croix did not talk about it when he was here.

Ms. Sheldon asked for the citations for the allegations contained in the middle paragraph. *Dr. Stauffer referred to Dr. La Croix and Lee Badgett's written testimony, and said he would supply the citations.*

There was a call for the question.

The motion to table the discussion on federal benefits does not pass with Mr. Hochberg and Ms. Sheldon voting aye, and Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting nay.

Dr. Stauffer called for the question on the underlying motion.

Mr. Hochberg spoke against the motion for all the reasons he spoke for tabling. Ms. Sheldon agreed.

Mr. Britt called for the question.

The motion to accept Substantial Benefit No. 14, federal benefits, passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Dr. Stauffer moved to adopt the motion on general benefits. Mr. Britt seconded the motion. It specifically reads:

General Benefits

The third category of benefits, following those that are intangible and those that are substantial-quantifiable, are the "general benefits." These consist of a relatively large class of legal benefits involving rights that are of limited economic value to the typical married couple, as the rights are used infrequently and/or are small in value.⁸²

Five examples follow. Conveyance taxes are usually levied on the sale of real property. Such taxes are not levied on transfers of property between a husband and wife,⁸³ but such conveyances are infrequent.

82. List the statutes here, keying on the list from Appendix A. Give an estimate of the total number of general benefits that would follow from this number of statutes.

83. §§247-3(4) & (12), HRS.

A University of Hawaii employee's spouse is exempted from the nonresident tuition differential when the spouse is not a Hawaii resident,⁸⁴ but there is likely to be only a few such instances each year.

Election law⁸⁵ allows an immediate family member to contribute up to \$50,000 to another immediate family member who is a candidate for public office, which is many times the dollar limit otherwise allowed, but relatively few couples exercise this benefit.

Certain fishing in Hilo bay,⁸⁶ and Statewide fishing for Nehu and `Iao (i.e., the *Stolephorus purpureus* anchovy and the *Pranesus insularum* "Silversides" fish),⁸⁷ while otherwise prohibited, are allowed for family consumption. With "family" not defined in Chapter 188, HRS, the definition from elsewhere in the HRS is used, meaning a family with a marriage certificate.⁸⁸ This makes these "marriage benefits." But again, relatively few legal couples use these benefits.

The Commission, in reviewing all of the listed "general benefit" statutes from footnote 79 above, finds that these laws all individually (or in groups) confer "major legal and economic benefits." Indeed, the Commission finds that economic techniques exist to place a value on all of these benefits.

For example, careful work between economists and marine biologists could estimate the supply of certain fish in Hilo bay, and of Nehu and `Iao in waters around the State. It could then be shown that by denying all non-married families and commercial enterprises the right to fish these species, their supply is therefore relatively high and that the resources of a certified couple, necessary to invest to catch the fish, is relatively low.

Economists could then look at the values of the fish. While these catches cannot be sold on the open market, they represent a "substitute value" in the sense that an equal amount of fish or protein products need not be purchased on the open market for the couple, thus saving them money.

For a certified couple that includes at least one spouse who fishes, the economic value realized by this legal benefit could be substantial,⁸⁹ certainly a great deal more than the name-change benefit cited by the Hawaii Supreme Court.⁹⁰

84. §304-4(b), HRS.

85. §11-204, HRS.

86. §188-34, HRS.

87. §188-45, HRS.

88. Give citation for the statutory construction rule on looking elsewhere in HRS for the definition; plus give the citation that it would be a married family.

89. Still, very few couples with marriage certificates use the marriage fishing benefits conferred by these two laws. If the value of the fish taken by those few couples is then divided by the total number of married couples in the State, the average fishing "benefit" conferred by these statutes, per couple, is relatively small.

90. See the previous discussion of this matter of name changes, beginning on page <?> of this report.

The Commission finds that its resources are limited in carrying out the type of investigation needed to give a precise value estimate for each of these "general" legal/economic benefits. The Commission has instead invested its time on the limited number of benefits, described above, which bestowed relatively larger values upon a more significant number of couples.

Dr. Stauffer explained that the general benefits are the catch-all when you take out the intangible and the substantial benefits. Dr. Stauffer gave *the* five particular examples above. While we are talking about fishing for Nehu and 'lao, which may be manini (*small*), we are talking about small fish but they are not small *benefits* because they *could be major benefits to the affected couples*. These benefits are major to an individual but not for a lot of people.

Ms. Sheldon questioned whether being able to catch fish on your own is was considered a major economic advantage. Dr. Stauffer replied yes.

Mr. Hochberg moved to table for the same reasons stated above. Ms. Sheldon seconded the motion.

The motion to table does not pass with Mr. Hochberg and Ms. Sheldon voting aye and Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting nay.

Mr. Hochberg requested that for the benefit of the legislature, shouldn't the Commission cite Dr. Ghali for this? Dr. Stauffer agreed to add to footnote 79, "For another opinion see Dr. Ghali testimony."

The motion to adopt the general benefits passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Mr. Britt moved to recess until the next day, November 7, 1995 at 1:30 p.m., in Room 1008, State Office Tower. Ms. Gomes seconded. The motion passed unanimously.

The meeting recessed at 3:35 p.m.

November 7, 1995

The meeting was reconvened on Tuesday at 1:40 p.m., in Room 1008, State Office Tower to continue the important matters that were not decided from the agenda of October 25, 1995. *All members were present.*

The next item on the agenda is the memorandum produced by Mr. Britt related to policy reasons. His amended 32-page motion was received by the Commissioners by fax this morning. The public policy report is attached to these minutes as Attachment 5.

Mr. Britt moved that his public policy report be adopted by the Commission subject to later review as appropriate. Dr. Stauffer seconded the motion.

Mr. Britt reviewed the changes from the previous edition. Particularly he referred to certified marriage versus sanctified marriage; the cause to lose jobs discussion on pg. 9; the discussion on the Attorney General's arguments related to biological parents and the government's involvement in procreation as not valid on page 11-12; the Hawaiian custom argument on the bottom of page 13; and the religious argument on page 14.

The Chair pointed out that many of the arguments are related to compelling state interest, is that our job to argue the State's case? Mr. Britt agreed that is was not, but it is important to include it as background information.

Skipping to pg. 25 Mr. Britt read the four policy reasons that were set out. Mr. Britt also amended the work "sex" to "gender" to be more precise.

Mr. Hochberg stated that gender refers to language. Dr. Stauffer says he researched it and agrees with Morgan.

Ms. Sheldon stated that she had some questions. Mr. Hochberg wondered if this report is to provide Dan Foley with information for court instead of being a report to *the* legislature. Mr. Britt responded "No". Mr. Hochberg said he thinks it looks like a document for Dan Foley. Mr. Britt disagreed. To him it is a cut-and-dry argument explaining why benefits are being denied.

The Chair reminded the Commission that the task is to extend or not extend benefits. If there is going to be an minority opinion *then* perhaps that could concentrate on policies not to extend.

Dr. Stauffer pointed out footnote number 10, *in the policy report that is the subject of the motion*. He said the fact that there is the Baehr *decision in place means the Commission can choose to not list reasons in favor of extending marriage rights*, because the burden is now on the State to prove the discrimination is justified and is narrowly drawn *and in order to justify continuing not to extend the benefits.*

Ms. Sheldon asked if it is the Commission's job to impose a burden? Dr. Stauffer believes the Commission needs to respond to what the State says. Mr. Britt added that the Commission is not imposing a burden, the Court has. The Chair clarified that position is in the lawsuit. Ms. Sheldon clarified that's the law suit and this is the Commission. The Chair agreed with Ms. Sheldon's point. Ms. Sheldon further clarified that the Commission is not defending the lawsuit, the State is defending the lawsuit.

Ms. Sheldon believes the statements in Mr. Britt report are conclusory and without background authority. Mr. Hochberg added that the one thing that is troubling is that the bibliography has information on both sides that won't be able to cited, and the two sides won't be able to address. I am expecting one of the heavily cited resources to be Boswell and there are criticisms of his that wouldn't be included in this report.

Mr. Britt explained that as an educator we set up content objectives, then performance objectives. That's how I've approached this. This initial process represents the content objectives. Ms. Kreidman asked aren't we supposed to discuss the policy reasons we're supposed to embrace? The Chair replied "Yes." Ms. Kreidman suggested discussion on the *four* policy reasons listed at the end of *Mr. Britt's policy* report that is the subject of the motion.

Ms. Sheldon offered that she has questions with regard to the Commission's findings. Will the report say the whole Commission? Dr. Stauffer replied that the process is that if the majority of the Commission decides, *the report will say "the Commission finds"*, but the minority still has *the* opportunity to file a report.

Ms. Sheldon reviewed material on page 3 and commented that the history *referred to there* refers to information that wasn't discussed. Dr. Stauffer reminded the Commission that the history section in his *earlier* memos were skipped over in the interest of time, *but they have* been available to read since October 6.

Mr. Britt called attention to page 4, line 8 *and the two ways basic rights are granted*.

Ms. Sheldon objected to comments on page 4, line 12 regarding the 14th Amendment argument, she disagrees on what the Loving case says, referring to Mr. Britt's comments on lines 22 and 23. Dr. Stauffer agreed with Mr. Britt. Mr. Hochberg added that it is important to cite a case for what it says.

Ms. Kreidman interrupted to ask before the Commission goes page by page over Mr. Britt's report, the Commission should decide what we're going to support.

Ms. Sheldon believes that Mr. Britt's report has all these mistaken premises. No defenses were made regarding children, and kids having to go to school with the offspring of homosexual parents. Mr. Britt recalled Sherri's testimony with the children.

The Chair suggested that there be discussion on the issues for at least another hour *and then the Commission should cut off discussion and vote on the motion, but the Commission* should address any inaccuracies.

Dr. Stauffer commented with regard to Ms. Sheldon's 14th amendment reference of Loving's holding *and read from* the very first sentence in the Loving case *that* says it is based on the 14th, and page 11, at the very least....(line 10) Mr. Hochberg offered that "persuasive" is not the same standard as "compelling state interest".

Ms. Sheldon also identified page 5, line 1 as referring to a defense based on religion that does not appear in the *Loving* case. Dr. Stauffer *replied that the trial* court judge quoted the bible, and he thinks the Commission can infer religion was involved.

Mr. Hochberg asked the Commission to decide if they're not going to adopt the language then we don't have to address the language of the report. Dr. Stauffer stated these

twelve things on pages 5 and 6 of the motion were issues that surrounded the case. Although the court opinion didn't directly use the word religion it used a religious argument. Mr. Hochberg offered that the wording would work if it said that "religion played a role" versus "a primary defense" which means the lawyer said it. The Chair confirmed that the exact language of Mr. Britt's report may be adjusted later. Mr. Hochberg reiterated if there are four people who don't want to use the language of this report then the Commission doesn't have to address it.

Dr. Stauffer stated that the Commission should correct inaccuracy, but the Commission doesn't have to adjust style unless clearly warranted, and that the ideas that Mr. Britt has laid out are good. Mr. Britt and Dr. Stauffer both agreed that neither set out to make a legal document in Parts I and II of the report. Neither are attorneys. Again, Mr. Hochberg stated that if there are four people then we don't need to deal with the report. That doesn't necessarily exclude our discussion of the four policies in the end.

Ms. Sheldon asked about page 7, lines 3-12, and then referred to *Baehr* page 557 which says there is no fundamental right to privacy or "otherwise". So the characterization of the argument as a fundamental right is incorrect (see page 557). Mr. Hochberg expanded on this concept. Dr. Stauffer stated that *Baehr*, in its plain language, is based on the plaintiff's civil rights, and as a layman he sees the civil rights involved as a "fundamental right." The Chair suggested moving on.

Mr. Hochberg pointed out on line 10 that "preemptively" should be changed to "presumptively".

Ms. Sheldon pointed out on line 19 that the State is not raising a primary defense based on religion. Mr. Britt agreed to "popular" instead of "primary." Ms. Kreidman queried if the Commission is considering all points of view .

Ms. Sheldon returned to page 7, line 27-30 and stated that just because you raise a public health defense doesn't mean you discriminate. No one said that. Mr. Britt said that he recalled Dr. Kehoe's testimony said something along those lines. Ms. Kreidman said that it sounds like the public health issues versus the health issues may be confused.

Ms. Sheldon moved on to page 8. She stated that nobody said there is gender discrimination. Ms. Kreidman disagreed and recalled the woman with her child, she clarified that is what we're talking about it. Ms. Sheldon disagreed and stated that she thinks we're talking about behavior discrimination. Dr. Stauffer contributed his point of view is *gender discrimination is the same as racial discrimination*. Ms. Sheldon disagreed stating that her point of view is that its an unascertainable behavior. Dr. Stauffer added that so is religion, *which nevertheless is a protected class*. Dr. Stauffer believes that his religion is discriminated against because some of the marriages performed in the church are not recognized by the State. Mr. Hochberg offered that at the beginning of the country they included one unascertainable category and no others, religion.

Mr. Hochberg pointed to page 4, line 1 as inaccurate. There is no such thing as a right to equality. Dr. Stauffer recognized that technically, there is equal protection under the law; to the lay person that means equality. Mr. Hochberg responded that outside of the law, there is no right for equality.

Mr. Hochberg moved to page 5, line 7 and 8, focusing on the defenses: Its immoral not to discriminate versus page 7, lines 25 and 26. He disagrees that anyone said its immoral. Dr. Stauffer disagreed and stated that he heard twenty people say that same-sex marriage was immoral. Mr. Britt agreed with Dr. Stauffer. Mr. Hochberg clarified that they didn't say it was immoral if you grant these licenses. Dr. Stauffer disagreed. Ms. Gomes disagreed with Dr. Stauffer, she remembers that those testifiers said homosexuality is immoral, not the granting of the license that is immoral. Dr. Stauffer concluded that they didn't care if a license was granted to same-sex couples. Mr. Hochberg stated that his recollection was that people thought that homosexuality is immoral and the State should not grant licenses to same-sex couples. They didn't say it is immoral not to discriminate against them.

Ms. Kreidman questioned Mr. Hochberg if *he* could see how those two ideas are bound together. Ms. Sheldon clarified that *even without the* religious school, most people believe that the conduct is immoral. Mr. Britt generalized that for these people it is probably true that any sex that is different is repugnant to normal heterosexual sex, but the private relationships have nothing to do with whether or not two people want to have a recognized relationship.

Ms. Sheldon began to speak on tradition, and Mr. Britt finished that tradition is not a good reason. Ms. Sheldon stated that if that is true then more groups will want protection. Soon pedophiles will be binding together to argue for more rights. Ms. Kreidman pointed out the difference to that situation is that children don't have any power. Ms. Sheldon stated that both are traditionally abhorrent behaviors. Ms. Kreidman asked abhorrent to who?

The Commission recessed at 3:00 and reconvened at 3:06.

Ms. Martin warned that the tape machine we have had the privilege to be using will not be available for the 8th and 9th. Mr. Britt mentioned that he has an appointment this afternoon, so he would like to cut off discussion in fifteen minutes and take a vote.

Mr. Hochberg suggested looking at the specific policies in the end. I wouldn't be able to accept the policies because I don't agree with the background material. Ms. Sheldon agreed. She also pointed to pg. 8 line 23-25. When has this been experienced? Mr. Britt recalled he heard testimony saying that Hawaii would be a Sodom and Gomorrah place. He is willing to cite the testimony.

Ms. Sheldon asked if Mr. Britt ever had an experience where he wasn't allowed to eat in a restaurant? Ms. Gomes said she had experienced it once in San Francisco. Ms. Sheldon asked if it ever happened in Hawaii. Mr. Britt replied at the Cracker Barrel.

Ms. Kreidman confirmed that the policies listed are the reasons we would be asserting that are legitimate to extend benefits to same-sex couples.

Mr. Hochberg, in reviewing the first of the policies, stated that all people in Hawaii are not free from discrimination. *Baehr v. Lewin* says you can discriminate if there is a compelling state interest that is narrowly drawn. He also stated that the constitution provides protection based on sex, not gender, so if you use the word "gender" you're wrong. Dr. Stauffer suggested adding "illegal" in front of discrimination.

Policy No. 2

Mr. Hochberg referred to lines 30-31 and stated that this relates to the earlier discussion on the *Baehr* case. He asked if the purpose of the policy reason is to affect the litigation and strip the Attorney General of the State's defense. Mr. Britt replied that the discussions Mr. Hochberg is referring to are background material to substantiate the policy. Mr. Hochberg reiterated his question in terms of if Mr. Britt knew this would strip the State's case would Mr. Britt want to include it? Mr. Britt replied that he did not consider it that way. The Chair confirmed that this is not the place to try the case. Ms. Kreidman stated that just because Dan Foley marches our report over to the court it doesn't mean the court will look at it. Mr. Britt stated he would be flattered.

Ms. Sheldon asked Mr. Britt to clarify what is background and what is policy. Mr. Britt started to explain that religion, morals and public health are not valid reasons to not extend benefits. The Chair interrupted and stated that he was being arbitrary and as time runs out the Commission needs to proceed to Number 3.

Ms. Sheldon objected that she is being asked to comment on a document that she just got this morning. She registered her objection to being railroaded into a vote.

Policy No. 3

Mr. Britt read Policy No. 3, relating to procreation. Mr. Hochberg restated his objections to Policy No. 3 on all the levels he objected to Policy No. 2. Ms. Kreidman asked Mr. Hochberg if he was suggesting something different. She reminded him that just because the State decides to put forth an argument doesn't mean that the Commission can't discuss it. Mr. Hochberg stated that the legislature will see that we disagree with the Attorney General's point of view.

Policy No. 4

Policy No. 4 was read. Mr. Hochberg stated that many of our laws are rooted in the Judeo Christian history. We do it all the time.

The Chair reminded the Commission that the motion pending is to adopt the report including the four policy statements.

Mr. Britt called for the question.

The motion to adopt the public policies as amended passed with Mr. Britt, Ms. Gomes, Ms. Kreidman, and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Ms. Sheldon stated that she has been trying to get a doctor she had wanted to testify, but he is unable to attend. Dr. Stauffer asked about *now proceeding to approve* the minutes. The Chair suggested, in light of the regularly scheduled meeting tomorrow, postponing the approval of the minutes until the November 22, 1995. Dr. Stauffer moved to adjourn. Mr. Britt seconded. *Motion passed unanimously.*

SUGGESTED AMENDMENTS TO THE MINUTES of October 11-12 AS DRAFTED

- Page 1: Seven lines from the bottom, at the end of the line change "Bob" to "Robert"
Next line capitalize "u" in Diana Pau U.
- Page 5: Paragraph just above "II Voting..." that starts Mr. Morgan. Change to Mr. Britt.
- Page 6: The fourth paragraph after "III Discuss...", the second sentence to read
"Assuming that all things are equal, it is the State's position that current legislative policy is that children of Hawaii are better off being raised by their biological parents in single home, recognizing that there is divorce, adoption, single parents and biological parents that may not be the best for children."
- : Last paragraph, first sentence. Add "so as" to make it read "Mr. Michaels continued to explain that the marriage law operates to be over-inclusive so as not to violate the civil liberties of the opposite-sex couples who would not have children."
- Page 7: Second paragraph. Second sentence add "He suggested" in front of "if" to read "He suggested if same-sex marriage..." then in front of the next sentence add "If" to read "If this de-stabilization and legal....."
- Page 8: First paragraph, first sentence to add "U.S. Supreme" to read "Mr. Hochberg paraphrased the U.S. Supreme Court's lesson in..."
- Page 10: Fourth full paragraph, second sentence replace "homosexual" with "gay and lesbian" to read "His Buddhist community supports members of the gay and lesbian community who wish to marry.... to extend legal and economic benefits to gay and lesbian couples.
- Page 11: Second paragraph, first sentence, for clarity: Sister Chatfield, speaking from a pastoral point of view, would like to see the Commission support something that brings two individuals to a stable relationship. She asked the Commission to consider cleaning up the current marriage law if that is how the Commission chooses to extend benefits because the marriage law is often used as a bludgeoning tool today.
- Page 12: Three lines from the bottom, correct the spelling of "convaluted" to "convoluted"

Attachment 1

Partial List of Requested Changes to Minutes
of October 11, 1995 Commission Meeting

Moheb Ghali, one of the economists who testified before the Commission, explained that to determine the economic value of any particular benefit, one must first determine the "Expected Value" and then discount that value by the probability of someone taking advantage of the benefit under consideration. Where an expected value of some benefit might be worth \$500 to a person who actually takes advantage of the benefit, if the probability of someone taking advantage of the benefit is say 1 in a 1000 chance, the expected value of that benefit is only \$0.50 ($\$500 \times .001$). The probability of use of a particular benefit is further reduced where the benefit requires special status before it becomes available to the general public. For instance, where a benefit derives from status as a professor at the University of Hawaii, then the likelihood of someone taking advantage of that benefit is equal to the ratio of the number of U.H. professors to the population at large.

Dr. Ghali also explained that most of the benefits addressed by Dr. La Croix, the other economist who testified at the commission, concern estate planning techniques or contract rights available to married people by virtue of their status as husband and wife. However, all of those benefits, with the exception of the marital deduction and marital elective share, are available to non married people from the use of inexpensive simple will forms available in stationary stores, trusts, durable powers of attorney, living wills and other contracts are the remedies available to all unmarried people without regard to their sexual orientation. In Dr. Ghali's opinion, the data or measurement of the value of these small benefits (saving the cost of these widely used remedial measures) is not warranted in light of the cost to do the research.

Dr. Ghali also clarified that the Employee Retirement System permits every member to designate anyone as the beneficiary: a spouse, domestic partner or anyone else. Thus by and large, there are not additional benefits to be realized in the ERS pension plan. The exception is an in-service death benefit in noncontributory plans which Dr. Ghali also as discussed.

Of the benefits listed in the LRB 15 page summary, Dr. La Croix identified only nine "[b]enefits from Marriage with a Significant Expected Value." Of those, Dr. Ghali testified that:

"Because, many of the benefits listed by Professor La Croix under his heading have very small probabilities of being used, as he correctly points out, the expected value of each benefit is small, and the sum of the discounted expected values of this group of benefits is likely to be small. While it is possible to collect data to measure the

Attachment 2

discounted expected values of these benefits, I do not believe the magnitude of the benefits is sufficient to justify the cost of the data acquisition." (see page 2 of Dr. Ghali's testimony entitled "Discussion of Some Benefits Which May Accrue to Individuals From Extending Marital Benefits to Domestic Partners").

However, Dr. Ghali agrees that three benefits addressed by Dr. La Croix merit investing the resources to research the economic value. Those benefits were: Retirement Health Insurance Benefits, Non Retirement Health Insurance, ERS Death Benefits, and Hawaiian Home Lands Leases. Dr. Ghali opined that none of the other benefits can possibly be large enough to bear the cost of the analysis needed to determine the economic value, and therefor do not constitute major legal or economic benefits.

Concerning the retirement health insurance benefits, Dr. Ghali suggested that data be collected and analyzed to determine the economic value of the benefit. The data needed should concern the average annual cost of spousal medical coverage and the estimate of the number of domestic partners expected to benefit. This information will reveal the estimated fiscal impact on the ERS and the Health Fund, and whether a general increase in employee contributions or in State tax revenues will be required to cover the additional cost.

Concerning the non retirement health insurance benefits, Dr. Ghali suggested that data be collected and analyzed concerning the average annual cost of spousal medical coverage and the estimate of the number of domestic partners expected to benefit from non retirement health insurance. This information will reveal the magnitude of the subsidy. In addition, he suggested that the Commission analyze alternative ways of funding the health insurance coverage.

Concerning the ERS Death Benefits, Dr. Ghali discussed Mr. Shimabukuro's testimony that the benefits payable upon the death in-service of an employee are only available to the surviving spouse (until remarried) and the dependent children (until 18 years old) if the employee was under the non contributory plan. The only benefit exclusive to spouses under the contributory plan is an additional pension. Dr. Ghali explained how to measure the economic value of this benefit:

Data on the number of cases of in-service death as a percent of the total active membership over the past five years would give a reasonable estimate of the probability of the death benefits. The average payment per case of in service death over the past five years would be a reasonable estimate of the benefit value. Both of these data should be easily available from ERS. The benefit value multiplied by the probability would yield the expected value of the death benefits. This figure, the expected value of death benefits to survivors of non-contributory members is needed to

measure both the potential benefits and costs of any policy change.

Similarly, the expected value of the exclusive spouse pension under the contributory plan can be calculated to evaluate the potential benefit and cost of the policy change.

Concerning the Hawaiian Home Lands Lease issue, Dr. Ghali opined that the cost to extending this benefit must be evaluated in light of the shortage of hawaiian home sites. To the extent that the Hawaiian family on the waiting list pays a rent higher than the Hawaiian homes lease rent, there is an inefficiency in the allocation of resources. He stated that data on the excess demand for Hawaiian Home Lands parcels be analyzed. The value of the Hawaiian Homes Land lease cannot be said to be a major benefit. Dr. Ghali suggested that:

To evaluate this potential benefit, one needs to know the frequency of domestic partnerships that occupy Hawaiian Homes Lands properties at this time. An opinion survey of Hawaiian community attitude towards granting the rights to domestic partners of Hawaiians in preference to there Hawaiian families would be helpful, as it will ultimately be the Hawaiian Home Lands that will make the decision regarding the extension of this benefit to domestic partners.

Dr. Ghali agreed with the prior testimony of Dr. La Croix and Professor Roth that the tax code both benefits and burdens married and unmarried couples depending on the taxable income rather than the marital status. Dr. Ghali also agreed that neither this commission nor the state legislature can modify the U.S. Internal Revenue Code. Therefore, there is no economic benefit to be gained from the IRC by creation of domestic partnerships which is not synonymous with marriage under the Code. Were domestic partners to actually marry, whether they benefit or are burdened depends on their relative incomes. Unless data show that most or all same-sex couples have greatly unequal income, Dr. Ghali agreed with Professor Roth and Dr. La Croix that there is no reason to assume a general tax benefit from marriage.

11/1/95

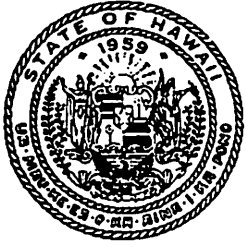
PROPOSED POLICY STATEMENT ON THE ECONOMIC EFFECT OF
LEGALIZING SAME-SEX MARRIAGE ON TOURISM IN HAWAII

Whether economic effect, or lack of it, is a "policy" which should be identified and analyzed under item (2) of Act 5 is, of course, arguable. However, if a given action by the legislature were to cause a loss of jobs or income it would be opposed as bad for the community and support a "policy" in opposition to such action. Conversely, if such action created additional jobs and income, and therefore better living conditions for the average citizen, it could be seen as good "policy" to encourage and support it.

While the effect on tourism--presently Hawaii's prime source of income--of legalizing same-sex marriage has been hotly argued, the weight seems on the side of greater benefits for the industry. While the numbers of such tourists could be substantial, their numbers as a proportion of total tourists coming to Hawaii, would probably be relatively modest. Such an influx would not necessarily cause a decrease in other tourists. (as basis for findings note articles in Southern California Law Review, Vol. 68, Maryland Law Review, Vol 53, and materials submitted by La Croix, Mak, & Ghali)

Therefore the Commission finds that the legalization of same-sex marriage, or the creation of a comparable legal status, would probably benefit Hawaii's economy, and it would be appropriate public policy to support such legislation.

Attachment 3



**THE COMMISSION ON
SEXUAL ORIENTATION AND THE LAW**

c/o Legislative Reference Bureau
State Capitol, Room 446
Honolulu, Hawaii 96813
Telephone: 587-0666
Facsimile: 587-0681

NEWS RELEASE

Contact: Pamela Martin
Phone: 587-0666

Thursday, November 2, 1995

The Commission on Sexual Orientation and the Law continues the October 25, 1995 meeting until November 6, 1995, to finish addressing important matters not decided .

The Commission on Sexual Orientation and the Law gave formal notice of a meeting convened on October 25, 1995. The Agenda and Notice of the meeting are attached to this release. The Commission has continued the meeting and has reconvened on October 26, and November 2 in their effort to address items on that agenda of reasonably major importance not decided. The Commission would like the public to know that the Commission has unanimously moved to recess and reconvene the meeting on November 6, 1995 at 1:30 p.m. in Room 1008, Leiopapa A Kamehameha Building, 235 S. Beretania Street, Honolulu, HI 96813. This meeting is a continuation of the meeting of October 25, 1995 and as the opportunity for public testimony has already been handled the items left on the agenda for November 6, 1995 do not include time for oral public testimony. The public is nevertheless encouraged to attend and submit written testimony. Those who would like an opportunity to testify on items on the agenda before the Commission in person should appear at the next regular meeting November 8, 1995, Room 329, State Capitol, at 9:00 a.m. That notice and agenda is also attached to this release.

Attachment 4

1 Note that all **Sans-serif**
2 **BOLD face** is additional
3 copy I have added since I
4 originally began working on
5 this draft. Anything else,
6 including the Shadow face
7 copy, is from a previous
8 draft which you should
9 already have.

10

11



(no Page 1)

Motion:

I move that the following public policy report be adopted by the Commission (subject to later review and amendment as appropriate).



"Examination of the Substantial Public Policy Reasons to Extend or Not to Extend Such Benefits, In Part or In Total, to Same-Gender Couples."

Introduction

The Commission finds that substantial public policy reasons exist to extend all the legal and economic benefits discussed in **Part I of this report** to same-gender couples willing to enter into the marriage contract, with all the responsibilities and burdens which that contract entails.

The primary reason for this, **the Commission finds**, is the deeply rooted belief of Hawaii, America, and all humanity, in the equality and equal rights of all people.

Background:

The 14th Amendment

The Commission has previously discussed the historical parallels between Hawaii's situation and that of 17th century England's refusal to grant government marriage certificates to married couples professing the wrong religion.

Great Britain does not have a Constitution, but the U.S. and the State of Hawaii do, and each of the latter documents have enshrined within them a groups of fundamental benefits of citizenship known as the Bill of Rights. **The Commission finds that these** stand senior to legislative law, and define the basic liberties we hold to be self-evident.

1 Key in this case, **the Commission finds**, is the right to equality,
2 sometimes called equal protection under the law. Within the U.S.
3 Constitution, this right is contained within the 14th Amendment, adopted
4 on July 21, 1868. It states in relevant part: "No State shall ... deny to any
5 person within its jurisdiction the equal protection of the laws."¹

6 The amendment was passed after the Civil War, and was primarily
7 designed to guarantee the rights of freed slaves. The amendment did this
8 in at least two ways. Another portion states, "All persons born ... in the
9 United States ... are citizens of the United States" and, "No State shall
10 make or enforce any law which shall abridge the privileges or immunities
11 of citizens of the United States."²

12 This granted basic rights. The equal protection section, cited above,
13 provided the second degree of insurance that the freed slaves would have
14 the right of equality.

15 **The Commission finds importantly, that** the amendment was not
16 designed to allow inter racial marriage. Indeed, it is thought that the
17 amendment may not have passed if this aspect had been brought up.

18 **The Commission finds that it** took almost a century until 1967
19 before the U.S. Supreme Court applied the 14th Amendment's guarantee
20 of equal protection to the topic of interracial marriage and ruled that the
21 amendment does apply, and that State miscegenation laws (those banning
22 interracial marriage) should be abolished as running counter to the
23 fundamental human right of equal protection under the law.³

24 ***The Loving Case***

25 The Hawaii Supreme Court in its **Baehr** decision⁴ referred to this
26 U.S. 1967 "**Loving**" case, which dealt with Virginia's marriage law that
27 limited the legal and economic benefits of governmental certification to
28 certain couples on the basis of race, thereby prohibiting equality to couples
29 of the wrong race.

30 **The Commission finds that there is much to learn from a review**
31 **of the *Loving* case and that the parallels between the *Baehr* and**
32 ***Loving* case are very strong.**

1 A primary defense cited by Virginia was one based on religion: that
2 the majoritarian religious belief of her citizens was in favor of the racial
3 limitation.

4 A second Virginia defense was one of **definition: certified** marriage
5 was a union of two people of the same race, by one definition, and this
6 definition should not be violated.

7 Morality formed a third defense: it was immoral not to discriminate
8 on a basis of race, many people said.

9 Public health and safety formed a fourth defense: some or most peo-
10 ple said that discriminating on a basis of race was good for the public
11 health as it would not produce mongrel and weak children and **also** would
12 prevent further interracial sexual relations, etc.

13 A fifth defense was related and revolved around pro creation: a good
14 many, perhaps a majority, felt that it was bad for the proper procreation
15 of the races to allow such discrimination to end.

16 The protection of children and ensuring that they would be raised in
17 a healthy environment formed a sixth defense: it was argued that if the
18 racial discrimination were ended, it would harm children.

19 A seventh defense was pure public opinion: a majority of Virginia's
20 citizens were in favor of the discrimination.

21 Public order formed an eighth defense: society's basic structure
22 would be undermined, it was said, if the discrimination were ended.

23 A ninth defense was one, oddly enough, of equality: all people were
24 equal under the law because the different races were equally discriminated
25 against as each could not **certifiably** marry across racial lines.

26 A tenth defense was one of individual rights: if such **certified**
27 marriages were allowed, then employers would soon find themselves
28 having to keep on the payroll workers who were entering into such
29 marriages, while those marriages might deeply violate the
30 religious/ moral/ etc. values of the employer.

31 Likewise, or so the tenth defense went, parents would find their chil-
32 dren having to attend schools with the offspring of such **certified**
33 marriages. Or having to attend schools with teachers who were in such

1 marriages. And while churches were free to exclude such people, they
2 would be under intense pressure not to discriminate once such **certified**
3 marriages became common.

4 Likewise, owners of restaurants or hotels would probably have to
5 allow such couples to eat or sleep in their establishments, thus perhaps
6 scaring away their other customers.

7 Closely related was an eleventh defense: special rights. This argu-
8 ment stated that by taking away others' individual rights (as listed above),
9 the court would be giving special rights to the couples who insisted on get-
10 ting their marriages certified. In short, this argument theorized that rights
11 were a fixed amount of benefits and that by taking from one group, special
12 rights were being extended to another group.

13 Also related to these defenses was a twelfth one: that the Virginia
14 economy faced economic hardship if such discrimination were ended.

15 **The Hawaii State Constitution**

16 **The Commission finds that upon** its initial adoption in 1959, the
17 Hawaii State Constitution included a part that guaranteed equal
18 protection under the law which was modeled after that part of the U.S.
19 14th Amendment, i.e., "No person shall be ... denied the equal protection of
20 the laws."⁵

21 And whereas the other portion of the U.S. 14th Amendment, cited
22 above, was designed to deal with guaranteeing the rights of the former
23 slaves (i.e., prohibiting discrimination on a basis of race), the Hawaii
24 Constitution extended this to prohibiting discrimination on a basis of gen-
25 der, a fundamental right that still does not exist in the U.S. Bill of Rights:
26 "No person shall ... be discriminated against in the exercise ... [of the laws]
27 because of race, religion, sex or ancestry."

28 The Hawaii Constitution strengthened its gender protections in 1978
29 with passage of an "equal rights amendment" which states: "Equality of
30 rights under the law shall not be denied or abridged by the State on ac-
31 count of sex."⁶

32 **The Commission finds that, as** with approval of the U.S. 14th
33 Amendment (whose supporters did not entertain ending racial
34 discrimination in marriage), it appears equally clear that the Hawaii

1 supporters of the State's special gender guarantees, and equal protection
2 guarantees, did not entertain ending gender discrimination in marriage.

3 **The Commission finds that, if** it took almost a century for the U.S.
4 14th Amendment to be applied to marriage on a basis of race **in the *Loving***
5 **decision**, it took only 15 years for Hawaii's constitutional guarantees to be
6 applied to marriage on a basis of gender. In the ***Baehr*** decision, the
7 Hawaii Supreme Court **applied** the guarantees of equal protection cited
8 above **to** the topic of same-gender marriage and ruled that the
9 Constitution does apply, and that State law banning same-gender mar-
10 riage is discriminatory and preemptively unconstitutional **as it runs**
11 counter to the fundamental human right of equal protection under the
12 law.⁷

13 In short, the court dealt with the Hawaii marriage law⁸ that **had**
14 limited the legal and economic benefits of governmental certification to
15 certain couples on the basis of gender, **and which had therefore**
16 **prohibited** equality to couples of the wrong gender.

17 **The Commission finds that** the parallels to the previous ***Loving*** case
18 are noteworthy:

19 A primary defense for the current law is one based on religion: that
20 the majoritarian religious belief of the State's citizens are in favor of the
21 gender limitation.

22 A second defense is one of **definition: certifiable** marriage is a union
23 of two people of different gender, by one definition, and this definition
24 should not be violated.

25 Morality forms a third defense: it is immoral, some say, not to dis-
26 criminate on a basis of gender.

27 Public health and safety forms a fourth defense: discriminating on a
28 basis of gender, some say, is good for the public health as it will not pro-
29 duce confused and weak children, will prevent further same-gender sexual
30 relations, etc.

31 A fifth defense is related to the fourth, and revolves around procre-
32 ation: it is bad for proper procreation, **some say**, to allow such
33 discrimination to end.

1 The protection of children and ensuring that they will be raised in a
2 healthy environment forms a sixth defense: it is argued by some that if the
3 gender discrimination were ended, it would harm children.

4 A seventh defense is public opinion: depending on how the survey
5 questions are formed, a majority of Hawaii's citizens are in favor of the
6 discrimination.⁹

7 Public order forms an eighth defense: society's basic structure will be
8 undermined, **some say**, if the discrimination were ended.

9 A ninth defense is one of equality: all people are equal under the law
10 because the different genders are equally discriminated against as each can
11 not **certifiably** marry across gender lines.

12 A tenth defense is one of individual rights: if such marriages were
13 allowed, then employers would soon find themselves having to keep on the
14 payroll workers who were entering into such marriages, while those
15 marriages might deeply violate the religious, moral **or personal** values of
16 the employer.

17 Likewise, or so the tenth defense goes, parents will find their children
18 having to attend schools with the offspring of such **certified** marriages. Or
19 attending schools with teachers who were in such marriages. Churches
20 are free to exclude such people, of course, but they would be under intense
21 pressure not to discriminate once such **certified** marriages became
22 common.

23 Likewise, owners of restaurants or hotels will probably have to
24 allow such couples to eat or sleep in their establishments, thus perhaps
25 scaring away their other customers.

26 Closely related is an eleventh defense: special rights. This argument
27 states that by taking away others' individual rights (as listed above), the
28 court will be giving special rights to the couples who insisted on getting
29 **their marriages certified**. In short, this argument theorizes that rights
30 are a fixed amount of benefits and that by taking from one group, special
31 rights are being extended to another group.

32 Also related to these defenses is a twelfth one: that the Hawaii econ-
33 omy faces economic hardship if such discrimination is ended.

1 The Fundamental Finding of Public 2 Policy

3 The Commission finds that the fundamental fact in this issue is that
4 the Hawaii Supreme Court has ruled that denying governmental certifica-
5 tion to married couples on the basis of gender is discriminatory and
6 presumptively unconstitutional. The Commission further finds that a
7 reading of history supports this finding of the court, and the Commission,
8 upon examination, supports this conclusion of the court.

9 The question before the Commission then becomes not "what
10 reasons exist to extend the benefits," but rather "what compelling state
11 interests exist to deny extending the benefits?"¹⁰

12 Put another way, the Commission has examined whether substantial
13 public policy reasons exist to extend the legal/economic benefits above to
14 same-gender couples, and has found that the senior public policy reason in
15 this area is that our government should not, must not, and shall not dis-
16 criminate. Further, that these benefits should be extended to these mar-
17 riages and families, based on the senior public policy reason that it is dis-
18 criminatory to do otherwise.

19 **If a given action by the legislature were to cause loss of jobs or**
20 **income it would be opposed as bad for the community and support a**
21 **"policy" in opposition to such action. Conversely, if such action**
22 **created conditions for the average citizen, it could be seen as good**
23 **"policy" to encourage and support it.**

24 **While the effect of tourism - presently Hawaii's prime source of**
25 **income - of legalizing same-sex marriage has been hotly argued, the**
26 **weight of expert study and testimony is on the side of greater**
27 **benefits for the industry. While the numbers as a proportion of total**
28 **tourists coming to Hawaii, would probably be relatively modest.**
29 **Such an influx would not necessarily cause a decrease in other**
30 **tourists.**¹¹

31 **Therefore, the Commission finds that the legalization of same-**
32 **gender marriage would probably benefit Hawaii's economy and it**
33 **would be appropriate public policy to support such legislation.**

34



1 **Alleged Compelling State Interests**

2 First Deputy Attorney General Steven Michaels has testified to the
3 Commission that the State has rejected most of the twelve possible
4 defenses described above.¹² At this time the State lists just defenses five
5 (procreation) and six (protection of children).¹³ Mr. Michaels also added
6 a thirteenth, protecting Hawaii marriage certificates from becoming
7 unrecognized in other jurisdictions.

8 The Commission has examined all three of these alleged compelling
9 state interests and finds none of them to be compelling.

10 The Commission finds that two of these were raised during the pub-
11 lic debate that culminated in the earlier **Loving** case and **both** were rejected
12 by the U.S. Supreme Court, and rightly so. The third argument,
13 recognition in other jurisdictions, was not involved with **Loving**, but the
14 Commission finds it to not have merit.

15 **Defense #5 : Procreation**

16 The Commission has found above¹⁴ that it is in the public interest to
17 support the procreation of children, and that the government is hindering
18 this public interest by denying certificates to same gender married couples
19 and families.

20 The Commission therefore agrees that procreation is a
21 public interest, but finds that it is a public interest that
22 favors the conferring of government certification of same-
23 gender marriages. The Commission further finds that the
24 continuation of the current gender discrimination and denial
25 of equal rights is harmful to the public interest.

26 **Defense #6 : Protection of Children**

27 Likewise, the Commission has found above¹⁵ that it is in the public
28 interest to support the protection of children, but that the government is

1 hindering this public interest by denying benefits to the children of same-
2 gender married couples.

3 The Commission therefore agrees that protection of children is a
4 public interest, but finds that it is a public interest that favors the confer-
5 ring of government certification of same-gender families. The
6 Commission further finds that the continuation of this discrimination and
7 denial of equal rights is harmful to the public interest.

8 ***Defense #13 : Recognition of Certificates***

9 The Commission finds no evidence that granting equal rights will
10 lead to a refusal to recognize existing Hawaii marriage certificates, or the
11 recognition of Hawaii marriage certificates of different gender couples in
12 the future. The historical record is very clear about this: during the years of
13 the miscegenation laws, no wholesale refusal to recognize certificates by
14 any State was ever allowed by the Federal courts.

15 Specifically, as late as 1948, the Commission finds that **30** of the **48**
16 States did not **certify** marriages that violated their racial discrimination
17 laws. Hawaii, then a territory, therefore joined just **18** other States that
18 granted such certification.

19 **The Commission finds that some** or all of the **30** other States did
20 not accept such racially equal certificates from Hawaii. But this did not
21 mean such States refused **the rest** of Hawaii's certificates.

22 **The Commission further finds all** of this was well settled in **the**
23 Federal courts, and the body of case law and scholarly reference books on
24 the topic is quite extensive.¹⁶

25 Therefore, the Commission finds that there is no basis for raising this
26 matter of an allegedly threatened public interest.

27 ***Additional Findings***

28 More particularly, the First Deputy Attorney General has explained
29 to the Commission that the State's position on procreation and protection
30 of children deals not with sexual orientation, per se, nor even with gender,
31 per se. Instead, it is based on the belief that being raised by biological par-
32 ents is best for the child (and so should receive public benefits) and that

1 being raised by non-biological parents is not the best for procreation and
2 the protection of children and should not receive public benefits.¹⁷

3 The obvious question is raised concerning those different-gender
4 couples which apply to get their marriages certified by the government
5 (and hence are able to receive public benefits) and which may not have
6 children, or intend not to have children, or are incapable of having chil-
7 dren. The First Deputy Attorney General addresses this issue by appealing
8 to a related defense of privacy.¹⁸

9 The Hawaii Constitution has a very strong constitutional protection
10 of privacy.¹⁹ This right of privacy has been interpreted as including the
11 right to procreation or against procreation and for privacy in general con-
12 cerning reproductive matters.²⁰ Therefore, the First Deputy suggests, it
13 would be unconstitutional to question different-gender couples requesting
14 their marriages to be certified as to whether or not they could or would
15 have children.²¹

16 On its face, **the Commission finds that this dual argument of**
17 **biological parents and privacy** is an amazing defense. Followed to its
18 logical conclusion, **the Commission finds that** a different-gender couple
19 seeking a certificate, if either one of them had custody of children for any
20 reason, would **generally** be denied the certificate on the grounds that it
21 was not in the public interest to let them raise such children as both of them
22 **would generally not be** the biological parents of the children.

23 Likewise, **the Commission further finds that** under this rationale,
24 the State should cancel the certificate for any couple attempting to adopt
25 any child on the basis that it is not in the State's interests to have them
26 **remain certified while they** raise such non-biological children.

27 On the other hand, **the Commission finds that** the right of privacy
28 involves freedom from State interference in reproductive matters. On its
29 face, a different-gender couple with the female past menopause, would be
30 historically thought to be incapable of bearing children. The State **has**
31 historically **allowed** such marriages to be certified, however, as the area of
32 reproduction is private.

33 With modern technology, **the Commission finds** that such a female is
34 capable of childbirth. **The Commission further finds that the** same is true
35 of different-gender couples with a male incapable of producing sperm: the

1 child may not be technically the biological offspring of the male in the
2 marriage, but childbirth is still possible.

3 **The Commission concludes that the** government simply should not
4 and cannot Constitutionally get involved with the details of reproduction
5 **even if this means allowing children to be born who are not the**
6 **biological offspring of both parents. The Commission finds that it is**
7 unconstitutional to do so, as the First Deputy Attorney General correctly
8 argues.

9 Therefore, **the Commission finds** the government should not and
10 cannot get involved with the details of reproduction in a same-gender
11 marriage. **The Commission further finds that** today medical science
12 allows same-gender female couples to have all the children they want, so
13 at a minimum, the State would have to allow same-gender female couples
14 to have certificates **under the First Deputy Attorney General's**
15 **rationale. And in the light of post-menopausal childbirth,** who is to say
16 what medical science will not be able to accomplish eventually with same-
17 gender male couples? And, at the least, privacy rights prevent us from
18 investigating further. **Therefore, the Commission concludes that** same-
19 gender male couples should be allowed certificates.

20 **The Commission also concludes that the First Deputy Attorney**
21 **General's argument would support granting certificates to same-**
22 **gender couples, as shown above, and would therefore result only in**
23 **the practice of denying certificates to those couples adopting children,**
24 **whether the couple is different- or same-gender.** The Commission
25 questions **this** argument that non-biological children should not receive
26 benefits. **Traditionally, our society has granted full benefits to legally**
27 **adopted children, and the Commission finds no reason, on account of**
28 **Baehr, to now deny these benefits.** Social science research suggests that
29 children adopted soon after birth have no lasting effects of not being raised
30 by their biological parents. The same is true of children raised by such
31 adoptive (by one or both parent) children whether the parents are different
32 gender or same-gender.²²

33 **Furthermore,** the Commission finds that due attention should be
34 placed on traditional Hawaiian custom:

35 The State reaffirms and shall protect all rights, customarily and
36 traditionally exercised for subsistence, cultural and religious
37 purposes and possessed by ahupua'a tenants who are descendants of

1 native Hawaiians who inhabited the Hawaiian Islands prior to 1778,
2 subject to the right of the State to regulate such rights. (**Article 12,**
3 **Section 7, of the Hawaii Constitution**)

4 and

5 The common law of England... is declared to be the common law of
6 the **State** of Hawaii in all cases except as otherwise expressly
7 provided... established by Hawaiian usage. (§ 1-1, HRS)

8 The Commission also finds that in traditional Hawaiian culture a
9 great number, perhaps the majority, of children were raised not directly by
10 the biological parents, but instead by the **hanai** parents. This traditional
11 custom and practice, the Commission finds, is well documented in the
12 literature. (*give citations*)

13 The Commission **concludes** that the alleged State interest of
14 **penalizing** (through the refusal to grant benefits) non-biological parents
15 for raising children runs counter to the Hawaii Constitution and State law
16 cited above. **Therefore, the Commission finds that for this additional**
17 **reason, above and beyond any other, this defense concerning**
18 **biological children** cannot be considered a compelling interest.

19 **The Commission also finds that the Hawaii Constitution protects**
20 **religions. Article I, Section 5, of the Constitution states in applicable**
21 **part: "No person shall ... be discriminated against in exercise ...**
22 **because of race, religion, sex or ancestry"** (*emphasis added*).

23 **The Commission also finds that those religious groups that are**
24 **opposed to same-gender marriage are allowed to marry different-**
25 **gender couples and have those marriages certified by the**
26 **government, but those religious groups that agree with same-gender**
27 **marriage are only allowed to marry same-gender couples but cannot**
28 **have those marriages certified by the government. The Commission**
29 **concludes that this is a matter of religious discrimination against**
30 **those religious groups whose beliefs and practices support same-**
31 **gender marriage.**

32 **The Commission also finds that to say both religious groups are**
33 **equally discriminated against in the practice of their religious beliefs,**
34 **because neither can certify same-gender marriages, is not persuasive**
35 **for the same reasons it is not persuasive on a basis of racial**
36 **discrimination or on a basis of gender discrimination.**

1 **The Commission also finds that religious belief, like a person's**
2 **race or gender, is accorded the highest level of protection by the**
3 **State's constitution, and requires the discriminator to prove a**
4 **compelling public interest to justify the discrimination.**

5 **For this religious discrimination, the Commission finds that First**
6 **Deputy Attorney General has provided no alleged compelling public**
7 **interests other than those examined above, and the Commission has**
8 **already found those alleged interests not to be compelling.**

9 **The Commission concludes that the alleged State interests in**
10 **favor of discriminating against certain religious beliefs and practices,**
11 **by refusing to certify marriages performed by certain religious**
12 **groups run counter to the Hawaii Constitution. Therefore, the**
13 **Commission finds that for this additional reason, above and beyond**
14 **any other, the State's defenses cannot be considered compelling**
15 **interests.**

16 **In conclusion, the Commission finds the specifics of the State's pro-**
17 **creation/children defense, including the related privacy defense, not to be**
18 **compelling.**

19 **While the Commission agrees that procreation, the protection of**
20 **children, privacy, the protection of Hawaiian religion and culture, and**
21 **the protection of general religious belief and practice, are all in the**
22 **public interest, the Commission also finds that these three issues of public**
23 **interest raised by the First Deputy Attorney General, and the three**
24 **issues raised above by the Commission, all argue for the conferring of**
25 **government certification on same-gender marriages and not against. The**
26 **Commission further finds that the continuation of the current gender and**
27 **religious discrimination, and denial of equal rights is harmful to the public**
28 **interest.**²³



29 **Other Alleged Compelling State** 30 **Interests**

31 **Although the State's Department of the Attorney General has itself**
32 **rejected the other alleged compelling State interests, the Commission has**
33 **examined them. The Commission agrees with the First Deputy**
34 **Attorney General in finding that none of them are compelling.**

1 The Commission **also** finds that these other ten defenses were all
2 part of the public, academic, and legal debate that culminated in the **Loving**
3 case, and that all these arguments were rejected by the U.S. Supreme
4 Court.

5 Defense #1 : Religion

6 **The First Argument**

7 **The first religious argument has been that nearly all of our**
8 **people posses fundamental religious beliefs, that all religions believe**
9 **in God, that the Bible is the literal word of God, and that the Bible**
10 **says not to allow same-gender marriages, so therefore there is a**
11 **compelling State interest against same-gender marriages.²⁴**

12 **The Commission finds that it may well be true that nearly all of**
13 **our people possess fundamental religious beliefs, though this is**
14 **subject to interpretation, the conclusion is itself inconclusive, and in**
15 **any event some of our people do not. More importantly, the**
16 **Commission finds that all religions do not believe in God.²⁵**

17 **Specifically, the Commission finds that Buddhism is the second**
18 **largest religion in the state. Some of its denominations dwarf the**
19 **size of the large numbers of Christian denominations here. As world**
20 **religion it is often considered only to Christianity. And yet it does**
21 **not believe in God. The Commission also finds that traditional**
22 **Hawaiian religion, protected under our Constitution and laws cited**
23 **above, has its belief in the major Gods and the innumerable other**
24 **Gods. Many other of the world's religions did not or do not believe**
25 **in a single God.²⁶**

26 **The Commission also finds that the argument that the Bible is**
27 **the literal word of God also does not withstand scrutiny. Buddhists,**
28 **Muslims, adherents to traditional Hawaiian religion, and others do not**
29 **subscribe to this belief.²⁷**

30 **And while it is true that Judaism and most Protestant Christian**
31 **denominations follow the same Jewish bible (called the "old**
32 **Testament" by many Christians), the Commission finds that is also**
33 **true that the Catholic, Greek Orthodox, and Russian Orthodox**
34 **divisions of Christianity each follow different Jewish bibles. And even**
35 **within the Jewish and Protestant pair there is a major division: only**
36 **the latter follows the "New Testament." and even within the various**
37 **denominations or branches of Judaism, Catholicism, Protestantism, the**
38 **Greek Orthodox, and the Slavic Christian Religions, there are a wide**

1 variety of opinions concerning the literalness of the various Bibles
2 that they have chosen to follow.²⁸

3 The Commission also finds that whether these various Bibles
4 condemn same-gender relationships is open to differences in
5 interpretation. The results of study on the topic are inconclusive,
6 although the preponderance of current scholarly opinion is that the
7 various Bibles do not condemn such relationships other than to
8 condemn exploitive relations whether they are same- or different-
9 gender.²⁹

10 The Second Argument

11 The Commission finds that a second argument concerning
12 religion is that certain religious groups within our community fell
13 extremely strongly that same-gender relationships are anathema to
14 their religious beliefs and practices and that therefore other religious
15 groups should not be allowed to marry same-gender couples and that
16 such relationships should not be allowed.³⁰

17 The Commission finds that this argument was well stated and
18 laid out in a recent Federal lawsuit,³¹ which sought to nullify a State
19 law expressly protects the rights of religious groups to marry same-
20 gender couples if they want to.³² The Federal court's decision was
21 that the religious argument to prohibit one religion's beliefs and
22 practices so as to allow another's, all in the name of the freedom to
23 practice religion was "baffling." The attempt to nullify the State law
24 was unsuccessful and the State law was upheld as Constitutional
25 under the U.S. Constitution. This decision was not appealed and so it
26 stands for the District of Hawaii.³³

27 The Third Argument

28 The Commission finds a third argument dealing with the mottos.
29 The Federal government's motto of "In God We Trust" has been cited
30 as a reason to respect some religious group's beliefs that same-
31 gender relationships should not be allowed. The Commission notes,
32 however, that this motto does not carry religious connotations but
33 instead has a secular (non-religious) meaning. Otherwise, it would be
34 challenged on First Amendment grounds.³⁴

35 The Commission has also heard that the State's motto, "Ua Mau
36 Ke Ika, I Ka Aina I Ka Pono," when translated at times into English,
37 includes the word "righteousness," and under some religious
38 interpretations this has been suggested as opposing same gender
39 relations.³⁵

1 **But the Commission finds that the Hawaiian term being**
2 **translated, "pono" can carry different meanings than the Hebrew and**
3 **Greek terms translated as "righteousness" in the Jewish bible or in**
4 **the "New Testament." The Commission also notes that the State**
5 **motto, when first coined, was not addressed to same-gender relations,**
6 **but rather towards the wrong act of Great Britain attempting to**
7 **establish a protectorate over the Hawaiian Islands in 1842 so as to**
8 **affect, amongst other things, the land-tenure policies of the Hawaiian**
9 **Kingdom. Finally, the Commission notes that the author of the State's**
10 **motto, Kamehameha III, was not opposed to same-**
11 **gender relationships, having had many himself.³⁶**

12 **The Fourth Argument**

13 **There has been the allegation, the Commission finds, that by**
14 **allowing the certification of same-gender marriages, the State would**
15 **begin to force churches to marry same-gender couples, even if this**
16 **was against their religious beliefs and practices. The Commission**
17 **finds that this allegation is without merits because § 572-12, HRS does**
18 **not require a minister, priest or officer of any religious denomination or**
19 **society to solemnize a marriage that is not in accordance with the usage,**
20 **rules and customs of that denomination or society. Nor does § 572-12,**
21 **HRS require any minister, priest, or officer of any religious denomination**
22 **or society to perform any marriage.³⁷**

23 Defense #2 : Definitions

24 **The Commission finds that dictionary definitions (e.g. Webster's) are**
25 **not legal definitions. There is no definition unless the court makes such a**
26 **definition. Refer to *Loving*.³⁸**

27 **The Commission also finds that the matter of definition was**
28 **directly addressed and resolved by the Hawaii Supreme Court in the**
29 ***Baehr* decision.³⁹**

30 Defense #3 : Morality

31 **The Commission finds that the common morality argument that**
32 **has been presented is to forbid same-gender marriage on the**
33 **grounds that they are immoral, and secondly, to deny such marriages**
34 **a certificate from the government.⁴⁰**

35 **But the Commission finds that same-gender marriages are**
36 **already allowed and protected under State law. Furthermore, that**

1 such law was passed by the Hawaii legislature, signed into law by
2 the Hawaii executive, and that it has been ruled constitutional under
3 the U.S. Constitution by the Federal judiciary, and is presumptively
4 constitutional under the Hawaii Constitution.⁴¹

5 The Commission concludes that having a religious practice
6 protected by law, passed by the legislature, signed into law by the
7 executive and passed on by a judiciary does not equate to its
8 morality or immorality. But the presumption is that the religious
9 practice being protected, in this case the celebration of the sacrament
10 of same-gender marriage by religious groups, must be considered
11 legal and moral. While other religious groups are free to view such
12 religious practice as immoral, this is a matter of their belief. They
13 are free to argue in the public arena for a repeal of such a law, or for
14 a suspension of those religious groups that practice same-gender
15 marriage, but this Commission has found no compelling reason to call
16 for such an appeal or for such suppression. Indeed, this Commission
17 finds in favor with the Federal judiciary's ruling on the law, which
18 noted that it appeared a fair way to support an even-handed
19 treatment religion without causing harm to religion.⁴²

20 The Commission having found that the religious belief and
21 practice of celebrating the sacrament of same-gender marriage being
22 protected in this State, the remaining immorality argument to
23 consider is whether it is immoral to grant certification of such
24 marriages.

25 The Commission has found no compelling arguments that to
26 certify such marriages to be immoral. Instead, the Commission has
27 already found that to deny such couples, and their religious
28 denominations or societies, the option of securing a certificate is itself
29 contrary to public policy and hence immoral.⁴³

30 Defense #4 : Public Health and Safety

31 Same-gender marriages (and the children from such marriages)
32 already exist in Hawaii. There has been no adverse public health and
33 safety effect from these marriages.

34 National findings from experts and professional associations have
35 found no adverse public health effect from these marriages and families.⁴⁴
36 **Indeed, the Commission finds that it is in the public interest to**
37 **promote the public health and safety by encouraging the formation**
38 **of committed families, and that the offering of marriage certification**
39 **to all couples is in the public interest.**

1 Defense #7 : Public Opinion

2 The Commission finds that public opinion is important in forming
3 public policy, but that is not a conclusive factor when dealing with
4 constitutional issues. The *Loving* case, in particular, is a good
5 historical example of this, as is the earlier *Brown v. Board of*
6 *Education* case.

7 With *Loving*, the Commission finds that polls at the time
8 indicated that 80% or more of the American people were opposed to
9 ending racial discrimination in marriage, and 40% of the whole
10 country felt that the decision was wrong and laws should exits in
11 every State in favor of racial discrimination. It is thought that these
12 figures were higher in Virginia.⁴⁵

13 Still the Commission finds that Virginia survived, as did the
14 country as a whole. Today the statistics nationally are about half the
15 figures of 28 years ago, but that still means that one in five
16 Americans feel racial barriers should be again imposed by law, and
17 two of five Americans feel that interracial marriage is wrong.⁴⁶

18 With *Brown v. Board of Education* (1954), the Commission finds
19 that polls showed overwhelming opposition to integrating the nation's
20 schools. Billboards to "lynch" the Supreme Court's Chief Justice went
21 up around the country and stayed up for decades to come.
22 Opposition bordering on insurrection was common, for years
23 afterwards, with governors calling up their States' militia (i.e., the
24 National Guard) and positioning armed troops to prevent children of
25 the "wrong" race from going to school. The Federal army had to be
26 called in, with some doubting if it would follow its commanders'
27 orders. And the Commission finds that opposition to school
28 integration remains strong in the country to this day.⁴⁷

29 Yet the Commission also finds that no rational argument exists
30 today claim either *Brown* or *Loving* were the wrong thing to do.
31 there is instead, the Commission finds, complete evidence that both
32 decisions were correct and if anything, wrong only in the length of
33 time it had taken the U.S. Supreme Court to have acted in these two
34 areas of racial discrimination.

35 With regard to public opinion and the Baehr case, the
36 Commission finds that today about one-third of the State openly
37 supports ending the gender discrimination in marriage - a much
38 higher rate of support for equality that existed in the country for
39 ending school race discrimination before *Brown*, or in Virginia for
40 ending marriage race discrimination before *Loving*. The Commission

1 also finds that about two-thirds of Hawaii's citizens support equal
2 rights for persons desiring same-gender relations, a rate of support
3 far in excess of those supporting racial equality in education in the
4 country 41 years ago, or those supporting racial equality in marriage
5 in Virginia 28 years ago.⁴⁸

6 The Commission concludes that public opinion is an important
7 factor, but that it is not a conclusive reason to continue the current
8 discrimination with marriage. The Commission fully expects reviews
9 in the future to look back at the decision to certify same-gender
10 marriages in Hawaii - if indeed such a decision is made - with much
11 the same conclusions that this Commission has reached above with
12 regard to looking back at the decisions to end race discrimination in
13 the school and in marriages.

14 Defense #8 : Public Order

15 The Commission finds that one can easily point out that society
16 was not unduly put at risk as an outcome of the *Loving* decision, or for
17 that matter, the *Brown* decision. Instead, the nation has improved
18 over time because of both decisions.

19 The Commission also finds that certifiable marriage is an
20 intrinsically stable and stabilizing arrangement between two people. As
21 such, public order should be enhanced if same-gender marriages
22 were given the option of becoming certified

23 The Commission also finds that public order could not be put at risk
24 since no marriages could be thrust upon the unwilling. This is in contrast
25 to earlier civil rights legislation which required forced desegregation or
26 affirmative action.

27 Defense #9 : Equality

28 The Commission finds that this was directly addressed and rejected
29 by both the *Loving* and the *Baehr* courts.⁴⁹

30 Defense #10 : Individual Rights

31 The Commission finds that this argument was most persuasively
32 made prior to the Civil Rights Act of 1964, a legislative action taken
33 in the context of the judicial decisions of *Brown* and *Loving*. Yet an
34 examination of history shows that the South did not witness a

1 **meltdown of individual rights after passage of the Act.** Nor did the
2 **Act put individuals at risk of losing any of their civil rights, black or white.**

3 **The Commission finds that inconveniences did occur. Employers**
4 **sometimes had to keep on the payroll workers they disagreed with**
5 **over race. Parents sometimes found their children's teachers to be of**
6 **the "wrong" race, and churches experienced pressure to integrate.**
7 **Restaurant and hotel owners had to allow people to use their facilities**
8 **regardless of race.**

9 **But the Commission finds that none of these inconveniences**
10 **placed people's individual rights at risk. And, looking back, we can**
11 **see how our rights as whole were enhanced by moving our nation**
12 **towards better quality. Who would say today that an employer,**
13 **parent, restaurant owner, or hotel proprietor, should be able to fire**
14 **someone, replace a teacher, or refuse service, based solely on race?**
15 **What "individual right" is enhanced by allowing unconstitutional**
16 **discrimination to persist?**

17 **The Commission concludes that this lesson from history is**
18 **applicable to Hawaii today as the State wrestles with the question of**
19 **allowing unconstitutional discrimination to persist with regard to**
20 **same-gender marriage certification.**

21 ***Defense #11 : Special Rights***

22 **The Commission finds that the concept of "special rights" used**
23 **as an argument against civil rights decisions or legislation, traces**
24 **back to the anti-integration era of over 30 years ago, when the**
25 **argument was used against racial integration.⁵⁰**

26 **The Commission finds the term "special rights" is somewhat**
27 **vague. One meaning is that the decision or legislation being**
28 **protested against will somehow grant some kind of unique or special**
29 **benefit to someone. While some people then (and now) would like to**
30 **think this first definition somehow applies, it is actually pretty clear**
31 **that this definition did not apply to African-Americans 30 years ago**
32 **and it does not apply to those seeking certification of their same-**
33 **gender marriages today. In both cases, the benefits being requested**
34 **were (or are) already available to other, and no unique or special**
35 **benefit is being contemplated.**

36 **The Commission also finds that the term also can mean that any**
37 **civil right - such as the right to sit at a lunch counter, or sit in an**
38 **empty seat in the front of a public bus - is "special." For example,**
39 **the century-old civil Rights Act of 1866, commonly used over the past**

1 three decades in discrimination lawsuits, guaranteed to all persons
2 "the same right...to make and enforce contracts...as is enjoyed by
3 white citizens."⁵¹

4 The Commission finds that in this example it is clear that rights
5 are being granted to non-whites. This could be viewed somehow as
6 "special." But the Commission finds that this law was designed to
7 create a level playing field, to extend to non-whites some
8 fundamental rights already available to whites.⁵²

9 As another example, the Commission finds that one time only
10 whites were allowed to vote in many southern primary elections
11 because the political parties were allowed to exclude blacks from the
12 parties primaries. When the Federal government considered forcing
13 the parties to allow non-whites to vote, this was objected to as
14 granting non-whites a "special right." Yet without the right to vote,
15 the Commission finds, how could non-whites participate in this most
16 fundamental of civil rights?⁵³

17 The Commission also finds that we have long since agreed that
18 being able to eat in a restaurant, or stay a night in a hotel, are
19 fundamental to our civil rights - yet these rights were vigorously
20 fought against as "special rights" prior to passage of the Civil Rights
21 Act of 1964.⁵⁴

22 The Commission concludes that just as having a meal or finding
23 a bed to spend the night are fundamental rights to living in our
24 nation, so are the basics of marriage certification. Indeed, the
25 Commission concludes that the fundamentals of certified marriage are
26 even more basic to our well-being as citizens, and to deny these
27 rights even more pernicious than the earlier denials of room or board.

28 The Commission additionally finds that the "special rights"
29 argument since the anti-integration debates of 30 years ago, has
30 included a concept that human rights are some kind of "zero-sum
31 game" where granting a human right to one person somehow takes
32 it away from someone else. This was argued strenuously in the
33 debate over the Civil Rights Act of 1964, when the case was made
34 that allowing someone to sit at a lunch counter somehow took away
35 some right from the restaurant's owner.⁵⁵

36 The Commission finds that this argument was incorrect thirty
37 years ago, and it is incorrect today. Denying fundamental human
38 rights is never correct. Granting a fundamental human right to
39 someone never takes away anything of value from someone else. In
40 short, there are more to fundamental rights than a "zero-sum game."

1 **The restaurant proprietor is inconvenienced perhaps, for a time but**
2 **the country improves in the long run.**

3 **The Commission points to the American south today. It was an**
4 **economic backwater 30 years ago. What self-respecting company**
5 **would engage in major business in a part of the country that treated**
6 **citizens like dogs? But today the area has been remade. It is a**
7 **modern economic center, engaged in world-class events. Even the**
8 **segregationist restaurant owner has prospered and lived to see the**
9 **error of his or her ways.⁵⁶**

10 **The Commission finds that the same lesson of history applies to**
11 **granting the fundamental right of marriage certification to married**
12 **same-gender couples. Some others may be inconvenienced, but no**
13 **one will "lose rights" because of this. And the State will gain by**
14 **expanding basic human rights to her citizens. Extending fundamental**
15 **human rights does not subtract from others nor harm them.**

16 **Indeed, the Commission further finds that the "special rights"**
17 **argument that has so often been used against granting fundamental**
18 **human rights could be said to be but a thinly veiled attempt to cover up**
19 **the fact that the inequities suffered by African-Americans or same-gender**
20 **couples today are so great that any claim to equal and fair treatment**
21 **under the law would somehow seem "special."**

22 ***Defense #12 : Economic Hardship***

23 **The Commission has received** convincing testimony from leading
24 **economists that there should be no hardship to the State's economy**
25 **because of extending certificates to same-gender families. Indeed, it**
26 **appears that the economy will be helped by extending such benefits to**
27 **same-gender marriages.**

28 **The Commission therefore finds that helping the economy is in the**
29 **public interest. The Commission further finds that it is in the public**
30 **interest to extend equal rights to these families because the economy will**
31 **be helped. Also, the Commission finds that by continuing to deny equal**
32 **rights, the State is conversely harming the economy and therefore hurting**
33 **the public interest.**

34

 **Narrowly Drawn** 

1 When a law discriminates against persons on a basis of religion,
2 race, gender, etc., it is "presumed to be unconstitutional unless the state
3 shows compelling state interests."⁵⁷ In addition, the State must show that
4 the law is "narrowly drawn to avoid unnecessary abridgments of constitu-
5 tional rights."⁵⁸

6 As the Commission's examination has shown the State's alleged
7 compelling state interests in this matter to not be compelling, it is
8 unnecessary to show if the discriminatory law was narrowly drawn.
9 However, for the record, the Commission finds that even if one or more of
10 the State's alleged compelling public interests were found to be
11 compelling, the law would still be unconstitutional as it is not narrowly
12 drawn so as to avoid unnecessary abridgments of constitutional rights.

13 **Public Policy Reasons to Extend Benefits to Same-** 14 **gender Couples.**

15 **Policy Reason No. 1**

16 **Article I, sections 2, 3, and 5 of the Constitution of the State of**
17 **Hawaii makes it clear that all persons in Hawaii are entitled to equal**
18 **protection of the law, the right to enjoy their inherit and in alienable**
19 **rights to life, liberty and the pursuit of happiness, and be free from**
20 **discrimination or the denial of these basic rights on the basis of sex.**

21 **The Commission finds that the denial of benefits of marriage to**
22 **same-sex couples purely on the basis of their gender is a violation of**
23 **these basic constitutional rights.**

24 **Policy Reason No. 2**

25 **The Supreme Court of Hawaii in the case which gave rise to the**
26 **establishment of this Commission (*Baehr v. Lewin*, 74 Haw. 530),**
27 **recognized the relevance of the United States Supreme Court 1967**
28 **decision to strike down a Virginia statute which prohibited**
29 **miscegenation or interracial marriage (*Loving v. Virginia*, 388 U.S. 1).**
30 **The Hawaii Supreme Court has found that denial of same-sex**
31 **marriage was presumed to be a violation of equal protection of the**
32 **law unless the State could show a "compelling state interest" for such**

1 denial. The Commission finds that the various reasons advanced for
2 denying same-sex marriages - including religious, moral and public
3 health and safety - are similar to the *Loving* case and do not
4 constitute a "compelling state interest" and as a matter of public
5 policy should not be used to deny equal rights under the law to
6 same-sex couples.

7 Policy Reason No. 3

8 The argument that same-sex marriage should be barred because it
9 cannot lead to procreation is invalid, inconsistent, and discriminatory.
10 State law does not require that opposite-sex couples prove that they
11 are capable of procreation before they can be married, and many
12 obviously are not, because of age, medical or other reasons.
13 Individuals in a same sex marriage may have children from a prior
14 opposite-sex marriage, or can adopt children if they desire a family.

15 Public policy should not deny same-sex couples the right to
16 marriage, and the right to raise a family if they wish to do so, on the
17 excuse that they, between themselves, cannot procreate, when this
18 reason is not applied to opposite-sex couples.

19 Policy Reason No. 4

20 The fact that some religions or branches thereof, and many
21 churches condemn and strongly oppose same-sex marriage does not
22 mean, under our constitutional government, that those religious
23 beliefs can be imposed on others who do not hold them. Our
24 separation of church and state prevents this type of religious
25 enforcement through state institutions, such as the Department of
26 Health.

27 Public policy should prevent the imposition of a particular
28 religious doctrine on those who do not subscribe to it, and therefore
29 should not be used to prohibit, by law, same-gender marriages.



Conclusion

1

2

3 The Commission finds that substantial public policy
4 reasons exist to extend all the legal and economic benefits
5 discussed in Part I of this report to same-gender couples
6 willing to enter into the marriage contract, with all the
7 responsibilities and burdens which that contract entails.

8 The primary reason for this, the Commission finds, is the
9 deeply rooted belief of Hawaii, America, and all humanity, in
10 equality and equal rights of all people.



End Notes.

- 1 Portion of Amendment 14, section 1, of the U.S. Constitution.
- 2 Portion of Amendment 14, section 1, of the U.S. Constitution.
- 3 Cite Loving.
- 4 Give citation.
- 5 Portion of Article I, section 5 of the Hawaii Constitution.
- 6 Article I, section 3, Hawaii Constitution.
- 7 Cite Bachr.
- 8 I.e., Chapter 572, HRS.
- 9 On the one hand, a majority is against "gay marriage." On the other hand, a majority are in favor of equal rights for same-gender couples. Poll results, at least in the present case for Hawaii citizens, seem to depend on how the polling question is phrased.
- 10 This restatement is based on the Hawaii system of addressing fundamental human rights. When such rights are threatened, the burden of proof is always on the discriminator to justify the discrimination.

While this system of using "compelling State interests" is a legal one, it makes sense from a lay person's point of view: we love liberty, we love equality, and we are fundamentally opposed to discrimination and so we impose the burden on the discriminator to justify the discrimination that is taking place.
- 11 Southern California law Review, Vol. 68, Maryland Law Review Vol. 53 and material submitted by la Croix, Mak and Ghali.

-
- 12 Cite his testimony
- 13 He also described a supplemental civil rights defense, associated with the procreation/children defenses, and described later in the text.
- 14 Give report page citations.
- 15 Give page number citations.
- 16 Give citations, etc. Can include modern articles that have directly applied the past to the current situation if Hawaii does certify same-gender marriages.
- 17 Cite his testimony.
- 18 Cite his testimony.
- 19 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."
- 20 Give citations.
- 21 Cite his testimony.
- 22 Give citations on this.
- 23 The Commission notes that Section 1 of Act 217, Session Laws of Hawaii 1994, "Legislative findings and purpose," spells out certain Legislative findings on the Baehr case.

Many of these findings are beyond the scope of this Commission. However, on pages 529 and 530 of Session Laws, the following Legislative findings occur:

The legislature further finds that section 572-1, Hawaii Revised Statutes, and all of Hawaii's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages.

The legislature finds that Hawaii's marriage licensing statutes, both as originally enacted and at present, are intended to apply only to male- female couples, not same-sex couples. The Commission, in its analysis of the history, has come to the same conclusions, as cited in the text.

The Legislature, on page 530 of Session Laws, also concluded "that same-sex relationships do exist." As such, the Commission was established (as reorganized since then by Act 5, Session Laws of Hawaii 1995) to conduct its study. The results of that study is given here.

- 24 Give citation
- 25 Give citation
- 26 Give citation
- 27 Give citation
- 28 Give citation
- 29 Give citation
- 30 Give citation
- 31 Give citation
- 32 Give citation
- 33 Give citation
- 34 Give citation
- 35 Give citation

36 Give citation

37 HRS § 572-12 reads:

"A license to solemnize marriages may be issues to, and the marriage rite may be performed and solemnized by any minister, priest, or officer of any religious denomination or society who has been ordained or is authorized to solemnize marriages according to the usage of such denomination or society, or any religious society having a clergy but providing solemnization in accordance with rules and customs of that society or any justice or judge or magistrate, active or retired of a state or federal court in the State upon presentation to such person or society of a license to marriage, prescribed by this chapter." (Emphasis added.)

38 Cite definitions per Loving .

39 Give citation

40 Give citation

41 Give citation

42 Give citation

43 Give citation

44 Give citation

45 Give citation

46 Give citation

47 Give citation

48 Give citation

49 Give citations.

50 Give citation

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- 51 Give citation
- 52 Give citation
- 53 Give citation
- 54 Give citation
- 55 Give citation
- 56 Give citation
- 57 Baehr v. Lewin, 74 Haw 535 (1993).
- 58 Baehr v. Lewin, 74 Haw 535 (1993).

TESTIMONIAL STATEMENT

TO: COMMISSION ON SEXUAL ORIENTATION AND THE LAW

FROM: BRUCE FERNANDES PO Box 714 PAIA, HI 96776

I disagree with the Sommer Le Croix testimony in favor of same sex marriages based upon the fact that 172,000 gay tourist will come to Hawaii per year to get married.

What a stupid and desperate argument! Just because we can not manage our taxes does not mean that we have to open up pandora's box and legalize gay marriages.

Besides do we really want 172,000 gay people per year coming to Hawaii promoting their concept of family? How many of these people will move here, PAY LESS IN TAXES and yet take advantage of our social and medical laws, lobby the government for more benefits and rights, and use our crowded nursing homes and hospitals if they develop AIDS?

Don't you think that Hawaii's liberal social and health programs will be abused? What would be the long term effects to our children, our hospitals, our family life, our education system, our tax structure, our society in general? What about the potential for fraud? What about gay divorces tying up our overcrowded courts?

Gays want the tax benefits, the pension benefits, the insurance benefits.... What are they willing to give back? Less taxes and more lawsuits? I think NOT! Is this a conspiracy? Is it discrimination? Is it unequal? Is it unfair? NO!!!

Marriage benefits are designed to strengthen and protect children and families from sickness, disability and death. Producing children is an essential part of marriage and that is the reason we have these benefits.

I do not have a problem if a gay person chooses to get married and commits themselves to each other in a loving spiritual bond. I do have a problem with gays forcing the majority to commit money and resources to enhance their lifestyle.

The bottom line is money. Marriage does provide economic and tax benefits to help promote and strengthen family life. Opening up these benefits to gay couples is unfair and discriminatory towards families and the majority. Please ENOUGH ALREADY!

