Nos. 12-16995 & 12-16998

# In the United States Court of Appeals for the Ninth Circuit

NATASHA N. JACKSON, *ET AL.*,
*Plaintiffs-Appellants,*

v.

NEIL S. ABERCROMBIE, GOVERNOR, STATE OF HAWAII,
*Defendant-Appellant,*

LINDA ROSEN, DIRECTOR, DEPARTMENT OF HEALTH, STATE OF HAWAII,
*Defendant-Appellee,*

and

HAWAII FAMILY FORUM,
*Intervenor-Defendant-Appellee.*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF HAWAII, CIVIL ACTION NO. 11-00734, HON. ALAN C. KAY

## BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: June 3, 2014

Respectfully submitted,

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## IDENTITY, INTEREST AND AUTHORITY TO FILE

*Amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit corporation, files this brief with the consent of the parties.[1] Since its founding in 1981, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

## STATEMENT OF THE CASE

Several Hawaii citizens who wished to enter same-sex marriages (collectively, "Plaintiffs") sued Hawaii's governor and the director of Hawaii's Department of Health under the Fourteenth Amendment's Due Process and Equal Protection Clauses to compel Hawaii to allow marriage between members of the same sex. Although captioned as a defendant, Governor Neil S. Abercrombie agreed with the Plaintiffs' position and filed briefs to challenge Hawaii's marriage laws. By contrast, the director of Hawaii's Department of Health defended Hawaii law and prevailed (along with intervenor Hawaii Family Forum) in District Court. Both Governor Abercrombie and Plaintiffs appealed.

After the appeals were filed, Governor Abercrombie called the Legislature

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

into special session to amend Hawaii's marriage laws to allow same-sex marriage. The Legislature did so, and Governor Abercrombie signed the bill into law. Further, as they have admitted, Plaintiffs have already obtained the relief that they brought this litigation to obtain: they have each already married their respective same-sex partners under Hawaii law. Pls. Br. at 11. Non-parties to this litigation have brought state-law challenges to Hawaii's amended marriage laws, but those challenges have been dismissed, with appeals pending. Based on the current status of Hawaii's marriage laws, the director of Hawaii's Department of Health advised this Court that she would not file an answering brief.

## SUMMARY OF ARGUMENT

With the possible exception of an attorney-fee award if Plaintiffs prevail, the amended Hawaii marriage laws and Plaintiffs' same-sex marriages under those laws gives Plaintiffs all that federal courts have jurisdiction to grant them. As such, Plaintiffs' claims are now moot. The prospect that an unrelated, state-law challenge to Hawaii's marriage laws would not only succeed on the merits but also result in the nullification of Plaintiffs' same-sex marriages is too remote to resuscitate Plaintiffs' mooted claims.

The remedy of *vacatur* would serve no purpose. In the unlikely event that Plaintiffs' marriages are nullified, *vacatur* would burden the parties and courts with a new trial, which would be subject to *de novo* appeal, when Plaintiffs could

simply seek reconsideration of their dismissal under Rules 60(b)(5) and 60(b)(6)m with the same *de novo* review of the denial of that relief. Moreover, with respect to Governor Abercrombie, his active role in first calling the Legislature to special session and then signing the resulting bill into law makes him an active participant in mooting this litigation. As a non-prevailing party who caused the mootness, he is not entitled to seek *vacatur*.

## ARGUMENT

### I. THIS COURT LACKS JURISDICTION OVER BOTH APPEALS

Now that Hawaii has amended the challenged laws to achieve the marriage rights that Plaintiffs sought via this lawsuit and Plaintiffs have married under the amended law, the rationale for this lawsuit has evaporated. These consolidated appeals fall outside the core Article III requirement for a case or controversy, as well as outside any waiver of, or exception to, Hawaii's immunity from suit in federal court. Accordingly, this Court must dismiss both appeals.[2]

Under Article III, appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and the party invoking federal jurisdiction bears the burden of proof on each step of the jurisdictional analysis. *Lujan v. Defenders*

[2] Alternatively, as Hawaii Family Forum argues, Appellee's Br. at 10, this Court could hold the appeals in abeyance, on the chance that litigation by other parties in state court could call Plaintiffs' same-sex marriages into question.

*of Wildlife*, 504 U.S. 555, 561 (1992). Federal appellate courts have an *obligation* to consider not only their own ongoing jurisdiction but also the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *California ex rel. Sacramento Metro. Air Quality Management Dist. v. U.S.*, 215 F.3d 1005, 1009 (9th Cir. 2000). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (interior quotations omitted). Under the circumstances, *amicus* Eagle Forum respectfully submits that this Court should dismiss these appeals for lack of jurisdiction.

The inter-related doctrines of standing, ripeness, and mootness all arise in Article III's requirement that federal courts confine themselves to cases and controversies. *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997); *Western Dist. Council of Lumber Prod. v. Louisiana Pac. Corp.*, 892 F.2d 1412, 1415 (9th Cir. 1989). "'All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the

powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Here, the fact that Plaintiffs have entered same-sex marriages under the amended Hawaii laws raises questions of standing, mootness, and ripeness.

These Article III doctrines include not only constitutional components derived from Article III's case-or-controversy requirement but also various judge-made prudential requirements "that are part of judicial self-government." *Defenders of Wildlife*, 504 U.S. at 560. "In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). For standing, a plaintiff must establish cognizable injury, caused by the challenged conduct, and redressable in court, *Defenders of Wildlife*, 504 U.S. at 561-62. Although plaintiffs can sue for both past and future injury, a future injury must be "imminent," *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), and must present a "credible threat" of future injury. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Otherwise, the future injury is simply too speculative to constitute a present-day case or controversy. Moreover, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

### A. Both Appellants Lack Standing and a Currently Ripe Claim

Hawaii's former marriage laws prohibited same-sex couples from marrying, which *qualified* as a cognizable equal-protection or due-process injury under Plaintiffs' theory that such prohibitions violate the Fourteenth Amendment. Significantly, the standing inquiry does not depend on the merits of Plaintiffs' claims. *Warth*, 422 U.S. at 500; *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"). "Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000). Otherwise, every non-prevailing party would lack standing. What once *qualified* as a sufficient injury, however, does not continue to *qualify* as an injury after the state has amended its laws to allow the relief requested and the plaintiffs have, in fact, obtained that relief. Moreover, the threat posed by a non-party's state-law suit against the amended law cannot qualify as resuscitating jurisdiction through the future injury of nullifying those marriages, unless both that suit's success and its impact on Plaintiffs are sufficiently *likely* for Article III purposes.

#### 1. Governor Abercrombie Lacks Standing to Appeal

Although states possess standing to defend their laws, *Diamond v. Charles*, 476 U.S. 54, 62-65 (1986), it is unclear what possible injury Hawaii's *former*

marriage laws presented to Governor Abercrombie, and it is unfathomable that he remains injured now that the Legislature has heeded his call and amended Hawaii law. Insofar as Governor Abercrombie bears the burden of proving his standing to appeal, *Defenders of Wildlife*, 504 U.S. at 561, this Court must dismiss his appeal unless he identifies a cognizable injury sufficient to sustain his ongoing litigation against Hawaii's former marriage laws.

### 2. Plaintiffs Lack a Cognizable Injury that Is Sufficiently Imminent to Pursue this Appeal

Unlike Governor Abercrombie, Plaintiffs at least once *had* a live case or controversy against Hawaii's marriage laws, and they sought the right to marry. They now have that right under Hawaii law, and they are married under Hawaii law. At this point, with respect to the initial injury of Hawaii's preventing their marriage, there is nothing that a federal court can do to redress their injury because they already have redressed their own injuries, notwithstanding their loss in the District Court. As to the threat that the now-dismissed state-court challenge to the Hawaii laws under which they married, Plaintiffs' injury now might be characterized as the threat of having their marriages nullified in the future, if the state-law suit against Hawaii's current marriage law succeeds. While that might be a cognizable injury, nothing in the record establishes that it is an *imminent* or *non-speculative* injury. As such, Plaintiffs no longer have a current case or controversy, and the dual threats of (a) the future invalidation of Hawaii law, and (b) that

invalidation's nullifying the same-sex marriages performed under current law,[3] plainly, are too speculative to support federal jurisdiction under Article III.

If it comes to pass that their marriages are nullified by changes in Hawaii law, Plaintiffs could seek relief in the District Court under Rule 60(b), either because "applying [the judgment] prospectively is no longer equitable" or under the catch-all provisions of Rule 60(b)(6). *See* FED. R. CIV. P. 60(b)(5)-(6). Proceeding in the District Court also would allow the District Judge to assess, in the first instance, whether the intervening *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), decision on federal marriage law changes the analysis for challenges to state marriage laws.

### B. The Original Claims of Governor Abercrombie and Plaintiffs Are Moot, and the Threat from Non-Party State-Court Litigation Is Too Remote to Revive those Claims

Governor Abercrombie and Plaintiffs have gotten all that they could want from Hawaii: an amended statute and, for the Plaintiffs, state-authorized same-sex marriages. As such, this litigation is now moot, but for the effect (if any) of the

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[3] When California invalidated same-sex marriage, the California Supreme Court held that the invalidation did not apply to same-sex marriages performed under the former law. *Strauss v. Horton*, 46 Cal. 4th 364, 470-74, 207 P.3d 48, 119-22 (Cal. 2009). Unless Hawaii law would nullify the same-sex marriages performed under the current Hawaii law – assuming *arguendo* that the state-law challenges to that law succeed – Plaintiffs cannot be injured by the pending state-law challenges. To have standing and a ripe claim based on the pending state-law challenge, therefore, Plaintiffs would need to establish that the state-law litigation would nullify *their marriages*, in addition to voiding Hawaii's marriage laws.

state-law challenge brought against Hawaii's marriage laws by non-parties to this litigation. Fortunately for Plaintiffs' same-sex marriages, but unfortunately for their Article III jurisdiction, that non-party litigation has not been demonstrated to have a sufficiently imminent, non-speculative effect on Plaintiffs' rights.

Plaintiffs and Governor Abercrombie essentially ask for an exception from mootness because Hawaii's amended marriage laws face a state-law challenge. With the related mootness exception for cases "capable of repetition yet evading review," there must be "a 'reasonable expectation' that the same complaining party will be subject to the same injury again" before allowing federal courts to continue to review otherwise-moot issues. *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509-10 (9th Cir. 1994); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (same); *cf. Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122-23 (1974) (allowing review of moot cases when threat of future action is a "brooding presence"). Here, the state-court challenge to Hawaii's amended marriage laws has been dismissed and is on appeal. While it remains true that the unrelated plaintiffs there may prevail on appeal and then prevail on the merits, neither Plaintiffs nor Governor Abercrombie have made the showing required that there is a "reasonable expectation" of that result.

Significantly, similarly situated plaintiffs from other states have challenged *current* husband-wife marriage laws in their states (*e.g.*, Texas, Michigan, and

Idaho, to name a few),[4] and those states are defending their laws. That other litigation likely will resolve the merits of this case – both in this Circuit and ultimately from the Supreme Court – perhaps even before the state-court challengers hypothetically prevail against Hawaii's current marriage laws. Simply put, even if they did not rely on the hypothetical outcome of non-party litigation in another court, these appeals would serve no useful purpose, unless a possible attorney-fee award or costs (if Plaintiffs prevail) is deemed a useful purpose.

### C. This Litigation Now Violates Hawaii's Sovereign Immunity, and No Remedy Will Redress Any *Extant* Injuries within the *Ex Parte Young* Exception to Sovereign Immunity

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine*, 527 U.S. 706, 728-29 (1999), applying equally to suits by a state's own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity or Congress has abrogated immunity under the

[4] *Latta v. Otter*, Nos. 14-35420 & 14-35421 (9th Cir.) (Idaho); *De Leon v. Perry*, No. 14-50196 (5th Cir.) (Texas); *DeBoer v. Snyder*, No. 14-1341 (6th Cir.) (Michigan).

Fourteenth Amendment. *Alden*, 527 U.S. at 712-16. The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon v. Texas*, 131 S.Ct. 1651, 1658 (2011) (interior quotations and citations omitted). Here, the changed facts – namely, the amended Hawaii law and the Plaintiffs' marriages – leave this litigation wholly outside not only any waivers of Hawaii's sovereign immunity but also any exceptions thereto.

First, the officer-suit exception of *Ex parte Young*, 209 U.S. 123 (1908),[5] applies only to *ongoing violations* of federal law: "when there is no ongoing violation, the issuance of a declaratory judgment ... is barred." *Cardenas v. Anzai*, 311 F.3d 929, 936 (9th Cir. 2002); *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 918 n.4 (9th Cir. 2003). Thus, for example, the *Ex parte Young* exception was unavailable in *Green v. Mansour*, 474 U.S. 64 (1985), where, after "Respondent … brought state policy into compliance," the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Mansour*, 474 U.S. at 66-67. Here, it is undisputed that Hawaii now allows Plaintiffs to marry (and indeed that Plaintiffs *have* married), so there is no current violation of federal law. Hawaii's alleged past

[5] Hawaii recognizes the *Ex parte Young* exception to sovereign immunity: "sovereign immunity will not be a bar where governmental action is challenged as unconstitutional." *Kaho'ohanohano v. State*, 114 Hawaii 302, 337, 162 P.3d 696, 731 (Haw. 2007).

violation of same-sex couples' right to marry is outside this Court's power to review under the *Ex parte Young* doctrine.

Second, the state parties before this Court – both the anti-Hawaii governor and the pro-Hawaii but silent director[6] – lack the authority to waive Hawaii's sovereign immunity. The *ability* of administrative or executive officers to waive sovereign immunity is a question of state law, such that if they lack authority to waive immunity, their failure to raise the immunity as an affirmative *defense* early in the litigation does not preclude their later raising the defense, even for the first time on appeal. *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459, 468-69 (1945), *overruled in part on other grounds Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613, 623 (2002). Under Hawaii law, only the Legislature can waive Hawaii's immunity,[7] *Tamashiro v. Dep't of Human Servs.*,

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[6] On May 6, 2014, pursuant to FED. R. APP. P. 31(c) and Circuit Rule 31-2.3, Director Rosen filed notice that she would not be submitting a brief, given the change in Hawaii law. That notice would not preclude her from raising Hawaii's sovereign immunity to challenge an attorney-fee award in either a subsequent phase of this litigation, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), or in a separate collection action by Plaintiffs. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 & n.6 (2009) (sovereign immunity is an exception to the general rule that parties cannot collaterally attack jurisdiction in subsequent proceedings).

[7] By its express terms, Hawaii's waiver of sovereign immunity applies only to suits brought in Hawaii courts. HAW. REV. STAT. §§661-1, 662-3; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984) ("a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts").

112 Haw. 388, 417, 146 P.3d 103, 132 (Haw. Ct. App. 2006) ("[n]othing … in the [Hawaii revised statues] can be read as expressly delegating to the [agency] the authority to waive the State's immunity"), and the waiver of immunity must be must be made "expressly and statutorily." *Chun v. Bd. of Trustees of the Employees' Retirement Sys.*, 106 Hawaii, 416, 432-33, 106 P.3d 339, 355-56 (Haw. 2005); *Nelson v. Hawaiian Homes Comm'n*, 130 Haw. 162, 168, 307 P.3d 142, 148 (Haw. 2013). Thus, while it is true that nothing compels Hawaii to assert its immunity from whatever relief a court might fashion, the fact that Hawaii has not asserted its immunity *yet* does not preclude Hawaii's doing so later.[8]

Third, the only potential relief genuinely at issue *now* is the availability of an attorney-fee award if Plaintiffs prevail, and that relief falls outside the limited *Ex parte Young* exception to sovereign immunity because "relief sought nominally

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[8] Although "the Constitution does not provide for federal jurisdiction over suits against *non-consenting* States," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000) (emphasis added), states may consent to federal jurisdiction or waive their immunity via various means, such that immunity is not "jurisdictional in the sense that it must be raised and decided by [courts] on [their] own motion." *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 515 (1982). For example, immunity poses no jurisdictional barrier where the state simply declines to raise it, *id.*, or voluntarily invokes federal-court jurisdiction (*e.g.*, by removing to, intervening in, or filing suit in federal court). *Lapides*, 535 U.S. at 619-20 (distinguishing between cases where "a State … *voluntarily* invoked [federal] jurisdiction" and ones with "a State that a private plaintiff had *involuntarily* made [a federal] defendant") (emphasis in original). But non-consenting states may raise immunity at any time, even on appeal. *Edelman*, 415 U.S. at 678. Moreover, Hawaii could collaterally attack whatever relief a federal court currently could provide as outside the courts' jurisdiction. *Bailey*, 129 S.Ct. at 2205-06 & n.6.

against an officer is in fact against the sovereign" where "the decree would operate against the latter" by "expend[ing] itself on the public treasury or domain," "interfer[ing] with the public administration," or "restrain[ing] the Government from acting, or to compel[ling] it to act." *Pennhurst,* 465 U.S. at 101-02 & n.11 (interior quotations omitted); *see also id.* at 100 (immunity applies "regardless of the nature of the relief sought"). Under Hawaii law, attorney-fee awards (and even taxation of costs) require a separate waiver of sovereign immunity. *Nelson,* 130 Haw. at 168 n.4, 307 P.3d at 148 n.4 ("an award of fees under the private attorney general doctrine is in the nature of damages; therefore, … in order to award fees under the doctrine, a waiver of sovereign immunity must exist"); *Pele Defense Fund v. Paty,* 73 Haw. 578, 609-10, 837 P.2d 1247, 1266 (Haw. 1992). At this point, even if it accepts the Plaintiffs' and Governor Abercrombie's merits arguments, there is nothing for this Court to order Hawaii to do.

## II. ALTHOUGH BOTH APPEALS MUST BE DISMISSED FOR LACK OF JURISDICTION, *VACATUR* IS NOT APPROPRIATE

Under *dicta* from *U.S. v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950), it was "established practice … in dealing with a civil case from a court in the federal system which has become moot while on [appeal] to reverse or vacate the judgment below and remand with a direction to dismiss." *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994). Under *Bancorp,* however, "Judicial precedents are presumptively correct and valuable to the legal community

as a whole," *Bancorp*, 513 U.S. at 26, so automatic *vacatur* under the *Munsingwear dicta* is inappropriate. Instead federal appellate courts must consider equitable factors and the public interest. *Id.* Under those factors, *vacatur* would be inappropriate here. Instead, this Court should either hold the case in abeyance as Hawaii Family Forum suggests or dismiss the appeals, recognizing Plaintiffs' right to seek reconsideration in District Court, in the unlikely event that Hawaii's current marriage laws are invalidated judicially or changed legislatively.

Because they could seek reconsideration based on a future invalidation of Hawaii's current marriage laws and the resulting nullification (if any) of their marriages, Plaintiffs would not be prejudiced by dismissal of these appeals without *vacatur* of the District Court judgment. That type of hypothetical, future post-judgment event would be one of the reasons that the federal rules allow motions for reconsideration, FED. R. CIV. P. 60(b)(5)-(6), with *de novo* review in this Court of the denial of reconsideration. By contrast, if the state-court litigation invalidated both Hawaii's marriage laws and Plaintiffs' marriages, *vacatur* would give Plaintiffs a new trial, with all of the corresponding burdens on the parties and courts. Appellees' Br. at 7, 10, 12. Moreover, by then, it is likely that Circuit law will be set on this issue, with the Supreme Court's ultimate resolution not far off.

In sum, *vacatur* would impose burdens, with no corresponding benefits.[9]

Although *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006), suggests that legislation is generally "not attributed to the executive branch" for purposes of finding repeal the voluntary action of non-prevailing officials, that suggestion is not binding here for two reasons. First, it was *dicta* in *Helliker*, where the relevant parties were industry groups who lobbied the Legislature, not executive-branch officials. *Id. S*econd, Governor Abercrombie was instrumental in amending Hawaii law, not only in signing the legislation but also in calling the Legislature into special session for the express purpose of amending Hawaii's marriage laws. Under the circumstances here, Governor Abercrombie is hardly a bystander.

Indeed, most of the authority for the extra-circuit decisions cited by *Helliker* involved *federal* legislation, not state legislation. While the federal Constitution requires separation of powers – and thus recognizes the distinction between legislative and executive action – the federal Constitution does not require the

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[9] Significantly, even without *vacatur*, the District Court opinion would not prejudice non-parties: "federal district judges … lack authority to render precedential decisions binding other judges, even members of the same court." *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2540 (2011); *accord Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977). Moreover, even with *vacatur*, the District Court opinion would be available as authority to the extent that a judge found its reasoning persuasive. *City of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting).

*states* to have divided government. *Dreyer v. People of State of Illinois*, 187 U.S. 71, 84 (1902); *Whalen v. U.S.*, 445 U.S. 684, 689 (1980) ("doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States"). Federal courts deciding constitutional issues of federal justiciability need not honor the states' independent decision to divide authority between an executive branch and a legislative branch.

## CONCLUSION

This Court should dismiss the two appeals for lack of Article III jurisdiction and leave the District Court's judgment in place. Alternatively, as Hawaii Family Forum argues, this Court could hold the case in abeyance to await future developments in other litigation.

Dated: June 3, 2014

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *amicus curiae* Eagle Forum Education & Legal Defense Fund states that it is unaware of any pending cases in this Court related to this one. (If these non-justiciable appeals raised merits issues, those merits issues would be similar to the issues raised in *Sevcik v. Sandoval*, No. 12-17668, and *Latta v. Otter*, Nos. 14-35420 & 14-35421, in this Circuit, concerning Idaho's and Nevada's marriages laws, respectively.)

Dated: June 3, 2014

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 4,196 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: June 3, 2014

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## CERTIFICATE OF SERVICE

I hereby certify that, on June 3, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph