No. SCWC-13-0000806

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

DIANE CERVELLI and TAKEO BUFFORD,

Respondents/Plaintiffs-Appellees,

vs.

ALOHA BED & BREAKFAST, a Hawai`i sole proprietorship,
Petitioner/Defendant-Appellant,

and

WILLIAM D. HOSHIJO, as Executive Director of the Hawai`i Civil Rights Commission,
Respondent/Intervenor-Appellee.

To the Intermediate Court of Appeals of the State of Hawai`i
(No. CAAP-13-0000806, Nakamura, C.J., Fujise and Reifurth, J.J.)
(Civil No. 11-1-3103-12, First Circuit Court, Judge Nacino, Presiding)

REPLY IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE FEBRUARY 23, 2018 OPINION OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I AND ITS MARCH 20, 2018 JUDGMENT ON APPEAL
APPENDIX EXHIBITS A & B
CERTIFICATE OF SERVICE

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REPLY IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI

For ten years, the Hawai`i Civil Rights Commission (the "Commission") has targeted Phyllis Young's religious views for punishment, sought compensatory, statutory, treble, and punitive damages, crippling attorneys' fees and costs awards, and even tried to put a nondiscrimination notice on the walls of her own home. The Commission's response to Young's application for certiorari (filed jointly with the private plaintiffs) is no exception. It takes Young's description of her religious beliefs—compelled during this litigation—entirely out of context, Response 2l; ROA 1010-18, denies any harm will result from forcing Young to lose her primary source of income and family home of forty years, Response 8 n.6; ROA 728, 938, and urges this Court to ignore the Commission's own guidance, which indicated that Young's private home could not be a place of public accommodation under Hawai`i law, Response 5, n.4.

This is exactly the sort of religious hostility that *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, __S. Ct.__, No. 16-111, 2018 WL 2465172 (June 4, 2018), forbids. Far from disparaging Respondents, Young informed the couple of her Christian identity and beliefs, explained that her decision was nothing personal and that she applies the same "house rules" to her own family members, pointed to the Mrs. Murphy exemption, and found another home in the area where they could vacation. ROA 884-85, 985-89. She balanced her own rights with the couple's in a tolerant and respectful way. *Masterpiece*, 2018 WL 2465172, *12. Yet the Commission seeks to ruin Young even though she had no way of knowing that it or the intermediate court of appeals would artificially limit HRS § 515-4(a)(2)'s protection. There is only one explanation for this unjust campaign: the Commission's hostility towards Young's religious beliefs. *Id.* For this reason and others discussed below, this Court should grant review.

ARGUMENT

I. HRS § 515-4(a)(2) Protects Young's Right to Make Religious Decisions About When to Rent Three Bedrooms in Her Family Home.

Respondents make much of the fact that Hawai`i's public accommodation law does not contain a separate Mrs. Murphy exemption. Response 2. The simple explanation for this omission is that the Hawai`i legislature viewed HRS § 515-4(a)(2) as exempting *any* homeowner who rents up to four rooms in the house in which they live from nondiscrimination laws' scope. Response 2 n.2. Section 515-4(a) plainly indicates that most family homes are not places of public accommodation. There was no need for the legislature to reiterate this point in HRS § 489.

Young's reading gives effect to both HRS § 489 and HRS § 515. In stark contrast, Respondents' theory confines § 515-4(a)(2)'s protection to homeowners who rent up to four rooms in their family homes *on a long term basis*. Response 3. Yet those additional words are not in the statute. If that is what the Hawai`i legislature meant, that is what it would have said. Aware of this obvious flaw in the intermediate court of appeals' analysis, the Commission begs this Court not to enforce § 515-4(a)(2)'s plain meaning. Response 10. But it should do so to vindicate the Hawai`i legislature's intent to protect those like Young who rent rooms in their family homes and to avoid the myriad constitutional violations that would otherwise result. *See infra* Parts II-IV.

Young's position is and has always been that (1) her family home is not a place of public accommodation, (2) HRS § 515-4(a)(2) recognizes this fact, and (3) HRS § 489-3 does not apply on any grounds. Opening Br. Appellant 9-17. Respondents' argument that Young did not challenge on appeal the ruling that her home is a place of public accommodation because she provides "services relating to travel or transportation," HRS § 489-2, is meritless. Response 4.

II. Young's Due Process and Equal Protection Arguments are Not Waived and Demonstrate the Commission's Hostility Toward Her Religious Beliefs.

Hawai`i law gave Young no warning that religious decisionmaking about renting three bedrooms in her home could be illegal. Aware of this lack of notice, Respondents suggest that Young's due process and equal protection arguments were not preserved below. Response 4. That is simply incorrect. Once Respondents' legal theory was fully presented in the circuit court, Young emphasized that accepting it and holding her personally liable would violate due process and equal protection. ROA 1379 (citing *State v. Modica*, 58 Haw. 249, 567 P.2d 420 (Haw. 1977)). PDF ROA at 1470-1485 Ex. A in Appendix pp. 5-10; PDF ROA at 1479-1484; Transcript March 28, 2013 hearing Appendix Exhibit B. She raised the same due process and equal protection argument before the intermediate court of appeals, which refused to address it with no explanation why. Opening Br. Appellant 21.

It is striking that the Commission—a state agency charged with protecting against religious as well as sexual orientation discrimination—would seek to ignore the obvious injustice of punishing Young when she (and any ordinary person at the time would have) believed that HRS § 515-4(a)(2) protected her faith-based conduct. ROA 543, 988. That is clear evidence of hostility towards Young's religious beliefs particularly when the due process concerns on which *Modica* was based have long applied to civil laws like HRS § 489-2 that suppress the exercise of

constitutional rights, are quasi-criminal, and have a severe stigmatizing effect. *Compare* Response 4, *with Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

No more persuasive is the Commission's argument that Young had notice because Hawai`i's public accommodation law applies to inns, hotels, motels. Response 5. Hotel-like structures have design requirements, owners rarely live in them, and they rent out more than four bedrooms. So it is no surprise that while § 515-4(a)(2) protects Young, it does not apply to them.

As to equal protection, Respondents simply repeat the mantra that housing and public accommodations are different. Response 4, 7. But the public accommodation they allege Young provides *is* housing. They never even attempt to explain the difference between "transient lodging" and "housing" in this case because there is none. Response 3. Forcing Young rent rooms in her family home involves housing no matter the title or general purpose of the cited law. And the intrusion on Young's constitutional rights is the same regardless of how long this compelled arrangement lasts. No arbitrary timeframe limits HRS § 515-4(a)(2)'s protection for that reason.

The state cannot simultaneously punish Young yet exempt those who rent rooms in their home for longer periods without violating equal protection or implicating Young's rights to privacy, freedom of association, and the free exercise of religion. Response 4. All those who rent a few rooms in their family homes are similarly situated. The Commission would penalize Young but respect other homeowners' constitutional rights. And it would do so despite the fact that the state has a much stronger interest in providing LGBT persons with long-term housing in a particular location than it does in ensuring they can stay at Young's home during a week-long visit. Such an irrational application of the state law cannot survive even rational basis review, let alone strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985). Defending this inequality merely proves the Commission's bias against Young's religious beliefs.

III. Young's Rights to Privacy and Intimate Association Bar the State From Forcing Her to Share the Living Areas of Her Home with Renters For Weeks at a Time.

Respondents' only answer to Young's privacy argument is that there can be no right to privacy when potential harm to third parties could result. Response 6. That is clearly not the case. For instance, the exclusionary rule is grounded in the right to privacy and may result in "considerable harm" to public safety and law enforcement. *United States v. Payner*, 447 U.S. 727, 734 (1980). But that has never justified abandoning the rule or the Fourth Amendment.

Nor does *State v. Kam*, 69 Haw. 483, 492, 748 P.2d 372 (1988), warrant Respondents' position. Response 6. *Kam* actually bolsters Young's right to privacy by emphasizing the strong protection article I, section 6 of the Hawai`i Constitution provides autonomy in personal and intimate affairs, such as Young's religious lifestyle in her family home. *Id.* at 492, 378. While article I, section 6 is grounded in federal precedents like *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Kam* recognizes that it was intended to provide "much greater privacy rights." 69 Haw. at 491, 748 P.2d at 377. And it indicates that Respondents' intrusion into Young's right to live by her religious values at home triggers strict scrutiny, 69 Haw. at 493, 748 P.2d at 378, the most demanding test known to law, *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Respondents' efforts to nullify Young's privacy rights find no basis in *Kam*. Response 6. That the Commission would make such an unfounded argument to ensure Young's punishment reveals more about its hostility toward her religious beliefs than it does about privacy law.

Respondents also argue that forcing Young to rent rooms in her family home of forty years does not implicate her freedom of intimate association. Response 6-7. They admit that intimate-association rights are not limited to families but suggest that essentially no one else qualifies. Response 7. Of course, both of these things cannot be true. Respondents' only supporting authority is a Ninth Circuit case in which escorts asserted a "right to date" or engage in "social association" with clients and sought to facially invalidate a county regulation on that basis. *IDK, Inc. v. Cty of Clark*, 836 F.2d 1185, 1191 (9th Cir. 1988); Response 6. *IDK* explicitly did not involve cohabitation. *Id.* at 1193. Nor did it address a relationship that necessarily takes place in the home or lasts more than a day or evening. *Id.* It tells us nothing about the case at hand.

Respondents seek to force Young to share the main living areas of her home with renters for up to five weeks. ROA 748. If that does not implicate the freedom of intimate association, nothing does because "[i]n the home ... *all* details are intimate." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The on point Ninth Circuit case is *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012). And that opinion makes clear that selecting housemates or roommates qualifies for intimate-association protection, particularly when they use the same living rooms, dining rooms, kitchens, and bathrooms. *Id.* at 1221.

In sum, Respondents cite no case in which the state forced a private citizen to rent rooms in her family home against her religious convictions. Response 5. Hawai`i should not be the first.

IV. *Masterpiece Cakeshop* Demonstrates Several Ways in Which the Commission Violated Young's Free Exercise Rights.

Sometimes the state's efforts to protect LGBT persons conflict with individual citizens' fundamental freedoms. *Masterpiece Cakeshop* explains that when this clash occurs hostility toward religious beliefs, like Young's, cannot decide the balance. 2019 WL 2465172, at *3. Rather than subject Young to an Inquisition-like proceeding in which her protected religious views were questioned and then cited as a basis for punishment under HRS § 489-3, the Commission could have acknowledged that HRS § 515-4(a)(2) safeguards her right to make faith-based decisions about the morality of sleeping arrangements in her family home and dismissed Respondents' complaints. 2019 WL 2465172, at *7. Like the choice of a minister not to perform a same-sex marriage, a grandmother's decision not to rent a bedroom in her home is something LGBT persons can accept as an exercise of religion without harm to their self-worth. *Id.*

But that is not what occurred. The Commission inquired into and criticized Young's religious beliefs as discriminatory, 2019 WL 2465172, at *11, which required it to adopt a negative view of Young's religious justification for referring Respondents' request, *id.* at *12. It endorses the argument that Young's faith-based decisionmaking about renting rooms in her family home is illegal despite HRS § 515-4(a)(2)'s plain text. Response 2-4; 2019 WL 2465172, at *9. The Commission insists that Young is not welcome in Hawai`i's business community and that she must stop renting rooms in her family home even though she needs the income to pay her mortgage. Response 9; ROA 728, 938; 2019 WL 2465172, at *9. And it ignores the harassment and hate mail Young has faced as a result of this litigation, let alone the harm facilitating sexual activity outside of marriage between a man and a woman would cause Young's personal integrity and self-worth. Response 9; ROA 1024. In short, the Commission invented a biased reading of Hawai`i law to deprive Young of legal protection and punish her religious beliefs despite Young having no way of knowing that her actions could be considered unlawful. Response 4-5. Tellingly, it filed a motion to intervene as a plaintiff before Young was even served with the couple's complaint.

That is religious hostility plain and simple. *Masterpiece Cakeshop* establishes that the Commission may not impose regulations that are hostile to religious beliefs against Young or anyone else. *Id.* at *12. Yet the Commission cites that opinion as supporting its ten-year campaign to punish Young based on the articles of her faith. Response 7, 10. Such blatant disregard for Young's free exercise rights necessitates this Court's review.

CONCLUSION

This Court should grant the application for a writ of certiorari to address the grave legal errors in the intermediate court of appeals' decision and remedy the Commission's pervasive hostility toward Young's religious beliefs.

Dated: June 22, 2018

/s/ James Hochberg
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APPENDIX

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

DIANE CERVELLI and TAEKO BUFFORD, Plaintiffs, WILLIAM D. HOSHIJO, as Executive Director of the Hawai'i Civil Rights Commission,	CIVIL NO. 11-1-3103-12 ECN (Other Civil Action) **Defendant Aloha Bed & Breakfast's Reply Memorandum to Plaintiffs' and Plaintiff-Intervenor's Opposition to Defendant's Motion for Summary Judgment filed** **(Caption continued next page)**

Plaintiff-Intervenor, v. ALOHA BED & BREAKFAST, a Hawai'i sole proprietorship, Defendant	**March 19, 2013; Certificate of Service** HEARING: DATE: Thursday, March 28, 2013 TIME: 9:00 a.m. JUDGE: Edwin C. Nacino Trial Date: November 4, 2013

Defendant Aloha Bed & Breakfast's Reply Memorandum to Plaintiffs' and Plaintiff-Intervenor's Opposition to Defendant's Motion for Summary Judgment filed March 19, 2013

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Introduction

This case boils down to the answers to a few straightforward questions. First is the statutory question: *what law applies to the rental of rooms in a home where the owner actually lives?* Is it the Discrimination in Real Estate Transactions Law, codified at Hawai'i Revised Statutes Chapter 515, which actually discusses such rentals? Or, is it the Public Accommodations Law, codified at Hawai'i Revised Statutes Chapter 489, which does not?

If the Court finds that Chapter 515 controls, that ends the analysis: this Court must grant summary judgment to Mrs. Young, because the Plaintiffs only bring their complaint pursuant to Chapter 489. Besides, Chapter 515 contains an explicitly-stated Mrs. Murphy's exemption that protects Mrs. Young from being found to have committed discrimination pursuant to it.

If the Court finds that Chapter 489 controls, a second, constitutional question must be answered: *does the application of Chapter 489's nondiscrimination requirement to Mrs. Young's rental of rooms in her home, where she lives, violate constitutional guarantees?* The answer to this question is almost certainly "yes." Forcing one to rent rooms in her home to those to whom she would prefer not to rent implicates privacy and intimate association concerns. The fact that one advertises for renters, and that the renters stay for only a few nights, does not change the analsysis. Privacy rights and intimate association guarantees are implicated whenever the State does not allow us to determine who we will accept into our own homes as overnight housemates. Because Mrs. Young's sincerely held religious beliefs will be violated if she is forced to rent a single room with one bed to a same-sex couple, free exercise rights are also implicated. And because Mrs. Young cannot afford to pay her mortgage if she cannot rent rooms in her home, the Takings Clause is implicated as well.

This leads to the third question: *does Chapter 489, as applied to Mrs. Young's rental of rooms in her home, satisfy strict scrutiny review?* Because it cannot, *see* infra, this Court should grant summary judgment to Mrs. Young.

Statement of Facts[1]

Mrs. Young is a Christian with sincerely held religious beliefs. (Decl. of Shawn A. Luiz, filed Feb. 20, 2013, ("Luiz Decl."), Ex. 5, Depo. of Phyllis A. Young ("Ex. 5, Young Depo."), at

[1] Mrs. Young incorporates by reference the statements of fact set forth in her summary judgment memorandum, filed Feb. 20, 2013 ("Aloha Mem"), at 2-4, and her memorandum in opposition to the plaintiffs' motion for summary judgment, filed Mar 19, 2013 ("Aloha Opp'n"), at 1-2.

65:5-8; 185:4-7.) These beliefs are shaped by both the Bible and her Church's teaching. (*Id.* at 185:23-25; 200:1-2; 208:14.) As part of her religious beliefs, Mrs. Young believes it is immoral for opposite-sex, unmarried couples to engage in sexual behavior. (*Id.* at 65:4-8; 98:20-23; 145:18-21.) She also believes that same-sex unions are immoral. (*Id.* at 143:19-21; 195:19-20.) Mrs. Young further believes that she should not allow such behavior to occur inside her home, and so she should not allow unmarried opposite-sex couples or same-sex couples to share a room. (*Id.* at 98:20-23.) Mrs. Young explained, "I would be violating my faith in allowing unmarried or same sex couples to stay in our room in our house because that's my faith. My faith—*I have to be obedient to God*." (*Id.*) (emphasis added.)

As a result, Mrs. Young does not rent single rooms to unmarried heterosexual couples or same-sex couples. (*Id.* at 65:5-8; 145:5 – 146:7.) Mrs. Young feels so strongly about this that she will not even allow her daughter to share a room with her live-in boyfriend when they visit. (*Id.* at 103:18-22.) This might seem old-fashioned, or even harsh. But Mrs. Young believes what the Bible and the Catholic Church teach about sexual morality. (*Id.* at 185:23 – 186:2; 200:1-2; 201:13 – 206:17.) As Mrs. Young explains, "This is my religious belief." (*Id.* at 103:22.)

Mrs. Young doesn't have anything against the Plaintiffs, (*id.* at 103:21-22; 195:19-20), any more than she has anything against her daughter. But she objects on religious grounds to sexual activity outside of opposite-sex marriage, (*id.* at 143:19-22), and she does not want it occurring in her home, (*id.* at 65:5-8). Renting rooms to those who may engage in such activity violates her religious belief.

The Plaintiffs do not have to agree with Mrs. Young's beliefs. Neither does this Court. But they are her beliefs. The First Amendment protects her right to hold them. Mrs. Young has the right to have them respected in her own home. And she has the right to rent rooms in her own home, where she lives, consistent with her religious beliefs. It is, after all, her *home*.

Argument

The outcome of this case might be different if the facts were different. For instance, if Mrs. Young did not live in the building in which she rented rooms, the law might require this Court to find she engaged in unlawful discrimination.[2] The same is true if Mrs. Young were

[2] The Plaintiffs quote Mrs. Young's statement that she would not want to rent to a same-sex couple even if she did not live in the home. (Pl. Opp'n Mem. at 3.) That situation, however, is not this case. Mrs. Young's statement, therefore, is irrelevant to the disposition of this matter.

selling her house but refused to sell to the Plaintiffs because of their sexual preferences.[3]

But those examples are not this case. *This* case is about whether the State can force Mrs. Young to rent rooms in her home to those she would prefer not. Under those facts, the law requires that this Court find for Mrs. Young and grant summary judgment in her favor, for at least two reasons. First, the rental of rooms in homes is subject to the Real Property Transactions Law. Haw. Rev. Stat. § 515-2. This law allows homeowners renting four or fewer rooms in the house where they themselves live to refuse to rent to anyone, for any reason. *Id.* § 515-4. Second, numerous constitutional guarantees would be violated if the State of Hawaii could force someone to take into her own home those she would prefer not. The State cannot satisfy the required strict scrutiny review in order to force Mrs. Young to do so. This Court should therefore grant summary judgment to Mrs. Young.

I. The Rental of Rooms in Mrs. Young's Home is Subject to the Discrimination in Real Property Transactions Law, Not the Public Accommodations Law.

The Plaintiffs wrongly suggest that Mrs. Young wants this Court to "import" the Mrs. Murphy's exemption from the Discrimination in Real Property Transactions Law into the Public Accommodations Law. (*See, e.g.*, Pls. Opp'n Mem. at 5, 8.) But Mrs. Young never suggested the Court do this. Rather, Mrs. Young has always correctly contended that the rental of rooms in a home is not subject to the Public Accommodations Law at all. (Aloha S.J. Mem. at 5-10; Aloha Opp'n Mem. at 2-13.) It is subject, rather, to the Discrimination in Real Property Transactions Law, which is the only law to discuss the rental of rooms in homes. (*Id.*)

The Plaintiffs hope to avoid this conclusion by postulating that the Discrimination in Real Property Transactions Law applies to only long term rental of rooms, while the Public Accommodations Law applies to short term rental of rooms to transients. (Pls. Opp'n Mem. at 6.) But nowhere does the Discrimination in Real Property Transactions Law say that one must rent a room for a certain length of time before it governs. Rather, it says that it applies to "the sale, exchange, rental, or lease of real property." Haw. Rev. Stat. § 515-2. And it provides an exemption from its nondiscrimination requirements "[t]o the rental of a room or up to four rooms in a housing accommodation by an owner or lessor if the owner or lessor resides in the housing

[3] Mrs. Young indicated at deposition that she would have no objection to selling a house to a same-sex couple. It is only facilitating what her faith holds is immoral sexual behavior, in her own home, that is objectionable to Mrs. Young. (Ex. 5, Young Depo., at 195:15-24.)

accommodation." *Id.* § 515-4(2). That exemption contemplates the situation before this Court.

Compare that to the Public Accommodations Law. Nowhere does it mention the rental of rooms in homes where the owner lives. In fact, it does not mention the rental of rooms in homes at all. Rather, it applies to the rental of rooms in nonresidential buildings that are designed to provide lodging to many transient guests at the same time. Haw. Rev. Stat. 489-2. It simply does not contemplate a homeowner renting three (and sometimes fewer) rooms in her home where she herself lives, as Mrs. Young does. (Aloha S.J. Mem. at 6-7; Aloha Opp'n Mem. at 4-7.) Only the Discrimination in Real Property Transactions Law contemplates that situation.

The Plaintiffs concede that if Mrs. Young rented a room to one who intended to make that room his residence, the rental transaction would be subject to the Discrimination in Real Property Transactions Law. (Pl. Opp'n Mem. at 6.) Because those who offer rooms in their homes for long term rentals advertise and charge rent, the Plaintiffs seem to postulate that the determining factor for whether a rental belongs under the Public Accommodations Law is whether it is short term, to transient guests. That, however, is not what the law says. Nor is it the line the legislature drew. Rather, it made the determining factor the type of property being rented. So rental transactions involving rooms in *homes* are subject to the Discrimination in Real Property Transactions Law, which is the only law to address homes. Rental transactions involving *nonresidential buildings* that take in many guests at a time are subject to the Public Accommodations Law, which is the only law to address those types of rentals.

Canons of statutory construction support Mrs. Young's position that the rental of rooms in homes should be understood as always falling within the Discrimination in Real Property Transactions Law. (Aloha S.J. Mem. at 7-8; Aloha Opp'n Mem. at 4-9.) So does Ninth Circuit case law construing similar provisions of federal law (Aloha S.J. Mem. at 9).[4]

Honolulu's zoning code likewise supports Mrs. Young's position. (Aloha S.J. Mem. at 8;

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[4] The Plaintiffs attempt to distinguish the case upon which Mrs. Young relies, *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159 (9th Cir. 2000), asserting that establishment in *Jankey* was "not in fact open to the public, because they were limited to only Fox employees and Fox employees' guests." (Pl. Opp'n Mem. at 5.) But that does not distinguish *Jankey*. Rather, that statement shows why *Jankey* is persuasive, because it perfectly describes Mrs. Young's home. No one can enter her home, except the Youngs, and those who they invite. Those wishing to rent rooms must first be interviewed by Mrs. Young, and only those she approves are offered admittance. The Plaintiffs' attempt to distinguish *Jankey* is thus unpersuasive. While *Jankey* does not control this Court, it is persuasive authority.

Aloha Opp'n Mem. at 9.) In fact, Honolulu's Land Use Ordinance explicitly excludes bed and breakfast homes from its definition of transient accommodations. It defines a "transient vacation unit" to be "a dwelling unit or lodging unit which is provided for compensation to transient occupants for less than 30 days, ***other than a bed and breakfast home.***" LUO, § 21-10.1. (emphasis added). Honolulu zoning law thus excludes bed and breakfast homes from being classified as transient accommodations, even though they rent to transient guests. Instead, it classifies them as residential homes. This supports Mrs. Young's position that the rental of rooms in her home is not governed by the Public Accommodations Law, which does not contemplate the rental of rooms in homes, but rather by the Discrimination in Real Property Transactions Law, which explicitly does.

The doctrine of constitutional avoidance also counsels this Court to find Mrs. Young's rentals subject to the Discrimination in Real Property Transactions Law. (*See* Aloha S.J. Mem. at 10-14; Aloha Opp'n Mem. at 3-4) (explaining *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012).) Similarly, *State v. Modica*, 58 Haw. 249, 567 P.2d 420 (Haw. 1977), counsels this Court to find that Mrs. Young's rentals are subject to the Discrimination in Real Property Transactions Law. In *Modica*, the Hawaii Supreme Court said that if the same act can be punished as either a felony or misdemeanor under either of two statutory provisions, a conviction under the felony statute violates due process and equal protection. *Modica*, 58 Haw. at 251, 567 P.2d at 422. In such situations a court should find that the act is subject to the statute affording the lesser punishment to avoid constitutional concerns.

In Mrs. Young's case, the "offending" act was Mrs. Young's declining to rent a room in her home to a same-sex couple seeking to rent a room with one bed in it. It is clear that the Discrimination in Real Property Transactions Law, which applies to the rental of rooms in homes, applies. If the Court finds that the Public Accommodations Law also applies, then the same act would be subject to two different statutes, each with a different punishment. A "conviction" under the Public Accommodations Law would result in punishment. But Mrs. Young could not be "convicted" under the Discrimination in Real Property Transactions Law, because of its Mrs. Murphy's exemption. In that situation, a ruling subjecting Mrs. Young to liability pursuant to the Public Accommodations Law would violate the equal protection clauses of both the federal and Hawaii Constitution, which require that similarly situated individuals receive similar treatment under the law.

Equal protection provisions require similar treatment on those similarly situated. The equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936); *Concordia Fire Ins. Co. v. Ill.*, 292 U.S. 535 (1934); *Sproles v. Binford*, 286 U.S. 374 (1932); *Ky. Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Smith v. Texas*, 233 U.S. 630 (1914); *Atchison, Topeka & Santa Fe R. Co. v. Matthews*, 174 U.S. 96 (1899). Significantly, this includes equality of exemption from liabilities. *Cotting v. Kan. City Stock Yards Co., Etc.*, 183 U.S. 79 (1901).

Mrs. Young's private residence is not similarly situated to a hotel. Mrs. Young's private residence is similarly situated to a residentially zoned private home. A challenge to a legislative classification as violative of the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution and the State Constitution equivalent is ordinarily resolved by inquiring whether a rational basis exists for the classification. *Nelson v. Miwa*, 56 Haw. 601, 546 P.2d 1005 (1976). But there is no rational basis for treating Ms. Young's private residence as a hotel where (1) her home is zoned as a residential home under City and County of Honolulu Land Use Ordinances, and (2) it does not have any of the characteristics of a hotel under City and County of Honolulu Land Use Ordinances, such as a clerk's desk that is manned 24/7. Such a finding would be manifestly arbitrary, unreasonable, and inequitable. This Court should therefore apply the doctrine of constitutional avoidance and find that Mrs. Young's rentals are subject to the Discrimination in Real Property Transactions Law.

As explained *supra*, the rental of rooms in Mrs. Young's home, where she lives, cannot be subject to the Public Accommodations Law. It must rather be subject to the Discrimination in Real Property Transactions Law. But the Plaintiffs have, by deliberate choice, brought their complaint only pursuant to the Public Accommodations Law. Their complaint must fail as a matter of law. This Court should therefore grant summary judgment to Mrs. Young.

II. The Application of the Public Accommodation Law to Mrs. Young's Rental of Rooms Violates Constitutional Guarantees.

Plaintiffs assert that Mrs. Young's constitutional rights are not burdened by applying the Public Accommodations Law to her rentals. (Pl. Opp'n Mem. at 8-16.) Plaintiffs are wrong.

In making their wrong assertion, the Plaintiffs first wrongly rely upon the test formulated by *IDK, Inc. v. County of Clark*, 836 F.2d 1185 (9th Cir. 1988), for determining whether a relationship is an intimate one. (Pl. Opp'n Mem. at 8-9.) But that case, which considered whether a client has an intimate association right with a paid escort, does not articulate the right test. Rather, the proper test for rental situations was articulated in *Roommate.com*, which considered whether a homeowner's intimate association rights are implicated if the State forces her to take in a renter that she does not want. (*See* Aloha Opp'n Mem. at 15-16.) Under that test, Mrs. Young enjoys intimate association rights with respect to those she invites to stay in her home overnight. (*See id.*) Contrary to the Plaintiffs' assertion, applying the Public Accommodations Law to her rentals implicates intimate association concerns.

Next, the Plaintiffs assert that forcing a homeowner to rent to those she would prefer not does not implicate her privacy rights. (Pl. Opp'n Mem. at 11-12.) The Plaintiffs wrongly suggest that the right to exclude from one's home those who one does not want to come inside is not "fundamental or implicit in the concept of ordered liberty, as required for privacy protection." (Pl. Opp'n Mem. at 11.) Mrs. Young has already refuted this suggestion. (Aloha Opp'n Mem. at 13-16.) The Plaintiffs also suggest that the Plaintiffs were "endanger[ed]" because Mrs. Young declined to rent to them. (Pl. Opp'n Mem. at 11.) On the contrary, Mrs. Young respectfully went out of her way to help the Plaintiffs, even finding them alternate accommodations in a house that was better than her own. (Ex. 5, Young Depo., at 102:6-25.) Mrs. Young did not endanger them. Nor did she otherwise harm them. She simply declined to rent to them. In doing so, she may have spared them an awkward stay in her home, where everyone might have been uncomfortable because of their close proximity, coupled with the interplay between Mrs. Young's religious beliefs and the Plaintiffs' sexual preference.

The Plaintiffs also suggest that the State Constitution, which affords great protection to personal autonomy privacy rights, does not apply to laws that force someone to accept others into her home. (Pl. Opp'n Mem. at 12.) But as Justice Kennedy said, "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Minn. v.*

Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). Contrary to the Plaintiffs' assertion, applying the Public Accommodations Law to Mrs. Young's rentals implicates privacy concerns.

Next, the Plaintiffs wrongly suggest that Mrs. Young's free exercise rights are not implicated by forcing her to accept a same-sex couple as renters of a room with one bed, when her religious belief tells her that she must not do so. (Pl. Opp'n Mem. at 13-15.) Both Mrs. Young and the Plaintiffs point to *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 87 Haw. 217, 953 P.2d 1315 (Haw. 1998), as offering support for their positions. (*See* Aloha S.J. Mem. at 17; Aloha Opp'n Mem. at 17; Pl. Opp'n Mem. at 13.) The Plaintiffs, however, have misstated both the reasoning of *Korean Buddhist* and also what it stands for. First, the Plaintiffs wrongly assert that *Korean Buddhist* indicated that its analysis of generally applicable laws burdening free exercise rights was ordinarily controlled by a case called *Employment Div. v. Smith*, which applied a lower level of scrutiny for violations of the federal free exercise clause.[5] (Pl. Opp'n Mem. at 13.) Actually, though, the court said that because *Smith*'s general applicability rule did not apply in the *Korean Buddhist* case, "we need not and do not reach the question whether there is such a rule under the Hawai'i Constitution." 87 Haw. at 247 n.31.

As previously explained, the state Supreme Court has not decided whether it will follow *Smith*'s lower scrutiny for free exercise claims, or whether instead it will join the 29 states that have given greater protection for free exercise claims arising under their state constitutions. (Aloha S.J. Mem. at 17.) But it has indicated, albeit in dicta, that it would apply the higher, strict scrutiny. *Korean Buddhist*, 87 Haw. at 247, 953 P.2d at 1345. While this is not binding, it is clear guidance for this Court as to the level of scrutiny that the Supreme Court thinks appropriate for laws burdening free exercise rights.

Plaintiffs correctly note that Mrs. Young's religious belief does not require her to rent rooms in her home. (Pl. Opp'n Mem. at 15.) What the Plaintiffs fail to address, however, is that her beliefs *do* require that she not rent single rooms to same-sex couples. Applying the Public Accommodations Law to Mrs. Young will force her to do so, in violation of her sincerely held religious beliefs. Contrary to the Plaintiffs' assertions, the free exercise clause is implicated.

The Plaintiffs also assert that the Takings Clause is not implicated, (Pl. Mem. Opp'n at

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[5] Mrs. Young asserts that *Smith* should be reconsidered and overruled by the United States Supreme Court, which should hold that strict scrutiny review is required for any law burdening free exercise rights under the federal Constitution, even when the free exercise claim is not part of a "hybrid claim" but stands by itself. This Court, however, is bound by *Smith*'s lower level of scrutiny for federal, stand-alone free exercise claims. Mrs. Young preserves this argument for appeal.

15-16), and that the "Hybrid Rights" Theory is not valid, (*Id.* at 16-17.) Mrs. Young has already demonstrated that these assertions are wrong. (Aloha S.J. Mem. at 18; Aloha Mem. Opp'n at 19.)

III. Application of the Public Accommodations Law to Mrs. Young's Rentals Cannot Survive the Required Strict Scrutiny Review.

The Plaintiffs argue that applying the Public Accommodations Law to Mrs. Young, and so forcing her to accept into her home renters to whom she would prefer not to rent, is justified by a compelling interest. (Pl. Opp'n Mem. at 17-20.) But that is simply not so. Mrs. Young has explained that not only is there no compelling interest in forcing her to rent rooms in her home to those she would rather not, the Public Accommodations Law is not narrowly tailored as applied to her situation. (*See* Aloha S.J. Mem. at 18-20.) Regardless of whether there is a compelling interest in requiring large places of public accommodation, like hotels, to take all comers as guests, there cannot be a compelling interest in requiring Mrs. Young to do so in her own home. It is too remote a possibility that the ability of same-sex couples to find lodging will be frustrated because the three rooms in Mrs. Young's home, among the thousands of rooms for rent in Honolulu hotels, are not available to them.

The Plaintiffs assert, however, that the State's interest is not about securing for all people places to stay, but rather about "ensuring that all people may participate in public life without the harm of being shunned by a business simply because of who they are—what the Hawaii Supreme Court described as the evil of unequal treatment." (Pl. Opp'n Mem. at 18.) Even if the Plaintiffs are correct, the State cannot rely on this interest to justify its law. The *State* treats same-sex couples differently than opposite-sex couples, at least for purposes of marriage. Specifically, the State allows opposite-sex couples to marry but does not allow same-sex couples to do so. Haw. Rev. Stat. § 572-1.[6] The State cannot therefore claim that it has a compelling interest in forcing Mrs. Young to treat same-sex couples the same as opposite-sex couples in her own home, when the State does not do so itself.[7]

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[6] The State places other restrictions on who can marry. For instance, it does not allow opposite-sex couples to marry when they are certain relatives of one another. It also does not allow opposite-sex couples to marry if one of the persons is younger than fifteen years old. Haw. Rev. Stat. § 572-1.

[7] The State may have valid policy reasons for allowing only opposite-sex couples to marry. For instance, the State's policy might be to allow only opposite-sex marriage in order to channel human sexual activity into the only type of marital union that can procreate children. Or the State might restrict marriage to only opposite-sex couples because the best available social science

The Plaintiffs suggest that the State's marriage policy is immaterial to the analysis. (Pl. Opp'n Mem. at 20.) Not so fast. Are we really to suppose that the State has an interest in forcing a private citizen to treat everyone the same when the state itself refuses to do so? The fact that the State does not treat same-sex couples the same as opposite-sex ones casts great doubt on both the sincerity of its proffered interest and also whether, if it actually exists, it is compelling.

Conclusion

This Court should grant summary judgment for Mrs. Young. Her home is not a place of public accommodation subject to the Public Accommodations Law. It is, rather, her *home*. It is the place where she is most protected from government intrusion. It is "the center of [our] private lives." *Minn.*, 525 U.S. at 99 (1998) (Kennedy, J., concurring).

Mrs. Young's choice to rent rooms in her home does not change that fact. Her home is still her *home*. As such, it is subject to the Discrimination in Real Property Transactions Law, which exempts it from antidiscrimination prohibitions. But even if the Public Accommodations Law did apply to Aloha, this application of the law cannot survive strict scrutiny review, and therefore cannot undergird the Plaintiffs' claims. Mrs. Young therefore respectfully asks this Court to grant her motion for summary judgment.

Dated: Honolulu, Hawai'i, March 22, 2013.

SHAWN A. LUIZ,
JAMES HOCHBERG,
JOSEPH P. INFRANCO (Admitted *Pro Hac Vice*),
JOSEPH E. LA RUE (Admitted *Pro Hac Vice*),
HOLLY L. CARMICHAEL (Admitted *Pro Hac Vice*)
Attorneys for Defendant
ALOHA BED & BREAKFAST

indicates that, on average, children do best when raised by a mother and father. Or the State might have other policy reasons for its choice to only allow opposite-sex couples to marry. Regardless of the reason, though, it is obvious that the State does not treat opposite-sex and same-sex couples the same.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Defendant Aloha Bed & Breakfast's Reply Memorandum to Plaintiffs and Plaintiff-Intervenor's Opposition to Defendant's Motion for Summary Judgment filed March 19, 2013; Certificate of Service was served on the following parties at their respective addresses in the manner indicated below:

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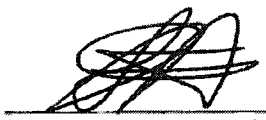
DATED: Honolulu, Hawai'i, March 22, 2013.



JAMES HOCHBERG
Attorney for Defendant
ALOHA BED & BREAKFAST

APPENDIX

EXHIBIT B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DIANE CERVELLI, et al.,) CIVIL NO. 11-1-3103
)
Plaintiffs,)
)
vs.)
)
ALOHA BED & BREAKFAST,)
)
Defendant.)
)

Transcript of proceedings had before The Honorable Edwin C. Nacino, judge presiding, on Thursday, March 28, 2013, regarding the above-entitled matter; to wit, (1) Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment; and (2) Defendant's Motion for Summary Judgment.

APPEARANCES:

PETER C. RENN, ESQ. For Plaintiffs
JAY S. HANDLIN, ESQ.

ROBIN WURTZEL, For Plaintiff-Intervenor
ATTORNEY AT LAW

JOSEPH E. LA RUE, ESQ. For Defendant
L. JAMES HOCHBERG, JR., ESQ.
SHAWN A. LUIZ, ESQ.

REPORTED BY:
Leslie L. Takeda
Registered Professional Reporter
Certified Realtime Reporter
Hawaii CSR #423; California CSR #10010

THURSDAY, MARCH 28, 2013; HONOLULU, HAWAII

--o0o--

THE CLERK: Now calling Civil Number 11-1-3103, Diane Cervelli, et al. v. Aloha Bed and Breakfast; (1) Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment; (2) Defendant's Motion for Summary Judgment.

Counsel, may I have your appearances.

MR. RENN: Good morning, Your Honor. Peter Renn with Lambda Legal Defense on behalf of Plaintiffs.

MR. HANDLIN: And Jay Handlin from Carlsmith Ball, also on behalf of Plaintiffs.

MS. WURTZEL: Robin Wurtzel on behalf of Plaintiff-Intervenor.

THE COURT: All right. Good morning.

MR. HOCHBERG: Good morning, Your Honor. Jim Hochberg and Shawn Luiz, local counsel, and pro hac vice counsel Joe La Rue, who will be arguing.

MR. LA RUE: Good morning, Your Honor.

MR. HOCHBERG: Record reflect that Mrs. Young and Mr. Young, the owners of the home, are present in the courtroom.

THE COURT: All right. Good morning.

Good morning, Mr. and Mrs. Young.

clearly. And if there were an inconsistency, we would say the State statute preempts the local ordinance. And it makes no sense to consult a local ordinance in trying to understand a State statute unless we're also to consider what Maui does, for example, with respect to zoning.

And, of course, these are ordinances that deal with fundamentally different issues. The question in those instances is not is this a business that is likely to harm third parties because it is engaging in a discriminatory practice. I can guarantee you that discrimination does not sting any less because it comes from a tall office building or if it comes from a home. And that is what the public accommodation law is seeking to address; it's seeking to prevent discrimination --

THE COURT: All right.

MR. RENN: -- and the harms it causes.

Thank you, Your Honor.

THE COURT: Okay. Let --

I'm sorry.

You needed to say one more thing?

MR. LA RUE: Your Honor, we had cross motions; and, so, if I may have a rebuttal, as well, I would appreciate it.

THE COURT: Well, the way I'm handling, Counsel,

is -- well, go ahead. You can -- you can argue a brief rebuttal, as well.

MR. LA RUE: Thank you, Your Honor.

THE COURT: Because my understanding is your cross motion is essentially your Memo in Opposition.

MR. LA RUE: No, Your Honor. We also filed a Motion for Summary Judgment.

THE COURT: Right. But the arguments that's entailed in your cross motion are pretty much the same arguments that you have in your Memo in Opposition.

MR. LA RUE: That is -- that is correct, yes. These -- yes.

I'm sorry. I forgot one thing I need.

Your Honor, I meant to offer this on my direct argument and forgot to do so. We brought a screen print of the Hawaii Civil Rights Commission web site, that, frankly, we were not even aware that it said what it says until this week, as we were finalizing my preparation for oral argument. We would like to offer it into evidence as Exhibit 42, if we may.

MR. RENN: We have not seen this.

THE COURT: Yeah, and the Court hasn't seen it. But --

MR. LA RUE: Your Honor, we'd like for you to take judicial notice --

THE COURT: Hold on, Counsel.

MR. LA RUE: -- of the web site, which we believe the Court may do.

THE COURT: You know what?

Can counsel approach.

On the record.

(A bench conference was had on the record as follows:)

THE COURT: Mr. La Rue, the way the Court was going to handle this is to hear their motion first. Your motion was filed after the fact.

Correct?

MR. LA RUE: Yes, sir, it was filed after theirs.

THE COURT: So I want to rule on their motion, which, then, if I rule according to what I think the law is, it moots your question.

MR. LA RUE: Okay.

THE COURT: And, so, your rebuttal shouldn't be introducing anything other than what was addressed in your Memo in Opposition. So I want to make that clear. So I'm going to deny that.

MR. LA RUE: Okay.

THE COURT: Because that was not in your memo in opposition to their motion.

Correct?

MR. LA RUE: That is correct, yes.

THE COURT: And you can make your objections now, if you want to, or --

MR. LA RUE: Your Honor, for the record, this is evidence that appears on the Hawaii Human Rights Commission's web site, and it defines how they understand public accommodations. And we object to your ruling.

THE COURT: Okay. And just for the record, to be clear, it was not attached as an exhibit to your Memo in Opposition to Plaintiffs' Motion for Summary Judgment; correct?

MR. LA RUE: That is correct, Your Honor, yes.

THE COURT: Okay.

MR. LUIZ: Your Honor, I was the one that discovered it when Mr. La Rue was getting ready. And we're asking the Court to take judicial notice of that because it's actually an admission that 489 is public property not public accommodations on their web site. We wish to preserve this because Exhibit 42 --

THE COURT: You can preserve it. But as long as the record is clear, it wasn't in your Memo in Opposition.

MR. LA RUE: It was not, Your Honor.

THE COURT: And there's a lack of foundation, as

far as the Court can see at this point. But in any sense, it's untimely. That's the ruling I have at this point.

MR. LA RUE: Thank you, Your Honor.

MR. LUIZ: If I may --

THE COURT: No. Just one attorney. I'm allowing him because he wrote -- not you, Mr. Hochberg.

Plaintiff, you give your opposition.

MR. RENN: We agree with Your Honor that it is late. It is so late that we have not even seen it as of this moment, at the time of oral argument. And we agree fully that it should be denied as untimely.

THE COURT: Okay. That's it.

MR. LA RUE: Thank you, Your Honor.

(Bench conference concluded.)

MR. LA RUE: Your Honor, I understand that the Court is prepared to rule. However, I ask for a few brief minutes just to get a couple of comments into the record, if I may.

THE COURT: And is it with regards to what Mr. Renn just raised?

Because it's coming down to a limiting scope of what you can argue, Counsel.

MR. LA RUE: Yes, sir, yes, sir.

Mr. Renn said that 515 should not apply because

it speaks of residences, and he said no transient guest intends to make their residence Mrs. Young's home. We would agree with the second part of that statement; that's obvious. But 515 does apply because it applies to residences, and this home is Phyllis's residence, Mrs. Young's residence.

THE COURT: You get no fight from the Court and from Plaintiffs about that.

MR. LA RUE: So we believe 515 does apply because it says on its face, by its terms, it applies to residences.

Second, I just simply want to remind the Court before it rules, that Mrs. Young's home is very different from an inn or a hotel or a motel in that strangers come into where she lives and sleeps, they have access to her belongings and her things, they come into her bedroom, as we said in the record, to use her computer; so it's very different than a hotel, that has its own separate, individual room and room and room.

THE COURT: It's similar to what I understand to be a bed and breakfast.

Correct?

MR. LA RUE: That is correct, Your Honor. It is a bed and breakfast. And that's the final thing that I'd like to say.

Again, pointing back to the Honolulu County -- City and County Land Use Ordinance, that ordinance explicitly excludes bed and breakfast homes from being transient vacation units.

THE COURT: So let me ask this, Counsel. In law school we have rule, ordinance, statute, constitution.

What Mr. Renn just articulated, that statute supersedes ordinance, what's your argument there?

MR. LA RUE: The Hawaii supreme court case that I cited earlier, Your Honor, where the Hawaii supreme court said a state law cannot be imposed against the owner of property to force the owner to use his property in a way that would violate the local ordinance. The Hawaii supreme court said that, and that's the issue that we have right here. What the plaintiffs are asking the Court to do is to place Mrs. Young's home within an ordinance, that if it actually fits there means she's zoned inappropriately.

THE COURT: Within a statute, you mean.

MR. LA RUE: Yes, sir, within a statute. I'm not sure what I said, but the Court is right, yes.

If she's placed within that statute, though, that means that she is zoned inappropriately and she's carrying on business that would actually be illegal for her type of zoning. It's the same issue that was before

the Hawaii supreme court, where the court said the zoning ordinance has to trump in situations like that.

THE COURT: Well, I disagree that the court would be forcing her to do something with her property. I'm just addressing Chapter 489. But I see what you're saying.

MR. LA RUE: Thank you, Your Honor.

THE COURT: All right. Thank you.

Okay. So the Court is ready to rule on this issue. And again, like I said, this is purely a statutory analysis of Chapter 489 based upon the Complaint that was brought by Plaintiffs in this case. Clearly Chapter 489, the purpose and the intent of that statute is articulated in 489-1, which is to protect the interest, rights, and privileges of all persons within the state with regards to access to what is considered public accommodation. The question here before the Court is whether or not the home that is in question here is considered, you know, a place of public accommodation, but more specifically an establishment that provides transient lodging to guests. The facts that I think no one disputes, that the Court articulated previously, leads the Court to conclude, that based upon 489-2(1) and (2) that it is an establishment that provides lodging to transient guests, based upon the facts that was

previously articulated, and it also may be construed as a facility relating to travel. Because there's been evidence or testimony submitted that the home houses guests or visitors from different states and also international guests and visitors from different countries, as well. The stays are not longer than 30 days in length; in fact, it's shorter than that on average. In fact, 99.9 percent, I guess, was the question asked, is two weeks or less. If I take what the Legislature intended 489 to do, which is mandate the court to liberally construe Chapter 489, and I have to apply the law in the plain meaning that I see, transient means briefly by all intentions. And what we have here is a situation where the bed and breakfast holds itself out on various web sites to accommodate visitors to Hawaii; it provides certain type of amenities similar to that of a hotel, not exactly the same, and it does so for a short period of time; and there's acknowledgment that it is not meant to be a permanent residence, such as what I believe 515 was intended to address.

Because, Mr. La Rue, I think your arguments are correct. 515 does address housing issues, tight living quarters here and understandably across the country, and that's why you have that exception there. But again, I refer back to the Complaint. This is a Complaint under

chapter 489, and that's what the Court is basing its ruling solely on. And, so, if I look at that, you have an establishment that provides transient lodging, lodging to transient guests, based upon the facts that are undisputed. So there's no genuine dispute of material facts there.

And I know no one disputes what was the exchange or the reasons for the declining of the reservation.

Correct, Mr. La Rue?

MR. LA RUE: Assuming that the plaintiffs are stating that it was because they were a lesbian couple, we do not dispute that.

THE COURT: All right. And you agree with that, right, Mr. Renn?

MR. RENN: That's correct, Your Honor.

THE COURT: All right. So, again, there's undisputed fact there as to what the prohibited act -- well, what the act was that raised the violation under 489-3. I think it's undisputed facts that the plaintiffs stated to her that they were in a homosexual or lesbian relationship. I think there's testimony in the record that the defendant, Mrs. Young, did ask if they were or confirmed that they were lesbians, and that she admitted, again, that that was the sole reason for declining to allow the reservation or the rental of the room for the

six-day period. So we have that, as well.

489-2 also articulates what sexual orientation is. And everyone agrees to that, counsel, that it can be -- if there's identity based on sexual preference, which is bisexuality, homosexuality, and/or heterosexuality, I don't think there's a dispute there.

So based upon all of that, there's no genuine issue of material fact as to a violation under 489, Chapter 489, which is the crux of the Complaint. So I'm going to grant the partial motion for summary judgment on behalf of the plaintiffs.

With regards to Defendant's motion, that's now become moot, and the Court declines to hear it based upon the ruling it has on the plaintiffs' motion for partial summary judgment.

With regards to the request for injunctive relief, Mr. Renn, I want to hear argument on that since the issue is still at hand regarding damages.

Why should the Court be granting the injunctive relief if damages are still at issue here?

MR. RENN: Your Honor, injunctive relief is purely something that the Court can grant within its powers of equity. It doesn't matter, frankly, what specific compensatory damages the plaintiffs suffered. The statute provides that if you show liability, the

No. SCWC-13-0000806

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

DIANE CERVELLI and TAKEO BUFFORD,
Respondents/Plaintiffs-Appellees,

vs.

ALOHA BED & BREAKFAST, a Hawai`i sole proprietorship,
Petitioner/Defendant-Appellant,

and

WILLIAM D. HOSHIJO, as Executive Director of the Hawai`i Civil Rights Commission,
Respondent/Intervenor-Appellee.

To the Intermediate Court of Appeals of the State of Hawai`i
(No. CAAP-13-0000806, Nakamura, C.J., Fujise and Reifurth, J.J.)
(Civil No. 11-1-3103-12, First Circuit Court, Judge Nacino, Presiding)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of the "**REPLY IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE FEBRUARY 23, 2018 OPINION OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I AND ITS MARCH 20, 2018 JUDGMENT ON APPEAL APPENDIX EXHIBITS A & B CERTIFICATE OF SERVICE**" was served in the manner indicated below, to the following:

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Dated: Honolulu, Hawai'i, June 22, 2018.

/s/ James Hochberg
Shawn A. Luiz
James Hochberg
Counsel for Petitioner/Defendant-Appellant
Aloha Bed & Breakfast